

# **EXHIBIT V**

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14  
15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**

17 JOANNE SIEGEL and LAURA  
18 SIEGEL LARSON,

19 Plaintiffs,

20 v.

21 WARNER BROS.  
22 ENTERTAINMENT INC., DC  
23 COMICS, and DOES 1-10,

24 Defendants.

25 DC COMICS,

26 Counterclaimant,

27 v.

28 JOANNE SIEGEL and LAURA  
SIEGEL LARSON,

Counterdefendants.

Case No. CV-04-8400 ODW (RZx)

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
ENTRY OF PARTIAL JUDGMENT  
UNDER FED. R. CIV. P. 54(B) AND  
FOR STAY OF REMAINING  
CLAIMS PENDING APPEAL**

FILED HEREWITH:  
DECLARATION OF MATTHEW T.  
KLINE IN SUPPORT OF  
DEFENDANTS' OPPOSITION

Hon. Otis D. Wright II

**Hearing Date:** September 27, 2010  
**Time:** 1:30 p.m.  
**Place:** Courtroom 11

DEFENDANTS' OPPOSITION TO MOTION  
FOR ENTRY OF PARTIAL JUDGMENT

1 (continued from previous page)

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1     **I. INTRODUCTION**

2         Plaintiffs' Rule 54(b) motion violates the paramount federal policy against  
3 rendering multiple judgments and allowing piecemeal appeals in a single case. The  
4 narrow Rule 54(b) exception to that rule does not apply to orders, as here,  
5 adjudicating discrete issues that are not determinative of an *entire claim*, let alone  
6 the entire case. Ninth Circuit law definitively forbids plaintiffs' attempt here to  
7 appeal parts of a single claim. As shown by the plain words of plaintiffs'  
8 complaint, other pleadings they filed, and Judge Larson's rulings, there is no single  
9 claim that has been finally and definitively resolved such that it may be appealed  
10 now. Moreover, an appeal now from an order deciding only *part* of a claim would  
11 be highly inefficient and disserve the interests of judicial economy given how all  
12 the claims in this case are intertwined.

13         At the August 13 scheduling conference, DC Comics made these points, and  
14 the Court asked plaintiffs' counsel a simple yes-or-no question: Did Judge  
15 Larson's rulings fully dispose of plaintiffs' first claim for relief? Plaintiffs' counsel  
16 said yes, as does their pending motion. *See* Mot. at 1:6-7 ("this Court *completely*  
17 *resolved all of the issues* in Plaintiffs' First Claim for Relief") (emphasis added).  
18 That is incorrect. As plaintiffs admit in the parties' December 2009 joint filing,  
19 Judge Larson never ruled on several open issues that directly concern the scope of  
20 plaintiffs' copyright interests, including "[t]he impact, if any, that Defendants' pre-  
21 *Action Comics No. 1* 'promotional announcements' *have on the scope of Plaintiffs'*  
22 *recaptured copyrights.*" Case No. CV 04-8400 (Docket No. 602) at 16:8-9 ("Dec.  
23 2009 Joint Report") (emphasis added). In addition, plaintiffs filed a motion for  
24 reconsideration challenging Judge Larson's ruling limiting the scope of the literary  
25 elements subject to recapture, and that motion remains pending. *See id.* Docket No.  
26 327 at 3. Plaintiffs try to sweep these issues under the rug by saying these open  
27 issues "relate to the *procedural parameters* of the 'accounting' phase of trial *and*  
28 *not Plaintiffs' First Claim for Relief.*" Mot. at 11 n.4 (emphasis added). That, too,

1 is incorrect. These unresolved issues are key substantive components to plaintiffs' 2 first claim for relief, and plaintiffs openly admitted that fact in December 2009.

3 No judgment can issue absent the final adjudication of these open issues. 4 The same is true of other parts of plaintiffs' first claim for relief, which go to the 5 core of this case and which closely interrelate with the other claims they have 6 asserted and remain to be tried. As a part of their first claim for relief, plaintiffs 7 explicitly seek a declaration that they "are entitled *to fifty percent (50%) of any and* 8 *all Profits* from the exploitation of, or attributable to ... any aspect of the 9 Recaptured Copyrights." Case No. CV 04-8400 (Docket No. 378) ("Compl.") 10 ¶ 83.d (emphasis added). There has been no ruling on this issue, and in the parties' 11 December 2009 joint report identifying what remained to be tried, plaintiffs 12 described their first claim as seeking a declaration that plaintiffs "were entitled to 13 an *accounting from Defendants for fifty percent of their profits* from the continued 14 exploitation of the recaptured Superman copyrights...." Dec. 2009 Joint Report at 15 3:4-9 (emphasis added). Judge Larson's orders on plaintiffs' "partial" summary 16 judgment motions never resolved this lynchpin issue. Nor does re-characterizing 17 the issue as a remedies question change the analysis. As the Ninth Circuit and other 18 courts have held, "a judgment is not final as to one entire claim ... under F. R. Civ. 19 P. 54(b) if it decides only liability and leaves open the question of relief." *Wolf v.* 20 *Banco Nacional de Mexico, S.A.*, 721 F.2d 660, 662 (9th Cir. 1983); *Int'l Controls* 21 *Corp. v. Vesco*, 535 F.2d 742, 748 (2d Cir. 1976) ("judgment cannot be considered 22 final as long as it leaves open the question of additional damages").

23 Because plaintiffs cannot meet the threshold requirement of Rule 54 by 24 showing their first claim for relief has been fully adjudicated, they devote much of 25 their brief to judicial-economy arguments. Such arguments are legally irrelevant, 26 however, in the absence of the final resolution of an *entire claim* that properly may 27 be appealed. *See Schudel v. Gen. Elec. Co.*, 120 F.3d 991, 994-95 (9th Cir. 1997). 28 Moreover, plaintiffs misstate the facts and law in support of these arguments. As

1 shown below, no cost savings or judicial resources will be spared if this case is  
2 stayed and appealed—just the opposite. Nor is plaintiffs' own conduct consistent  
3 with a professed concern for judicial efficiency. They waited almost a year to bring  
4 this motion, and plaintiffs appear to be using the motion as a part of an improper  
5 strategy to stop a recent related lawsuit DC Comics filed against them.

6 Finally, plaintiffs seek to have DC Comics' first, second, third, fourth, and  
7 fifth counterclaims certified for appeal. For all of the same reasons and more,  
8 plaintiffs' motion on these claims is not well-taken and should be denied.

9 **II. PLAINTIFFS MOTION SHOULD BE DENIED.**

10 **A. Rule 54(b) Appeals Are An Exceptional Procedure And Require  
11 Final Adjudication of an *Entire Claim*.**

12 Rule 54(b) provides:

13 When an action presents more than one *claim for relief*—whether as a  
14 *claim*, *counterclaim*, *cross-claim*, or *third-party claim*—or when  
15 multiple parties are involved, the court may direct entry of a final  
16 judgment as to one or more, but fewer than all, *claims* or parties only if  
the court expressly determines that there is no just reason for delay.

17 FED. R. CIV. P. 54(b) (emphasis added); *Cont'l Airlines, Inc. v. Goodyear Tire &*  
18 *Rubber Co.*, 819 F.2d 1519, 1524 (9th Cir. 1987) (judgment under Rule 54(b)  
19 permissible when (1) at least one entire claim has been fully adjudicated; and  
20 (2) the court finds no just reason to delay appeal on that claim).

21 This limited exception to the “historic federal policy against piecemeal  
22 appeals” applies only in “exceptional circumstances.” FED. R. CIV. P. 54(b)  
23 Advisory Comm. Note, 5 F.R.D. 433, 473 (1946); *Curtiss-Wright Corp. v. Gen.*  
24 *Elec. Co.*, 446 U.S. 1, 8 (1980) (“Plainly, sound judicial administration does not  
25 require that Rule 54(b) requests be granted routinely.”); *Spiegel v. Trustees of Tufts*  
26 *College*, 843 F.2d 38, 42 (9th Cir. 1988) (“entry of judgment under [Rule 54(b)]  
27 should not be indulged as ... a magnanimous accommodation to lawyers or  
litigants”); *Cadillac Fairview/Calif., Inc. v. U.S.*, 41 F.3d 562, 567 (9th Cir. 1994)

1 (“Judgments under Rule 54(b) must be reserved for the unusual case in which the  
2 costs and risks of multiplying the number of proceedings and of overcrowding the  
3 appellate docket are outbalanced by pressing needs of the litigants for an early and  
4 separate judgment as to some claims or parties.””).

5 As the text of the Rule makes clear, the first prong of the two-part test  
6 requires that “final judgment” have been entered on an *entire claim* (or on behalf of  
7 one party). *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956) (Rule  
8 54(b) “does not relax the finality required of each decision, as an individual claim,  
9 to render it appealable”). Rulings on sub-issues or elements underlying a claim do  
10 *not* qualify as final judgments under the Rule. *See, e.g., Curtiss-Wright Corp.*, 446  
11 U.S. at 7; *Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038,  
12 1039 (9th Cir. 1991). This “requirement of finality is a statutory mandate and not a  
13 matter of discretion.” *W.L. Gore & Assocs., Inc. v. Int'l Med. Prosthetics Research  
Assocs., Inc.*, 975 F.2d 858, 862 (Fed. Cir. 1992).

14 If a party seeking to pursue a Rule 54(b) judgment and appeal cannot prove  
15 that an entire claim has been fully adjudicated, that is the end of inquiry; the Court  
16 cannot and need not address the efficiency concerns presented under the second  
17 part of the test. *E.g., Schudel*, 120 F.3d at 994-95 (not addressing equities under  
18 part-two of test where entire claim not finally resolved); *Vaughn v. Regents of the  
19 Univ. of Calif.*, 504 F. Supp. 1349, 1354-55 (E.D. Cal. 1981); *Wheeler Mach. Co. v.  
20 Mountain States Mineral Enters., Inc.*, 696 F.2d 787, 789-90 (10th Cir. 1983).

21 Where courts reach the second part of the Rule 54(b) test, they must make an  
22 “express determination” there is “no just reason” to delay appeal of the claim. *Nat'l  
23 Ass'n of Home Builders v. Norton*, 325 F.3d 1165, 1167 (9th Cir. 2003). In making  
24 this finding, a court must uphold “the historic federal policy against piecemeal  
25 appeals.” *Gen. Acquisition, Inc. v. Gencorp., Inc.*, 23 F.3d 1022, 1030 (6th Cir.  
26 1994); *Wood v. GCC Bend, LLC*, 422 F.3d 873, 883 (9th Cir. 2005); *Masson v. New  
27 Yorker Magazine, Inc.*, 832 F. Supp. 1350, 1376 (N.D. Cal. 1993). The equities

1 favoring such an appeal must far outweigh the inconvenience “in requiring [a party]  
2 to await, in accordance with normal federal practice, the disposition of the entire  
3 case before obtaining appellate review.” *Hogan v. Consol. Rail Corp.*, 961 F.2d  
4 1021, 1025 (2d Cir. 1992). Moreover, if the “appellate court will be required to  
5 address legal or factual issues that are similar to those contained in the claims still  
6 pending before the trial court[,] [a] similarity of legal or factual issues *will weigh*  
7 *heavily against* entry of judgment under the rule, and in such cases a Rule 54(b)  
8 order will be proper only where necessary to avoid a harsh and unjust result,  
9 documented by further and specific findings.” *Cadillac Fairview*, 41 F.3d at 567.

10 Finally, while plaintiffs’ erroneously assert that Rule 54(b) rulings are  
11 reviewed for “abuse of discretion,” Mot. at 13:1-2, only the second part of the test  
12 is reviewed under that standard, *Gregorian v. Izvestia*, 871 F.2d 1515, 1519 (9th  
13 Cir. 1989); *AmerisourceBergen Corp. v. Dialysis West, Inc.*, 465 F.3d 946, 954  
14 (9th Cir. 2006). Whether an *entire claim* has been finally resolved is reviewed *de*  
15 *novo*. *See id.*; *Sears*, 351 U.S. at 437 (“District Court cannot, in the exercise of its  
16 discretion, treat as ‘final’ that which is not ‘final’ within the meaning of § 1291”).  
17 The Ninth Circuit frequently rejects Rule 54(b) appeals that do not comply with this  
18 threshold requirement. *E.g.*, *Wood*, 422 F.3d at 883; *In re First T.D. & Inv., Inc.*,  
19 253 F.3d 520, 531-32 (9th Cir. 2001); *Claver v. Coldwell Banker Residential*  
20 *Brokerage Co.*, 2009 WL 1606611, at \*2 (S.D. Cal. June 8, 2009); *DeFazio v.*  
21 *Hollister, Inc.*, 2008 WL 109097, at \*3 (E.D. Cal. Jan. 8, 2008).

22 **B. Plaintiffs Fail The First Part Of the Rule 54(b) Test: Their First  
23 Claim for Relief Has Not Been Finally Adjudicated.**

24 Plaintiffs have repeatedly represented to the Court that Judge Larson  
25 “completely resolved” “all of the issues” in their first claim for relief:

- 26 • Judge Larson’s March 26, 2008 and August 12, 2009 orders “constitute a  
27 ‘final’ disposition of Plaintiffs’ claim.” Notice of Mot. at 1:12-13.

- 1     • “In a series of lengthy published decisions, this Court completely resolved all  
2         of the issues in Plaintiffs’ First Claim for Relief.” Mot. at 1:5-7.
- 3     • “[T]hose core decisions were made in three exhaustive published opinions  
4         [and] were thoroughly adjudicated and have all the indicia of a final  
5         judgment.” Aug. 13, 2010 Hr’g Tr. at 41:8-14 (Kline Decl. Ex. B).

6 Plaintiffs also have represented that their first claim for relief encompasses only the  
7         validity and scope of their copyright termination notices:

- 8     • “Plaintiffs’ First Claim for Relief … relate[s] to the validity and scope of the  
9         Siegel Terminations,” and “sought declaratory relief to affirm the validity of  
10         Plaintiffs’ Superman Termination Notices pursuant to 17 U.S.C. § 304(c).”
- 11     • “The Court’s March 26, 2008 order unambiguously upheld the validity of the  
12         Siegel Terminations, … *thus disposing of Plaintiffs’ First Claim for Relief...*  
13         *The Court’s order clearly amounts to an ‘ultimate disposition’ of the Siegels’*  
14         *First Claim for Relief.*” Mot. at 1:7-9, 4:13-14, 13:7-13 (emphasis added).

15 These representations are incorrect.

## 16                   1.     **Plaintiffs’ Complaint**

17         Plaintiffs filed their second amended complaint on October 8, 2008, asserting  
18         five claims for relief. The factual background section—paragraphs 16 to 51—  
19         applies to “All Claims for Relief,” Compl. at 6:1—and each claim for relief  
20         incorporates those facts, *e.g.*, *id.* ¶ 52. Plaintiffs’ first claim for relief seeks a four-  
21         part “declaration of [plaintiffs’] rights.” *Id.* ¶¶ 53-54. These four declarations are  
22         that: (a) plaintiffs’ copyright termination notices were effective, *see id.* ¶ 54.a;  
23         (b) plaintiffs own 50% of the copyrights they recaptured (they concede Joseph  
24         Shuster owned the other half of the rights, and that he assigned his rights to DC  
25         Comics), *see id.* ¶ 54.b; (c) plaintiffs are entitled to “fifty percent (50%) of any and  
26         all Superman “Profits” “attributable to, in whole or in part, any aspect of the  
27         Recaptured Copyrights,” *id.* ¶ 54.c; and (d) DC Comics cannot confer exclusive  
28         licenses in the Superman rights, *id.* ¶ 54.d.

1 Plaintiffs' motion makes no mention of these four separate requests for relief.  
2 Nor do they mention their prayer for relief, in which they sought "interest" on their  
3 first claim as well as attorney's fees. Compl. ¶¶ 96, 97. Judge Larson never  
4 resolved any of these issues with any finality.

5 **2. Issues In Plaintiffs' First Claim That Judge Larson Never  
6 Resolved**

7 a. The Promotional Announcements. In their December 2009 joint report,  
8 the parties identified as one of the unresolved issues in the case, "[t]he impact, if  
9 any, that Defendants' pre-*Action Comics No. 1* 'promotional announcements' have  
10 on the scope of Plaintiffs' recaptured copyrights." Dec. 2009 Joint Report at 16:8-  
11 9 (emphasis added). At the status conference held August 13, 2010, DC Comics  
12 advised the Court that this issue directly affected plaintiffs' first claim, remained  
13 unresolved, and required that plaintiffs' Rule 54 motion be denied. *See* Kline Decl.  
14 Ex. B at 38:19-25. In response, plaintiffs' counsel contended that Judge Larson's  
15 orders fully adjudicated the "promotional announcements" issue: "It is not so that  
16 Judge Larson did not rule regarding the contents of the promotional ads. He  
17 specifically did [in] one of his published rulings." *Id.* at 45:4-6. Counsel for DC  
18 Comics pointed out how this assertion was directly belied by the joint report  
19 *plaintiffs' counsel* filed in December 2009:

20 Mr. Toberoff stipulated as follows: "Both parties respectfully  
21 request, however, that the Court determine the remaining undecided  
22 [A]dditional [I]ssues which the parties briefed in 2008 because such  
23 [A]dditional [I]ssues define the contours of the pending accounting  
trial, the parties cannot properly prepare for trial prior to a  
determination of the [A]dditional [I]ssues.

24 "The [A]dditional [I]ssues are not in limine motions and have  
25 far too large an impact on the trial to be decided like in limine motions  
26 only days before trial. These remaining issues include" -- and the first  
27 one listed, and it is the only one, I will read right now, is as follows:  
28

1                   “*The impact, if any, that defendant’s pre-Action Comics*  
2                   *Number 1 promotional announcements have on the scope of plaintiff’s*  
3                   *recaptured copyrights.*”

3                   *Id.* at 50:1-16 (emphasis added).

4                   While plaintiffs’ motion mentions rulings Judge Larson made on the  
5                   promotions, *see* Mot. at 7:25-8:6, 8:17-19, 8:26-9:4 & 9 n.3, and says Judge Larson  
6                   never resolved certain open issues, *see id.* at 9:5-13, the motion *never* explains that,  
7                   by plaintiffs’ own admission, the open promotional-announcement question could  
8                   directly impact the “scope of Plaintiffs’ recaptured copyrights.” Dec. 2009 Joint  
9                   Report at 16:8-9. To mask their omission, plaintiffs’ motion claims the “Additional  
10                  Issues” on which Judge Larson did not rule “relate to the *procedural parameters* of  
11                  the ‘accounting’ phase of trial and *not Plaintiffs’ First Claim for relief.*” Mot. at 11  
12                  n.4 (emphasis added). That is double talk. The very first “Additional Issue”  
13                  plaintiffs’ counsel identified in the December 2009 report as requiring resolution  
14                  was the ““promotional announcements”” issue—and its “impact” on the “scope of  
15                  Plaintiffs’ recaptured copyrights.” Dec. 2009 Joint Report at 16:8-9. The report  
16                  says nothing about “procedural parameters.” Nor does falsely re-characterizing the  
17                  issue as “procedural” do anything to change the analysis. Significant parts of  
18                  plaintiffs’ claims remain unresolved no matter how plaintiffs misdescribe them.

19                  Cases like *Schudel v. Gen. Elec. Co.*, 120 F.3d 991, 994-95 (9th Cir. 1997),  
20                  illustrate why plaintiffs’ Rule 54(b) motion must be denied. In *Schudel*, the Ninth  
21                  Circuit reversed a district court’s grant of Rule 54(b) certification because the  
22                  district court had issued rulings with respect to “*respiratory injuries* allegedly  
23                  sustained by [plaintiff] Carlson and with respect to *neurological injuries* allegedly  
24                  sustained by the Froese plaintiffs,” but did not resolve plaintiffs’ various alternative  
25                  theories. *Id.* at 994. The Ninth Circuit reasoned there was no “final judgment”  
26                  because, while “[t]he district court [ruled] as to *issues related to certain injuries*,”  
27                  its rulings did not dispose of any claim in full. *Id.* (emphases added).

1                   b. The “Dicta” Question. In the joint report, plaintiffs identified as an open  
2 issue its motion to reconsider and have declared as “dicta” Judge Larson’s  
3 “statements in [his] March 26, 2008 Partial Summary Judgment Order concerning  
4 the literary elements in *Action Comics No. 1.*” Dec. 2009 Joint Report at 16:22-23.  
5 Judge Larson’s March 26 order lists each of the copyrightable elements in *Action*  
6 *Comics No. 1* that plaintiffs recaptured. *See Siegel v. Warner Bros. Entm’t Inc.*,  
7 524 F. Supp. 2d 1098, 1110-11 (C.D. Cal. 2008). Plaintiffs objected to this ruling,  
8 erroneously asserting that Judge Larson’s findings should not “be taken as  
9 conclusive” and do not “restrict the Superman elements” they “recaptured.” Case  
10 No. CV 04-8400 (Docket No. 312) at 20-25. Judge Larson retired before ruling on  
11 this motion, and this “Additional Issue” was never resolved. It clearly is not a  
12 “procedural” matter, as plaintiffs assert, Mot. at 11 n.4, and is an additional,  
13 independent ground to deny their motion, *see Schudel*, 120 F.3d at 994-95.

14                   c. Entitlement To 50% Of All Superman Profits. Plaintiffs’ motion does not  
15 recite that paragraph 54.c of the complaint seeks the following declaration:

16                   Plaintiffs are *entitled to fifty percent (50%) of any and all proceeds,*  
17 *compensation, monies, profits, gains and advantages* from the  
18 exploitation of, or attributable to, in whole or in part, any aspect of the  
19 Recaptured Copyrights (hereinafter, sometimes referred to as the  
“*Profits.*”).

20                   Although plaintiffs included this request in a proposed order on their motion for  
21 partial summary judgment, *see* Case No. CV 04-8400 (Docket No. 160) at 1:22-24,  
22 there was no ruling on it. Judge Larson entered no judgment in plaintiffs’ favor on  
23 this critical issue (much less the whole first claim) and, instead, said the case must  
24 proceed to an accounting trial, as detailed in the parties’ December 2009 joint status  
25 report. Nowhere in that report did plaintiffs contend that their first claim for relief  
26 had been finally adjudicated or that a Rule 54(b) appeal could or should be taken.  
27 Just the opposite: plaintiffs said this case is “principally an action for an accounting  
28 of Plaintiffs’ allocable share of profits from the exploitation of Plaintiffs’

1 recaptured Siegel Superman copyrights after April 16, 1999, the noticed Superman  
2 Termination date.” Dec. 2009 Joint Report at 2:12-16. And in describing their first  
3 claim, plaintiffs said:

4 Plaintiffs’ First Cause of Action sought declaratory relief to affirm the  
5 validity of Plaintiffs’ Superman Termination Notices pursuant to 17  
6 U.S.C. § 304(c), *and to declare Plaintiffs, having recaptured Siegel’s*  
*fifty percent share of the original Superman copyrights, were entitled*  
*to an accounting from Defendants for fifty percent of their profits*  
7 *from the continued exploitation of the recaptured Superman copyrights*  
8 *after April 16, 1999.*

9 *Id.* at 3:4-9 (emphasis added).

10 In describing the open issues yet to be adjudicated, the report addresses  
11 “[w]hether the apportionment analysis, if applicable, should be on a work-by-work  
12 basis or pursuant to a general ‘template,’” and “[h]ow broad or narrow is the scope  
13 of the mixed use—copyright/trademark—products and merchandise as to which an  
14 accounting is required (e.g., t-shirts with both Superman trademarks and  
15 copyrightable imagery).” Dec. 2009 Joint Report at 16:8-23. Each of these “open  
16 issues”—and the several others like them, *see id.*—impacts whether plaintiffs are  
17 “entitled to fifty percent (50%) of *any and all Profits* … attributable to … the  
18 Recaptured Copyrights,” which they seek pursuant to their first claim for relief.  
19 Compl. ¶ 83(d) (emphasis added). Where *any* part of a claim remains  
20 undetermined, judgment may not be entered pursuant to Rule 54. *See Schudel*, 120  
21 F.3d at 994-95. Here, many such issues remain unresolved.

22 Indeed, as is clear from the joint December 2009 submission, *before*  
23 plaintiffs changed strategies and filed this Rule 54(b) motion, they *openly admitted*  
24 that important components of their first claim remained undecided. Dec. 2009 Joint  
25 Report at 15:22-16:23. Only now that plaintiffs want to derail further resolution of  
26 these issues and the accounting trial do they assert that Judge Larson “*completely*  
27 *resolved all of the issues* in Plaintiffs’ First Claim for Relief.” Mot. at 1:6-7  
28 (emphasis added). That categorical misstatement cannot be squared with the

1 record, including plaintiffs' own admissions and unexplained delay of close to a  
2 year in bringing this motion. Noteworthy is that plaintiffs have referred to the  
3 pendency of this motion in the lawsuit DC filed against them in May of this year.  
4 *See DC Comics v. Pacific Pictures Corp.*, Case No. CV 10-3633 ODW (RZx);  
5 Kline Decl. Ex. C. Although plaintiffs may have tactical reasons for stopping this  
6 new case in its tracks, they are of no moment to the requirements of Rule 54.

7 d. Interest and Attorneys' Fees And Other Prayers For Relief. In their reply,  
8 we anticipate plaintiffs will assert that their fourth claim or other claims contain  
9 their "accounting" claim, Compl. at 20:3, and their second claim addresses which  
10 accounting principles should apply, *see id.* ¶¶ 57-58. But that does not negate that  
11 their first claim—*no matter if duplicative it is of their other claims*—seeks 50% of  
12 all Superman "profits" as well as an "accounting," Dec. 2009 Joint Report at 3:4-9,  
13 as well as other monetary relief Judge Larson never awarded. In plaintiffs' prayer  
14 for relief, for example, they ask for:

- 15 • 50% of "any and all" Superman "Profits," as part of their *first claim*;
- 16 • "interest at the highest lawful rate on all sums awarded Plaintiffs" on "ALL  
17 CLAIMS FOR RELIEF," including on the *first claim*; and
- 18 • attorneys' fees "ON ALL CLAIMS," including on the *first claim*. *Id.* at  
19 23:16-24:3, 27:6-10.

20 Because these issues were never decided, plaintiffs' first claim has not been  
21 finally adjudicated, and their Rule 54(b) motion must be denied. *See*:

- 22 • *Wolf*, 721 F.2d at 662 ("a judgment is not final as to one entire claim ...  
23 under F. R. Civ. P. 54(b) if it decides only liability and leaves open the  
24 question of relief");
- 25 • *Id.* (appeal improper under Rule 54(b) where judgment addressed liability  
26 issue but did not address damages or *attorney's fees*);

27  
28

- 1     • *In re In re Exxon Valdez*, 484 F.3d 1098, 1101 (9th Cir. 2007) (“It is well
- 2         settled that prejudgment interest is a substantive aspect of a plaintiff’s
- 3         claim....”);
- 4     • *RD Legal Funding, LLC v. Erwin & Balingit, LLP*, 2010 WL 1416968, at \*1
- 5         (S.D. Cal. 2010) (“Plaintiff tacitly admits [the] summary judgment order is
- 6         insufficient for a final judgment against the two Defendants because *Plaintiff*
- 7         *requests additional relief in the form of interest, costs and attorneys’ fees*,
- 8         which was not addressed in the summary judgment motion.”) (emphasis
- 9         added).

10         Indeed, it would have been impossible for Judge Larson to award plaintiffs  
11         any of this relief—including the 50% interest of “any and all” Superman Profits,  
12         interest thereon, and attorney’s fees—without holding an accounting trial, and  
13         without resolving plaintiffs’ other, related, and overlapping claims for relief, such  
14         as the fourth and second claims. As noted, the parties admitted such an accounting  
15         trial and ruling on these claims was necessary to resolve the “profits” issue and thus  
16         plaintiffs’ first claim. *See generally* Dec. 2009 Joint Report.

17         Moreover, cases like *Mattel, Inc. v. MGA Entm’t, Inc.*, 2010 WL 2853761  
18         (9th Cir. July 22, 2010), confirm that an accounting trial is required to address such  
19         sweeping claims for “all” or “half of all” profits. In *Mattel*, Mattel alleged that its  
20         employee worked improperly with MGA to develop the now-famous “Bratz” dolls.  
21         Mattel contended that MGA took these ideas, built Bratz into a billion dollar  
22         business, and Mattel was entitled to 100% of the profits of that business, because it  
23         owned Bryant’s original work. The Ninth Circuit squarely rejected this argument:

24         Even assuming MGA took some ideas wrongfully, it added  
25         tremendous value by turning the ideas into products and, eventually, a  
26         popular and highly profitable brand. The value added by MGA’s hard  
27         work and creativity dwarfs the value of the original ideas Bryant  
28         brought with him, even recognizing the significance of those ideas ....  
       It is not equitable to transfer this billion dollar brand—the value of  
       which is overwhelmingly the result of MGA’s legitimate efforts—  
       because it may have started with two misappropriated names.

1 *Id.* at \*4-5. The Ninth Circuit remanded the case for a retrial at which any profits  
2 due and owing Mattel could be apportioned. Judge Larson *never* ruled in this case  
3 that plaintiffs were entitled to 50% of DC Comics' Superman profits, but even had  
4 he done so, that ruling would have been clear error. It thus makes no sense to send  
5 this case to the Ninth Circuit before all issues are resolved, including a full  
6 accounting trial, as well as final disposition of issues like "interest" and "fees."

### 3. Plaintiffs' Inapposite Cases

8 Plaintiffs cite to no case, as here, where there are so many unresolved sub-  
9 issues underlying the very claim they seek to appeal. Rather, they cite to:

- Cases in which the judgment dismissed *a party* from the action entirely, *see Noel v. Hall*, 568 F.3d 743, 747 (9th Cir. 2009); *Erwin v. U.S.*, 2008 WL 750739, at \*1-2 (M.D.N.C. Mar. 18, 2008);
  - Cases in which entire claims, including damages, were fully resolved and there was no reason to delay an appeal, *see Curtiss-Wright Corp.*, 446 U.S. at 5-12; *Whitney v. Wurtz*, 2007 WL 2601222, at \*2-3 (N.D. Cal. Sept. 6, 2007) (district court “reluctantly” granted Rule 54(b) judgment where *finality was conceded* and there was a danger of multiple trials and appeals); and
  - Cases in which the fully adjudicated claims were “sufficiently severable factually and legally from the remaining matters,” such that Rule 54(b) judgment would “streamline further litigation,” *Cont'l Airlines, Inc.*, 819 F.2d at 1524-25; *Doe v. Univ. of Calif.*, 1993 WL 361540, at \*1-2 (N.D. Cal. Sept. 2, 1993) (if dismissal of federal claim affirmed on appeal, court could dismiss pendent state-law claims and entire case).

24 None of these circumstances is present here, as shown above.

### C. Plaintiffs' Efficiency Arguments Are Irrelevant And Wrong.

26 The “requirement of finality is a statutory mandate and not a matter of  
27 discretion.” *W.L. Gore*, 975 F.2d at 862. Thus, even assuming there were  
28 efficiency reasons to appeal sub-issues underlying plaintiffs’ first claim for relief,

1 the Court may not grant plaintiffs' motion because plaintiffs' *entire claim* has not  
2 been finally resolved. Thus, the Court need not reach plaintiffs' efficiency  
3 arguments. *See id.*; *Schudel*, 120 F.3d at 994-95; *Vaughn*, 504 F. Supp. at 1354-55;  
4 *Wheeler Mach. Co.*, 696 F.2d at 789-90.

5 Even considering efficiency, however, there are powerful reasons to proceed  
6 with the remaining issues in the case and the accounting trial, and plaintiffs fail to  
7 meet their heavy burden to overcome the "historic federal policy against piecemeal  
8 appeals." FED. R. CIV. P. 54(b) Advisory Comm. Note, 5 F.R.D. 433, 473 (1946).

9 First, as one can see from plaintiffs' prayer for relief and the December 2009  
10 report, their claims are all closely related, including the first one. *E.g.*, Compl. ¶ 83  
11 & Dec. 2009 Joint Report at 2:12-16, 3:4-9 (Entire Case: case "principally an action  
12 for an accounting of Plaintiffs' allocable share of [Superman] profits"; First Claim:  
13 seeking 50% of "all" Superman profits and "accounting"); Compl. ¶ 84 & Joint  
14 Report at 3:10-25 (Second Claim: 50% of all Superman profits and "accounting");  
15 Compl. ¶ 85 & Dec. 2009 Joint Report at 3:26-4:1 (Third Claim: 50% of proceeds  
16 of Superman Crest and "accounting"); Compl. ¶ 87 & Dec. 2009 Joint Report at  
17 4:2-4 (Fourth Claim: 50% of "licensing" proceeds and "accounting"); Compl.  
18 ¶ 89-90 (Fifth Claim: "accounting" and constructive trust on all profits).

19 As then-Judge Kennedy explained, and the Ninth Circuit re-affirmed, Rule  
20 54(b) certification is counter-productive when the claim plaintiff seeks to appeal  
21 involves similar legal and factual issues as the other claims remaining in the case:

22 "Judgments under Rule 54(b) must be reserved for the unusual case....  
23 The trial court should not direct entry of judgment under Rule 54(b)  
24 unless it has made specific findings setting forth the reasons for its  
25 order. Those findings should include a determination whether, upon  
26 any review of the judgment entered under the rule, *the appellate court*  
27 *will be required to address legal or factual issues that are similar to*  
28 *those contained in the claims still pending before the trial court. A*  
***similarity of legal or factual issues will weigh heavily against entry of***  
***judgment under the rule***, and in such cases a Rule 54(b) order will be  
proper only where necessary to avoid a harsh and unjust result,  
documented by further and specific findings.

1      *Cadillac Fairview*, 41 F.3d at 567 (quoting *Morrison-Knudsen Co. v. Archer*, 655  
2      F.2d 962 (9th Cir. 1981) (emphasis added)).

3      The same is true here: Each of plaintiffs' claims overlap and present the  
4      same factual and legal issues, and carving out the first claim for relief is  
5      inappropriate and wrongly will result in "duplication of effort." *RD Legal*, 2010  
6      WL 1416968, at \*1 (rejecting Rule 54(b) motion where trial court still needed to  
7      resolve related claims against co-defendants: "the breach of contract claims asserted  
8      against [co-defendants] are essentially the same as the claims asserted against  
9      [defendant who prevailed, in part, on summary judgment]. Accordingly, any  
10     appeals in this action could easily present similar factual and legal issues, and likely  
11     would result in a duplication of effort"). Moreover, given this is just one of *four*  
12     lawsuits the Siegels have filed against DC Comics—and almost every issue in these  
13     cases has been contested—it is anticipated the Siegels will appeal all adverse  
14     rulings, whether from a first trial, a re-trial, or a trial after any intermediate appeal,  
15     meaning the savings plaintiffs promise are illusory. *Cf. Wood*, 422 F.3d at 882  
16     (appellate courts "cannot afford the luxury of reviewing the same set of facts in a  
17     routine case more than once without a seriously important reason").

18      Second, while plaintiffs make "parade of horribles" arguments about how  
19      difficult it would be to try the accounting case now and the waste of judicial  
20      resources it would require, *see* Mot. at 14-18, such arguments can be made in any  
21      complicated case where liability and damages are disputed, and plaintiffs have not  
22      shown how their case is any different, *cf. 02 Micro Int'l Ltd. v. Monolithic Power*  
23      *Sys., Inc.*, 2007 WL 2070275, at \*2 (N.D. Cal. 2007). In any event, to mitigate  
24      against the risk of waste or delay, DC Comics has proposed a special master be  
25      appointed to help resolve this case efficiently and without overburdening the Court.

26      Third, plaintiffs are wrong to assert that "[t]he Ninth Circuit's input at this  
27      important juncture will promote the long awaited settlement of the *entire* Superman  
28      dispute." Mot. at 19:14-15. The only thing that will promote a settlement is an

1 accounting trial, in which it will be shown—consistent with cases like *Mattel*—that  
2 plaintiffs' claims for 50% of all of DC Comics' Superman profits are manifestly  
3 unwarranted. Plaintiffs assert they have been winning this case decisively, *see* Mot.  
4 at 5-11, and imply DC Comics has not made significant settlement offers, *cf. id.* at  
5 2:3-4. However, plaintiff's *lost* the Phase One trial of the case, and in his other  
6 rulings Judge Larson rejected all but a narrow sliver of plaintiffs' claims. Indeed,  
7 only through the tortious interference of the defendants in the related *Pacific*  
8 *Pictures* case did the Siegels purport to reject a settlement agreement that would  
9 have netted them tens of millions of dollars to date, and avoided this needless and  
10 wasteful litigation. *See* Case No. 10-3633 (Docket No. 1) ¶¶ 61-62, 167-73.

11 Finally, contrary to plaintiffs' assertions about how the issues in this case  
12 will be dispositive of the issues in the *Pacific Pictures* lawsuit that DC Comics  
13 brought against the Shuster heirs, *see* Mot. at 2, 19-20, plaintiffs' counsel and Judge  
14 Larson both said the opposite. In other court filings not mentioned in their motion,  
15 plaintiffs counsel, Mr. Toberoff, argued:

- 16 • “[T]he Siegel Litigations do not concern the Shuster's copyright interests in  
17 *Superman* and/or *Superboy* (if any): the litigations concern *only* Jerry  
18 Siegel's copyright interests .... [DC Comics'] ownership of Joseph Shuster's  
19 joint copyright interest in *Superman* is not at issue in the Siegel Litigations.”  
20 Kline Decl. Ex. A at 15 (emphasis in original).
  - 21 • “The Shuster Termination ... is wholly separate and apart from the Siegel  
22 Terminations .... The Shuster Termination has no legal bearing or effect  
23 upon the Siegel Terminations or upon Plaintiffs' claims in the Siegel  
24 Litigations or upon [DC Comics'] counterclaims or defenses.” *Id.* at 4.
- 25 Judge Larson recognized the same in one of his final rulings in this case: “It is by  
26 no means a foregone conclusion that the Shuster estate will be successful in  
27 terminating the grant to the Superman material published in *Action Comics No. 1*.”  
28 Case No. CV 04-8400 (Docket No. 554) at 23.

**D. DC Comics' Counterclaims Are Not Properly Subject to Rule 54(b) Certification.**

3 Plaintiffs also urge the Court to enter judgment on several of DC Comics'  
4 counter-claims. That request is equally without merit. DC Comics' counterclaims,  
5 by plaintiffs' admission, "relate to the validity and scope of the Siegel  
6 terminations," which plaintiffs say is the gravamen of their first claim for relief.  
7 Mot. at 1:6-9. Because plaintiffs' first claim may not be appealed, nor may DC  
8 Comics' counter-claims. Rule 54(b) certification is appropriate only where the  
9 matters being appealed are "sufficiently severable factually and legally from the  
10 remaining matters." *Cont'l Airlines*, 819 F.2d at 1525. Plaintiffs concede their first  
11 claim and DC Comics' counter-claim "concern[] the same issues, Mot. at 5:19-23.

12 There is similarly no efficiency justification to stay this entire case to appeal  
13 these cross-claims now. For example, one of DC Comics' claims is that plaintiffs'  
14 claims were barred by the Copyright Act's three-year statute of limitations. *See*  
15 Mot. at 5:9-10. There is no reason to put this case on hold to decide that narrow  
16 question. Similarly, because Judge Larson's ruling on DC Comics' settlement-  
17 defense counter-claims is inconsistent with the teachings of the *Mattel* case, 2010  
18 WL 2853761, at \*6, DC Comics will be asking this Court to reconsider that ruling  
19 in light of *Mattel*, *see Sch. Dist. v. Lundgren*, 259 F.2d 101, 105 (9th Cir. 1958)  
20 (trial court has power to reconsider, set aside, or amend interlocutory orders at any  
21 time prior to final judgment); Case No. CV 04-8400 (Docket No. 623) at 5:18-26.

### 22 | III. CONCLUSION

23 For the foregoing reasons, plaintiffs' motion should be denied.

24 Dated: September 3, 2010

Respectfully Submitted,

O'MELVENY & MYERS LLP

27 By: /s/ Daniel M. Petrocelli  
Daniel M. Petrocelli

# **EXHIBIT W**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES - GENERAL

Case No.	CV 04-8400 ODW (RZx)	Date	October 13, 2010
Title	<i>Joanne Siegel, et al. v. Warner Bros. Entertainment, Inc., et al.</i>		

Present: The Honorable Otis D. Wright II, United States District Judge

Steve Chung	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s):

Not Present

Attorneys Present for Defendant(s):

Not Present

**Proceedings (In Chambers): Order Requesting Further Briefing and Denying Without Prejudice Plaintiffs' 54(b) Motion [618]**

After reviewing the parties' various submissions and other relevant filings, including Docket Numbers 336, 339, 348, 349, 560, 602, 617, 618, 293, 623, 625, 626 and 627, the Court finds it necessary for the parties to brief the following Additional Issues identified in their December 21, 2009 Joint Status Report:

- 1) The impact, if any, that Defendants' pre-*Action Comics No. 1* "promotional announcements" have on the scope of Plaintiffs' recaptured copyrights;
- 2) Whether principles of apportionment should be applied to the calculation of Plaintiffs' share of the profits from the recaptured copyrights;
- 3) Whether the apportionment analysis, if applicable, should be on a work-by-work basis or pursuant to a general "template," or whether there should be an alternative method of apportionment;
- 4) Who bears the burden of proof on what issues;
- 5) How broad or narrow is the scope of the mixed use – copyright/trademark – products and merchandise as to which an accounting is required (e.g., t-shirts with both Superman trademarks and copyrightable imagery);
- 6) How much or how little is needed to transform the post-termination sale of a pre-termination "derivative work" into a post-termination "derivative work" so as to require an accounting (e.g., DVD boxed sets of pre-1999 Superman films); and
- 7) Whether the Court's background statements in its March 26, 2008 Partial Summary Judgment Order concerning the literary elements in *Action Comics No. 1* are dicta. (Docket No. 602 at 16.)

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES - GENERAL

Case No.	CV 04-8400 ODW (RZx)	Date	October 13, 2010
Title	<i>Joanne Siegel, et al. v. Warner Bros. Entertainment, Inc., et al.</i>		

The parties direct the Court to their previously-filed briefs concerning these Additional Issues. (See Docket No. 620) (citing, *inter alia*, Docket Nos. 336, 339, 348, 349, 602, 617, 293 and 560). Specifically, the parties offer their July 2008 filings as to outstanding “Additional Issues” and the Court’s August 12, 2009 Order Resolving Additional Issues. (Docket No. 560.) Other than the Additional Issues identified in the parties’ December 21, 2009 Joint Status Report and restated above, however, the parties do not specify which Additional Issues remain unresolved. The Court has neither the resources nor the inclination to dissect the parties’ lengthy briefs in light of the Court’s equally lengthy Order Resolving Additional Issues, to divine and ultimately resolve any and all outstanding issues. As the parties’ 2008 briefs are now stale, and to facilitate the advancement of this protracted litigation, the parties are **ORDERED** to 1) meet and confer regarding which Additional Issues remain unresolved, 2) identify for the Court all such issues and, in the same joint filing, 3) propose a briefing schedule to address the same.

The parties may modify or supplement the Additional Issues as they agree, remembering all the while to narrowly frame the issues in light of the specific facts of this case. The Court does not issue advisory opinions. The parties’ joint statement of Additional Issues and accompanying proposed briefing schedule shall be filed on or before **November 8, 2010**.

As for Plaintiffs’ Motion for Entry of Partial Summary Judgment Under Fed. R. Civ. P. 54(b), it is premature. (See Docket No. 618.) The outstanding issues discussed above bear directly on the finality of the claim for declaratory relief which Plaintiffs move to certify for appeal. For example, the first outstanding issue identified above – the impact, if any, that Defendants’ pre-*Action Comics No. 1* “promotional announcement” have on the scope of Plaintiffs’ recaptured copyrights – forecloses a finding that Plaintiffs’ claim for declaratory relief is final. That claim seeks a declaration to not only clarify the parties’ “respective rights and obligations with respect to the Termination and the copyright interests thereby recaptured by Plaintiffs” (SAC ¶ 55), but also to establish Plaintiffs’ ownership of “an undivided fifty percent (50%) of the Recaptured Copyrights to each and/or all the Works for their renewal terms.” (Id. ¶ 54b.) Until the effect of the “promotional announcements” on the scope of the recaptured copyrights is determined, however, and the “principles of apportionment” issue is settled (second and third issues identified above), the Court can neither declare the parties’ respective rights nor even begin to apportion profits, as Plaintiffs’ claim for declaratory relief seeks. Accordingly, Plaintiffs’ motion under Fed. R. Civ. P. 54(b) is **DENIED WITHOUT PREJUDICE**.

**SO ORDERED**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No.	<u>CV 04-8400 ODW (RZx)</u>	Date	<u>October 13, 2010</u>
Title	<u>Joanne Siegel, et al. v. Warner Bros. Entertainment, Inc., et al.</u>		

Initials of Preparer ----- : 00  
RGN

# **EXHIBIT X**

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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

JOANNE SIEGEL and LAURA  
SIEGEL LARSON,

Plaintiffs and  
Counterdefendants,

v.

WARNER BROS.  
ENTERTAINMENT INC., DC  
COMICS, and DOES 1-10,

Defendants and  
Counterclaimant.

Case No. CV-04-8400 ODW (RZx)

**THE PARTIES' JOINT  
SUBMISSION RE: CASE  
MANAGEMENT ISSUES FILED  
PURSUANT TO COURT'S  
OCTOBER 13, 2010 ORDER**

The Hon. Otis D. Wright II

PARTIES' JOINT SUBMISSION  
PURSUANT TO OCT. 13, 2010 ORDER

1 (continued from previous page)

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1       As directed by the Court in its October 13, 2010 order, *see* Docket No. 630,  
2 the parties hereby make this joint submission. Plaintiffs and defendants set forth  
3 their respective positions in Parts I and II below identifying (i) open issues in the  
4 case left to be resolved and (ii) proposed means and schedules for resolving them.

5       The parties conferred, but were unable to agree on a joint proposal. By  
6 submitting this joint report, neither plaintiffs nor defendants accept the others'  
7 factual and legal assertions, and all parties reserve all rights. Neither plaintiffs nor  
8 defendants had the opportunity to review or respond to the other sides' briefing  
9 below before submitting this joint document.

10 **I. PLAINTIFFS' POSITION**

11           **1. Issues 1 and 2 Should Be Resolved First**

12       Pursuant to the Court's October 13, 2010 minute order ("Order"), the parties  
13 met and conferred as to the "Additional Issues" ("Issues"). All the Issues 1-7, set  
14 forth on page 1 of the Order, have been fully briefed, but remain unresolved.

15       The Issues suggest a logical decision-making order and progression. Thus, in  
16 the interest of efficiency, the Court need not resolve all Issues simultaneously. As  
17 correctly noted by the Court, Plaintiffs' First Claim as to the validity and effect of  
18 the statutory termination is the basis for Plaintiffs' remaining claims. Issues 1 and  
19 2 relating to the First Claim should therefore be adjudicated first.

20       Issue 1, "the impact of the promotional announcements," allegedly concerns  
21 the scope of Plaintiffs' recaptured copyrights.<sup>1</sup> Issue 2 addresses the threshold issue  
22

23       <sup>1</sup> Defendants should not be permitted to file yet another motion as to this Court's  
24 published decision, which sharply limited the content of the promotional  
25 announcements ("Ads"). *Siegel I*, 542 F. Supp. 2d 1098, 1124-26 (C.D. Cal. 2008).  
26 Defendants' prior motion for reconsideration of this ruling (Docket No. 307) was  
27 specifically denied *with prejudice*. Docket No. 327 at 1, 3. By contrast, Plaintiffs'  
28 motion for clarification of the Court's decision (Docket Nos. 300, 312) was denied  
without *prejudice*, and Plaintiffs were invited by the Court to include this motion in  
the Additional Issue briefing. Docket No. 327 at 1, 3. Plaintiffs' motion had asked  
that the Court confirm that because the Ads are purely derivative of *Action Comics*,

1 of “[w]hether [federal] principles of apportionment should be applied” to an  
2 accounting between co-owners which is governed solely by state law.

3 In contrast, Issues 3-7 relate to the mechanics of *how* an accounting of profits  
4 should be conducted –the subject of Plaintiffs’ Second, Third and Fourth Claims.  
5 Given the Court’s stated concern with “advisory opinions” (Order at 2), Issues 3 - 7  
6 should be decided *after* the Court’s threshold decision as to whether apportionment  
7 even applies (Issue 2).

8 **2. Issues 1 and 2 Can Be Decided Without Further Briefing**

9 As the Court noted, the sheer volume of papers already filed in this case is  
10 “extensive” and “daunting.” August 13, 2010 Transcript at 13:20-21. However, the  
11 Court need not spend its scarce resources “dissecting” the prior briefing, as Issues 1  
12 and 2 are clearly and separately delineated in the briefs before the Court and are  
13 ready to be decided. Below is a “break-down” for the Court’s convenience:

14 <b>Issue</b>	15 <b>Briefed at:</b>
16 1. The impact, if any, that Defendants’ pre- <i>Action Comics No. 1</i> “promotional announcements” have on the scope of Plaintiffs’ recaptured copyrights.	17 Docket No. 339 at 58-74 Docket No. 348 at 41-44 Docket No. 349 at 41-42
18 2. Whether principles of apportionment should be applied to the calculation of Plaintiffs’ share of the profits from the recaptured copyrights.	19 Docket No. 336 at 21-31 Docket No. 339 at 4-8 Docket No. 348 at 2-6 Docket No. 349 at 35-36

20  
21 As these issues have already been completely briefed and such briefs are  
22 readily accessible, there is little benefit to the Court from the parties re-briefing the  
23 same issues since the applicable law has not changed. Re-briefing such Issues  
24 creates more work for the Court, further delays resolution of this drawn-out case

25 No. 1, they cannot limit Plaintiffs’ recaptured copyrights in *Action Comics*, No. 1.  
26 See Docket No. 312 at 1, 11-12; 17 U.S.C. § 103(b). Plaintiffs’ motion regarding  
27 the Ads (Issue 1) is thus included in the “Additional Issues” briefing pending before  
28 this Court (Docket No. 339 at 58-74), while Defendants’ motion was denied with  
prejudice. Docket No. 327 at 1.

1 and risks prejudicing the parties. It requires the parties to incur significant attorney  
2 time, in addition to that spent on the original briefing, and opens the door to  
3 effective “sur-replies” to the original briefing that was duly completed and closed.  
4 As Defendants’ new counsel now seek to re-litigate six years of litigation, such  
5 “sur-reply” briefing largely benefits Defendants to the prejudice of Plaintiffs.

6 If it pleases the Court, the parties can easily “cut and paste” the existing  
7 briefing into new comprehensive documents for the Court’s convenience. For  
8 example, the parties can resubmit their prior briefing in two simple briefs: (i) the  
9 first, combining the parties’ opening briefs on Issues 1 and 2, and (ii) the second,  
10 combining the parties’ response briefs on Issues 1 and 2. This “kills two birds with  
11 one stone” by streamlining the briefs for the Court, while avoiding prejudice and  
12 the free-for-all that will ensue from re-opening previously completed briefing.

13 In the alternative, if the Court still believes that it is necessary for Issues 1 and  
14 2 to be fully re-briefed, Plaintiffs submit the following proposed schedule:

<u>Event</u>	<u>Deadline</u>
16 Plaintiffs’ Motion for Clarification on Issue 1 (“Promotional Announcements”) (20-page limit)	November 24, 2010
17 Defendants’ Opposition to Motion for Clarification on Issue 1 (20-page limit)	December 1, 2010
19 Plaintiffs’ Reply in Support of Motion for Clarification on Issue 1 (10-page limit)	December 8, 2010
21 Parties’ Opening Briefs on Issue 2 (Whether there should be apportionment) (10-page limit)	November 24, 2010
22 Parties’ Response Briefs on Issue 2 (10-page limit)	December 8, 2010
24 Hearing on Issues 1 and 2	December 20, 2010

25 **3. Schedule After Resolution of Issues 1 and 2**

26 After Issues 1 and 2 are determined, the following schedule presents the most  
27 reasonable way to minimize the burden on the Court while moving this case  
28 forward:

<u>Event</u>	<u>Deadline</u>
Plaintiffs file renewed motion to enter judgment on the First Claim under F.R.C.P. 54(b) <sup>2</sup>	7 days from Court's decision on Issues 1 and 2
Hearing on Plaintiffs' Rule 54(b) motion	35 days from the Court's decision on Issues 1 and 2

If Plaintiffs' renewed Rule 54(b) motion is granted, both parties will likely appeal the First Claim judgment, staying the remainder of the case, and avoiding the likelihood of re-trial of the detailed accounting claims, due to potential errors in the many underlying "work-made-for-hire" determinations. *See* Docket No. 618 at 16-18.

If the renewed Rule 54(b) motion is denied, the precise contours of Issues 3 through 7 will depend on the Court's decision as to Issues 1 and 2. For instance, if the Court decides that "apportionment" from *federal* copyright infringement case law simply does *not* apply to Plaintiffs' accounting claims, governed by California law, then Issue 3 and much of Issue 4 would be mooted and need not be decided.

The remaining Issues 3-7 fall into the following conceptual categories:

- If "apportionment" is ordered, how should it apply? ("Apportionment Mechanics") (Issues 3 and 4)
- What works, if any, should be excluded from DC's accounting? ("Excluded Works") (Issues 5 and 6)
- If "apportionment" applies, were the Court's passing comments as to the literary elements in *Action Comics*, No. 1 dicta? ("Dicta") (Issue 7)

Issues 3-7, like Issues 1-2, are separately delineated in the briefs before the Court. Below is a "break-down" for the Court's convenience. The Court can decide Issues 3-7 on the existing briefs, on a schedule best suited to the Court's calendar:

<sup>2</sup> See Order at 2 ("As for Plaintiffs' Motion for Entry of Partial Summary Judgment Under Fed. R. Civ. P. 54(b), it is premature. .... Plaintiffs' motion under Fed. R. Civ. P. 54(b) is DENIED WITHOUT PREJUDICE.")

1	<b>Issue</b>	<b>Briefed at:</b>
2	3. Whether the apportionment analysis, if applicable, should be on a work-by-work basis or pursuant to a general "template," or whether there should be an alternative method of apportionment.	Docket No. 336 at 32-38 Docket No. 339 at 16-27 Docket No. 348 at 13-23 Docket No. 349 at 36-43
5	4. Who bears the burden of proof on what issues?	Docket No. 336 at 69-80 Docket No. 339 at 8-10 Docket No. 348 at 6-8 Docket No. 349 at 31-35
7	5. How broad or narrow is the scope of the mixed use – copyright/trademark – products and merchandise as to which an accounting is required (e.g., t-shirts with both Superman trademarks and copyrightable imagery)?	Docket No. 336 at 38-51 Docket No. 339 at 44-58 Docket No. 348 at 33-41 Docket No. 349 at 47-50
11	6. How much or how little is needed to transform the post-termination sale of a pre-termination "derivative work" into a post-termination "derivative work" so as to require an accounting (e.g., DVD boxed sets of pre-1999 Superman films)?	Docket No. 336 at 51-58 Docket No. 339 at 36-43 Docket No. 348 at 31-33 Docket No. 349 at 43-47
14	7. Whether the Court's background statements in its March 26, 2008 Partial Summary Judgment Order re: the literary elements in <i>Action Comics</i> , No. 1 are <i>dicta</i> .	Docket No. 339 at 74-80 Docket No. 348 at 44-48
17	As suggested above for Issues 1 and 2, the parties can readily "cut and paste" the existing briefing into combined comprehensive documents to streamline the process for the Court's convenience.	
20	Alternatively, if the Court still desires that the parties fully re-brief Issues 3-7, Plaintiffs propose the following schedule:	
22	<b>Event</b>	<b>Deadline</b>
23	Parties' Opening Briefs on Issues 3-7: Apportionment Mechanics (25-page limit), Excluded Works (20-page limit) and Dicta (10-page limit)	28 days after decision on renewed Rule 54(b) motion
25	Parties' Response Briefs on Issues 3-7: Apportionment Mechanics (15-page limit), Excluded Works (10-page limit) and Dicta (5-page limit)	42 days after decision on renewed Rule 54(b) motion
28	Hearing(s) on Issues 3-7	As set by the Court

1	<u>Event</u>	<u>Deadline</u>
2	Trial	As set by the Court

4. **Defendants' Extraneous Issues**

5 Superboy: Defendants included the "Superboy Issues" from *Siegel v. Time*  
6 *Warner Inc.*, Case No. 04-CV-8776 ODW (RZx) in their proposal even though the  
7 Court's October 13, 2010 Order was plainly issued in the Superman case alone,  
8 listed only issues in the Superman case, and did not ask for anything pertaining to  
9 the Superboy case. As the Superman and Superboy cases are separate,<sup>3</sup> and the  
10 Court is treating them as such, Plaintiffs have not addressed Superboy issues herein.  
11 Plaintiffs believe that the appropriate juncture to address Superboy briefing is after  
12 the Court has ruled on Issues 1 and 2 and on Plaintiffs' renewed Rule 54(b) motion.

13 Reconsideration: Defendants have also improperly included herein motions  
14 for reconsideration of the Court's published decision in *Siegel v. Warner Bros. Ent.*  
15 *Inc.*, 542 F. Supp. 2d 1098 (C.D. Cal. 2008) as to Defendants' purported statute of  
16 limitations and settlement agreement defenses which were long ago decided by the  
17 Court. The Court's October 13, 2010 Order clearly did not encompass such motions  
18 for reconsideration, and it is Plaintiffs' understanding that the Court wishes to  
19 streamline this case, not to re-litigate everything decided against Defendants during  
20 six years of hard-fought litigation. If Defendants are eager to contest the Court's  
21 prior rulings, they should not oppose Plaintiffs' renewed Rule 54(b) motion and take  
22 such matters up with the Ninth Circuit. If Defendants insist on repeatedly moving to  
23 reconsider this Court's rulings, they must follow Local Rule 7-18's procedures.

24 Defendants' Premature "Accounting": Defendants specifically agreed in both  
25 the December 2009 Joint Status Report and in prior stipulations that resolution of

26 <sup>3</sup> Defendants previously brought a motion (Docket Nos. 20-21) to consolidate the  
27 Superman case with the Superboy case. The Court denied Defendants' motion in  
28 large part, and consolidated the two cases for discovery purposes only. See Docket  
No. 30.

1 the fully briefed Additional Issues should be decided **prior** to any accounting  
2 because this will “define the contours of the pending accounting.” Docket No. 602  
3 (Joint Status Report) at 16:2-17:2. *See also* Docket Nos. 290, 352, 356, 480, 556  
4 (parties’ stipulations). In contradiction, Defendants now propose to unilaterally  
5 submit their version of an accounting, absent any legal framework. As previously  
6 demonstrated, this would be highly inefficient, and only serve to prolong this case  
7 by obfuscating the accounting issues. *See* Docket No. 625 at 6-8. If Defendants are  
8 permitted to render an accounting before the Court decides the legal framework for  
9 such accounting, Defendants will inevitably take the same self-serving legal  
10 positions that led to Issues 3-7 in the first place. Far from streamlining this process,  
11 Defendants’ proposal would only complicate it, as it would be nearly impossible to  
12 divine what they left out of their unilateral accounting and why. The far simpler  
13 path is for this Court to establish the appropriate legal framework for Defendants’  
14 accounting by resolving Issues 3 - 7, and for Defendants to then render a structured  
15 accounting in compliance therewith.

16 **II. DEFENDANTS’ POSITION**

17 There are a number of open issues in both the Superman case and the  
18 Superboy case. Most of these issues have been briefed, but as the Court recognized  
19 in its October 13 order, the briefs and supporting materials are voluminous, can be  
20 synthesized by the parties in short, concise briefs, and can be updated to address  
21 new facts and legal authorities that render the parties’ prior briefing “stale.” Docket  
22 No. 630 at 2 (Oct. 13, 2010 order). Plaintiffs’ insistence that the parties submit  
23 these issues to the Court based *only* on the prior submissions in this case places a  
24 needless burden on the Court and will only invite error, as certain of plaintiffs’  
25 arguments in their prior briefing have been rejected by intervening case law. *See*,  
26 *e.g.*, Docket No. 626 at 1-2.

27 As DC Comics sets forth below and in prior submissions, there is a logical  
28 sequence in which the open issues can be decided. First, the Court should rule on

1 certain key, threshold legal issues. Second, DC Comics can and will render an  
2 accounting to plaintiffs. Third, plaintiffs should identify any objections they may  
3 have to the accounting. Fourth, with the benefit of the accounting, any remaining  
4 legal issues raised by plaintiffs' objections can be briefed and resolved. Finally, the  
5 Court can and should appoint a special master to preside over any contested fact  
6 issues raised by the accounting.

7 DC Comics has proposed below specific dates and ways to address these  
8 issues, which it submits will put the parties and the Court on the most efficient path  
9 to resolving these long-running, complicated cases. DC Comics submits that the  
10 issues in the Superboy case should be treated in the same way, as also set forth  
11 below. Plaintiffs' objection to resolving the Superboy case as part of this overall  
12 process will only cause more confusion and delay.

13 Finally, plaintiffs' briefing proposals needlessly prejudice DC Comics—both  
14 by giving plaintiffs more space to brief issues than defendants are afforded, *see*  
15 *supra*, and requiring that DC submit briefing on an issue on the Monday after the  
16 Thanksgiving holiday, *see supra*.

17 **A. The Open Issues To Resolve**

18 1. The Seven Issues Identified By The Court

19 In its October 13 ruling, the Court identified seven issues to be resolved in  
20 this case. Both plaintiffs and DC Comics agree the Court should rule on these  
21 issues, which are set forth in the numbered list below. In Section II.B of this  
22 submission, DC Comics proposes a process for grouping, briefing, presenting, and  
23 resolving these seven issues:

- 24 (1) "The impact, if any, that Defendants' pre-*Action Comics No. 1* 'promotional  
25 announcements' have on the scope of Plaintiffs' recaptured copyrights,"  
26 (2) "Whether principles of apportionment should be applied to the calculation of  
Plaintiffs' share of the profits from the recaptured copyrights,"

27

28

- 1 (3) "Whether the apportionment analysis, if applicable, should be on a work-by-  
2 work basis or pursuant to a general 'template,' or whether there should be an  
3 alternative method of apportionment,"
- 4 (4) "Who bears the burden of proof on what issues,"
- 5 (5) "How broad or narrow is the scope of the mixed use – copyright/trademark –  
6 products and merchandise as to which an accounting is required (e.g., t-shirts  
7 with both Superman trademarks and copyrightable imagery),"
- 8 (6) "How much or how little is needed to transform the post-termination sale of a  
9 pre-termination 'derivative work' into a post-termination 'derivative work'  
10 so as to require an accounting (e.g., DVD boxed sets of pre-1999 Superman  
11 films)," and
- 12 (7) "Whether the Court's background statements in its March 26, 2008 Partial  
13 Summary Judgment Order concerning the literary elements in *Action Comics*  
14 *No. 1* are dicta."

15 Docket No. 630 at 1-2.

16                   2. Other Issues To Address

17                   The Court's October 13 order anticipated that there may be additional  
18 unresolved issues. *See Docket No. 630 at 2* ("The parties may modify or  
19 supplement the Additional Issues as they agree, remembering all the while to  
20 narrowly frame the issues in light of the specific facts of this case."). DC Comics  
21 presently identifies the following two sets of additional issues.

22                   First, the parties' December 2009 joint submission identified the following  
23 open issues related to the Superboy case:

- 24                   • Whether there was any original copyrightable material in the Superboy script  
25                   that Jerry Siegel submitted to Detective Comics;
- 26                   • Whether Siegel's Superboy script was ever "published," as required to  
27                   receive statutory copyright protection and be eligible for termination; and
- 28                   • Whether Judge Larson already decided the Superboy joint-work issue in DC  
                         Comics' favor, which plaintiffs dispute.

29                   *See Docket No. 602 at 22-23* (parties' Dec. 2009 report). We propose that these  
30 issues be addressed in a single set of new briefing from the parties; once these legal  
31

1 issues are resolved, plaintiffs' Superboy claims can be dismissed (e.g., if Siegel's  
2 Superboy script was not published) or folded into the Superman accounting trial.

3 Second, an important new decision by the Ninth Circuit, *Mattel v. MGA*  
4 *Entm't, Inc.*, 2010 WL 4117741 (9th Cir. 2010), as well as new, disputed factual  
5 assertions plaintiffs have advanced, may require revisiting Judge Larson's summary  
6 judgment rulings on two of DC Comics' complete defenses to this case. Plaintiffs  
7 agree these issues can be resolved pursuant to a motion for reconsideration.

8 **B. DC Comics' Proposed Case Management Schedule**

9 As set forth in its Proposed Order, DC Comics proposes the following  
10 schedule for briefing and resolving the open issues in the Superman case:

11 1. Promotional Announcements and Dicta Issues (Issues 1 and 7)

12 **Dec. 3, 2010:** The parties submit briefs not to exceed 20 pages regarding  
13 the impact of the promotional announcements and the dicta question. (This  
14 20-page-limit applies to the entire set of new briefing on these two issues,  
15 and amounts roughly to 10 pages per issue—no more. This general  
16 template for page-limits is followed below and in the Proposed Order.)

17 **Dec. 10, 2010:** The parties file responses not to exceed 10 pages regarding  
18 the impact of the promotional announcements and the dicta question.

19 **Dec. 17, 2010:** If necessary, the Court holds a hearing on the impact of the  
20 promotional announcements and the dicta question, including hearing any  
21 necessary live testimony on the subject of the promotional announcements.

22 2. Accounting Issues (Issue 2)

23 a. *Apportionment*

24 **Dec. 20, 2010:** The parties submit briefs not to exceed 20 pages regarding  
25 the question "Whether principles of apportionment should be applied to the  
26 calculation of Plaintiffs' share of the profits from the recaptured  
27 copyrights."

1                   **Jan. 7, 2011:** The parties submit responses not to exceed 10 pages  
2                   regarding the question “Whether principles of apportionment should be  
3                   applied to the calculation of Plaintiffs’ share of the profits from the  
4                   recaptured copyrights.”

5                   **Jan. 24, 2011:** If necessary, the Court holds a hearing on the question  
6                   “Whether principles of apportionment should be applied to the calculation  
7                   of Plaintiffs’ share of the profits from the recaptured copyrights.”

8                   b.       *DC Comics’ Accounting*

9                   **Mar. 1, 2011:** DC Comics renders its accounting to the Siegels.

10                  **Apr. 4, 2011:** The Siegels file objections—if any—to DC’s accounting.

11                  **Apr. 11 to Apr. 29, 2011:** The parties conduct any depositions of experts  
12                  or percipient witnesses related to DC Comics’ accounting or the Siegels’  
13                  objections thereto.

14                  c.       *Remaining Superman Legal Issues (Issues 3-6)*

15                  **May 9, 2011:** With the benefit of the accounting and the Court’s rulings,  
16                  the parties submit briefs not to exceed 40 pages regarding the four legal  
17                  issues remaining (*i.e.*, “Whether the apportionment analysis, if applicable,  
18                  should be on a work-by-work basis....,” “Who bears the burden of proof on  
19                  what issues,” “How broad or narrow is the scope of the mixed use....”  
20                  “How much or how little is needed to transform....”).

21                  **May 23, 2011:** The parties file responses not to exceed 20 pages regarding  
22                  the four remaining Superman legal issues.

23                  **June 13, 2011:** If necessary, the Court holds a hearing regarding the four  
24                  remaining Superman legal issues, including hearing any necessary live  
25                  testimony on the subjects.

26                  **Aug. or Sept. 2011:** If necessary, the parties conduct an accounting trial  
27                  before a special master. The parties and Court shall resolve the selection of  
28                  a special master by April 15, 2011.

1 To the extent the Court intends to follow the same approach for addressing  
2 the open issues in the Superboy case, DC Comics proposes the following schedule:

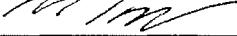
3 **Jan. 24, 2011:** The parties submit briefs not to exceed 25 pages regarding  
4 the open Superboy issues.

5 **Feb. 2, 2011:** The parties file responses not to exceed 12 pages regarding  
6 the Superboy issues.

7 **Feb. 14, 2011:** If necessary, the Court holds a hearing on the Superboy  
8 issues, including hearing any necessary live testimony on the subject.

9 Dated: November 8, 2010

TOBEROFF & ASSOCIATES, P.C.

10 By:   
Marc Toberoff

11 Attorneys for Plaintiffs and Counterdefendants

14 Dated: November 8, 2010

O'MELVENY & MYERS LLP

15 By:   
Daniel M. Petrocelli

16 Attorneys for Defendants and Counterclaimant

17 CCI:838734

# **EXHIBIT Y**

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11 Attorneys for Defendants and Counterclaimant

12 **UNITED STATES DISTRICT COURT**  
13 **CENTRAL DISTRICT OF CALIFORNIA**

15 JOANNE SIEGEL and LAURA  
16 SIEGEL LARSON,

17 Plaintiffs and  
18 Counterdefendants,

19 v.

20 WARNER BROS.  
ENTERTAINMENT INC., DC  
21 COMICS, and DOES 1-10,

22 Defendants and  
Counterclaimant.

Case No. CV-04-8400 ODW (RZx)

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS JOANNE SIEGEL  
AND LAURA SIEGEL LARSON'S  
NOTICE OF MOTION AND  
MOTION FOR LEAVE TO FILE  
THIRD AMENDED COMPLAINT  
PURSUANT TO FED. R. CIV. P. 15  
AND 16**

**DECLARATION OF JASON H.  
TOKORO FILED CONCURRENTLY  
HEREWITH**

**Judge:** Hon. Otis D. Wright II  
**Magistrate:** Hon. Ralph Zarefsky

**Hearing Date:** February 7, 2011  
**Hearing Time:** 1:30 p.m.

DEF.'S OPP. TO MOTION FOR LEAVE TO  
FILE THIRD AMENDED COMPLAINT

1     **I. INTRODUCTION**

2           The Siegels' untimely motion to amend their complaint in this case—filed  
3 *years* after the deadline for doing so—is legally and factually without basis and  
4 should be denied. The Siegels' delay in seeking this amendment cannot be  
5 excused, and any amendment would be futile because there are no grounds to take a  
6 Rule 54-based appeal in this case. Numerous liability issues remain to be resolved  
7 on the Siegels' first claim, and the first claim is inextricably intertwined with the  
8 other claims and defenses at issue. The Siegels' motion and proposed amendment,  
9 moreover, are impermissibly designed to manufacture grounds for another  
10 interlocutory appeal when, in the past month alone, the Ninth Circuit has *three*  
11 *times* rejected the Siegels' improper efforts to obtain piecemeal review of adverse  
12 rulings in the related *Shuster* case. The motion also should be denied because the  
13 deliberate aim of the proposed amendment is to delay indefinitely the much-needed  
14 resolution of this case that is close at hand, all to the prejudice of DC. Finally, as  
15 submitted, the Siegels' proposed amendment and order would deprive defendants  
16 DC and Time Warner of their rights and remedies against the Siegels for their  
17 insupportable fifth claim for relief and their unsuccessful prosecution of claims  
18 against Time Warner.

19     **II. THE SIEGELS' MOTION TO AMEND SHOULD BE DENIED.**

20        **A. The Siegels' Motion Should Be Denied Pursuant To Rule 16  
21           Because They Have Not Established "Good Cause" To Amend The  
Court's Scheduling Order.**

22           Where, as here, a Rule 16 case-management scheduling order sets a deadline  
23 for amending pleadings, the Rule 15 test for permitting amendment—on which the  
24 Siegels rely, Mot. at 6-12—is not implicated, unless the Rule 16 test first has been  
25 met. To permit amendment, Judge Larson's existing scheduling order must be  
26 modified, and this requires leave of court and a showing of "good cause." FED. R.  
27 CIV. P. 16(b); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000).  
28 In determining whether the Siegels have met their burden of showing good cause,

1 the Court “primarily considers the [Siegels’] diligence [in] seeking amendment,”  
2 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (1992), and if the  
3 Siegels fail to show that diligence, “the inquiry should end,” *id.*, and the Court need  
4 not reach the Rule 15 test.

5 The Siegels were not diligent in seeking to amend their complaint. The  
6 Siegels filed their complaint in this case in October 2004 and amended it by  
7 stipulation on October 18, 2005, and then again on October 8, 2008. Docket Nos.  
8 1, 43, 378. Both amendments were facilitated by DC’s stipulation because the  
9 Court’s scheduling order set a deadline of October 17, 2005—*over five years ago*—  
10 for filing amended pleadings. Docket No. 38.

11 In December 2009—*after* the first phase of trial was concluded and this case  
12 was reassigned to this Court—the parties submitted an extensive 24-page joint  
13 report identifying the “open issues” left to be litigated and proposed procedures to  
14 resolve them. In the joint submission, the Siegels described this case as  
15 “principally an action for an accounting,” and said their “first claim” sought a  
16 declaration that they “*were entitled to an accounting from Defendants* for fifty  
17 percent of their profits from the continued exploitation of the recaptured Superman  
18 copyrights after April 16, 1999.” Docket No. 602 at 2-3 (emphasis added). The  
19 Siegels *never once* mentioned any further need or intent to amend their complaint  
20 or to file a Rule 54-based appeal. Instead, they urged the Court to decide the open  
21 issues in the case and conduct an accounting trial. At that time, the Siegels knew  
22 that, in 2008 and earlier in 2009, Judge Larson had entered the partial summary  
23 judgment rulings they now wish to contest on appeal, and they knew that, in the  
24 summer of 2009, he had dismissed their claims against Time Warner. *Siegel v.*  
25 *Warner Bros. Entm’t Inc.*, 542 F. Supp. 2d 1098 (C.D. Cal. 2008); *Siegel v. Warner*  
26 *Bros Entm’t Inc.*, 658 F. Supp. 2d 1036 (C.D. Cal. 2009); Docket No. 602 at 12.

27 Hence, it is undisputed that the Siegels long ago “knew … the facts and  
28 theories” on which their proposed amendment is based, they cannot show the

1 diligence or good cause required to meet the Rule 16 test, and, accordingly, their  
2 motion should be denied. *AmerisourceBergen Corp. v. Dialysis West, Inc.*, 465  
3 F.3d 946, 953 (9th Cir. 2006); *Acri v. Int'l Ass'n of Machinists & Aerospace*  
4 *Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986) (same).

5 To excuse their lack of diligence, the Siegels now claim they only became  
6 aware of the need to amend their complaint when the Court denied their recent Rule  
7 54 motion. Mot. at 4, 10-11, 13-14. That is specious. First, given that the Siegels  
8 seek to amend their first claim for relief solely to facilitate a Rule 54 appeal, *id.*,  
9 diligence would have required the Siegels to seek to file this appeal and amend their  
10 complaint, if need be, no later than 2009. Cf. *Lockheed Martin Corp. v. Network*  
11 *Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (denying amendment where  
12 “[n]othing in the proposed amended complaint relied on facts that were unavailable  
13 before the stipulated deadline”); *Harrison Beverage Co. v. Dribeck Imps., Inc.*, 133  
14 F.R.D. 463, 469 (D.N.J. 1990) (purpose of Rule 16 “nullified if a party could inject  
15 amended pleadings upon a showing of less than good cause after scheduling  
16 deadlines have expired”). The Siegels did neither.

17 Second, it is apparent that the purpose of the proposed amendment and  
18 ensuing Rule 54(b) appeal the Siegels wish to take is to derail the related *Shuster*  
19 case filed by DC against the Siegels, Shuster parties, and Toberoff parties. As  
20 made explicit in their motion to amend and in prior filings, were the Siegels to  
21 succeed in carving out part of their first claim for relief for an immediate appeal,  
22 they will assert that the issues on appeal are preclusive of certain matters in the  
23 *Shuster* case and therefore require a partial stay in the *Shuster* case. Docket Nos.  
24 628 at 12; Mot. at 3 n.1. Indeed, it was only *after* DC initiated the *Shuster* case that  
25 the Siegels first surfaced their request to challenge Judge Larson's rulings by way  
26 of a Rule 54(b) appeal—long after Judge Larson issued his rulings in 2008 and  
27 2009.

28

1           Documents produced last month in the related *Shuster* case reveal another  
2 improper purpose of the proposed amendment: the Siegels seek an immediate  
3 appeal to convince other movie studios, to which they seek to market their  
4 purported Superman rights, that they have more expansive rights in Superman and  
5 are entitled to more money. On April 29, 2010, the Siegels' counsel sent an e-mail  
6 to a group of motion picture executives claiming that, while Judge Larson ruled that  
7 the Siegels only recaptured a limited category of works, the Siegels intended to  
8 appeal that ruling and predicted they have "a good chance of success." Decl. of  
9 Jason H. Tokoro ("Tokoro Decl.") Ex. A; *see also* Ex. B-D.

10           None of this constitutes "good cause" or excuses the Siegels' lack of  
11 diligence. To the contrary, this motion and any Rule 54 appeal are just tactics to  
12 avert the impending conclusion of this case and to stall the related *Shuster* case.

13           **B. The Siegels' Motion To Amend Their First Claim For Relief  
14           Should Be Denied Pursuant To Rule 15 Because The Siegels'  
15           Motion Fails All Aspects Of The Rule 15 Test.**

16           In exercising their discretion to grant or deny a Rule 15 motion for leave to  
17 amend, courts consider: (1) whether the movants previously amended their  
18 complaint; (2) the movants' good faith (or not) in seeking the amendment;  
19 (3) whether undue delay will be caused by granting the motion; (4) whether  
20 granting the motion will cause prejudice to the opposing party; and (5) the futility  
21 (or not) of the amendment at issue. *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir.  
22 2004). Among these factors, prejudice "carries the greatest weight." *Eminence  
23 Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

24           All five factors weigh against the Siegels' tactic of reconfiguring their  
25 complaint, for the third time now, and solely to facilitate an immediate appeal of  
26 court rulings adverse to them over the past six years. Such an amendment and  
27 appeal are an inappropriate circumvention of Rule 54 and other time-honored rules  
28 designed to litigate claims to a final judgment before an appeal can be taken. Such

1 maneuvers are not a good-faith basis for an amendment and will only serve to delay  
2 the final disposition of this case to the prejudice of DC. It is simply unfair for this  
3 case to be put in limbo for yet another year or longer while the Siegels see if they  
4 can do better on appeal. This is especially true given the strong likelihood that the  
5 Ninth Circuit either will decline to accept the Siegels' interlocutory appeal or, if it  
6 decides to hear the appeal and reach the merits, will affirm the rulings adverse to  
7 the Siegels.

8 The case law confirms that the Siegels' "eleventh hour" amendment will only  
9 cause undue delay and severe prejudice to DC and, for that reason, their motion to  
10 amend should be denied. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th  
11 Cir. 2002); *accord Solomon v. N. Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1138-39  
12 (9th Cir. 1998); *Roberts v. Ariz. Bd. of Regents*, 661 F.2d 796, 798 (9th Cir. 1981).  
13 DC has been subjected to the Siegels' claims for over six years, it has succeeded in  
14 defeating the vast majority of them, and it is entitled to conclude the final issues in  
15 the case without further delay—all of which can be readily accomplished by the end  
16 of this year. At that time the parties can pursue their appellate rights, just like in  
17 any other case.

18 Furthermore, the Siegels' proposed amendment to manufacture immediate  
19 appellate jurisdiction will be futile. As DC showed in successfully opposing their  
20 initial Rule 54 motion, the Siegels' first claim for relief in this case cannot  
21 separately be appealed. Docket No. 624. While the first claim seeks to determine  
22 the validity of certain copyright termination notices the Siegels served, it also  
23 alleges the Siegels' entitlement to an accounting from DC and a declaration that the  
24 Siegels "are entitled to fifty percent (50%) of any and all Profits from the  
25 exploitation of ... any aspect of the Recaptured Copyrights." Docket No. 378  
26 ¶ 83.d. The complaint also seeks other monetary compensation in connection with  
27 their first claim, including "interest at the highest lawful rate on all sums awarded  
28 Plaintiffs" and attorneys' fees. *Id.* at 23:16-24:3, 27:6-10.

1       The Siegels now wish to delete from their first claim all references to an  
2 accounting or requests for monetary relief and suggest that by deleting these  
3 requests for relief, the first claim will now be fully resolved and eligible for a Rule  
4 54(b) appeal. Mot. at 1-2, 4-15. They are mistaken. As noted in the Court's  
5 October 13, 2010, order denying the Siegels' original Rule 54 motion, there are still  
6 liability-related issues that remain to be resolved in connection with the Siegels'  
7 first claim, and these "outstanding issues ... bear directly on the finality of the  
8 claim for declaratory relief which Plaintiffs move to certify for appeal." Docket  
9 No. 630 at 2.

10       Indeed, "the *scope* of the [Siegels'] recaptured copyrights" is still yet to be  
11 determined, *id.*, and among the liability issues that bear on these issues are:

- 12       • the "promotional announcements" questions Judge Larson left open, *id.*;  
13       • whether certain of Judge Larson's rulings were "dicta," as the Siegels  
14       argued in a pending motion for reconsideration, Docket Nos. 602 at 16,  
15       624 at 9; and  
16       • the impact of the Ninth Circuit's decision in the *Mattel* case on DC's  
17       settlement defense and the radical change in position the Siegels took only  
18       recently on key factual questions related to DC's and the Siegels' tolling  
19       agreement, which bears on DC's statute-of-limitation defense. Docket  
20       Nos. 623 at 5, 626 at 2, 631 at 9-10.

21       Before the Ninth Circuit could even be asked to hear a Rule 54(b) appeal—  
22 and DC submits such an appeal is not appropriate—the Court would need to  
23 address and resolve these remaining issues. *See* FED. R. CIV. P. 54(b); *Sears,*  
24 *Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956) (Rule 54(b) "does not relax  
25 the finality required of each decision, as an individual claim, to render it  
26 appealable"); *W.L. Gore & Assocs., Inc. v. Int'l Med. Prosthetics Research Assocs.,*  
27 *Inc.*, 975 F.2d 858, 862 (Fed. Cir. 1992) (same).

28

1       Even if all these issues were concluded by the Court, a “piecemeal appeal[]”  
2 of the Siegels’ first claim would still be unwarranted. FED. R. CIV. P. 54(b)  
3 Advisory Comm. Note, 5 F.R.D. 433, 473 (1946). All of the Siegels’ claims are  
4 interrelated, and severing the first claim for appeal is inappropriate because, among  
5 other defects, it will improperly result in “duplication of effort,” *RD Legal Funding,*  
6 *LLC v. Erwin & Balingit, LLP*, 2010 WL 1416968, at \*1 (S.D. Cal. Apr. 8, 2010);  
7 *accord Cadillac Fairview/Calif., Inc. v. U.S.*, 41 F.3d 562, 567 (9th Cir. 1994).

8       Recent events in the related *Shuster* case confirm the impropriety of the  
9 Siegels’ effort to jump to the court of appeal. In the past month alone, in response  
10 to various filings by the Siegels, the Shusters, and the Toberoff parties, the Ninth  
11 Circuit has:

- 12       • Issued an order to show cause, and then later dismissed for lack of  
13 jurisdiction the Siegels’ first interlocutory appeal of a routine case-  
14 management order by this Court, Tokoro Decl. Exs. E, I;
- 15       • Denied their petition for writ of mandate, challenging this Court’s  
16 discovery and case-management rulings, *id.* Ex. H;
- 17       • Denied their “urgent” stay motion, *id.*;
- 18       • Issued an order to show cause why a second interlocutory appeal  
19 challenging the Court’s discovery and case management rulings should  
20 not be dismissed for a lack of jurisdiction, *id.* Ex. G; and
- 21       • Rejected an improper attempt by the Siegels to dismiss this second appeal  
22 *without* prejudice, *id.* Ex. J.

23       Given the Ninth Circuit’s refusal to countenance these interlocutory proceedings,  
24 the Siegels’ proposal to manipulate their pleading to facilitate yet another  
25 interlocutory appeal should not be allowed.

26       **C.     The Siegels’ Other Proposed Amendments Are Improper.**

27       The Siegels propose to dismiss Time Warner as a defendant and to dismiss  
28 their fifth claim for relief, alleging violation of California Business & Professions

1 Code §§17200 *et seq.* Neither amendment is appropriate in the form proposed, nor  
2 is the Siegels' proposed order. In the first place, after having been forced to endure  
3 a two-week "alter ego" trial, Time Warner prevailed and was ordered dismissed  
4 from the case. Docket No. 602 at 12-13. There is no need for an amendment as it  
5 relates to Time Warner.

6 The Siegels' proposed amendment and order are also unwarranted to the  
7 extent they would impair Time Warner's rights and remedies against the Siegels for  
8 their unsuccessful claims against Time Warner. Time Warner is entitled to its costs  
9 against plaintiffs once a final judgment issues. *E.g.*, FED. R. CIV. P. 54(b); *Hawaii*  
10 *Motorsports Inv., Inc. v. Clayton Grp. Servs., Inc.*, 2010 WL 3946516, at \*1-3 (D.  
11 Haw. Sept. 30, 2010); *Int'l Marble & Granite of Colo., Inc. v. Congress Fin. Corp.*,  
12 465 F. Supp. 2d 993, 1000-01 (C.D. Cal. 2006).

13 Likewise, as to the Siegels' request to dismiss their fifth claim for relief, the  
14 proposed order they seek is inappropriate because it would operate to deprive  
15 defendants of their right to obtain costs and other relief. Docket No. 637-3 at 1. At  
16 a minimum, the dismissal of the Siegels' fifth claim should be conditioned on  
17 defendants' right and ability to seek and obtain costs and all other appropriate  
18 relief. *E.g.*, *Gen. Signal Corp. v. MCI Telecomms. Corp.*, 66 F.3d 1500, 1514 (9th  
19 Cir. 1995) (costs awarded after amendment dismissed counterclaims); *Kronfeld v.*  
20 *First Jersey Nat'l Bank*, 638 F. Supp. 1454, 1460 (D.N.J. 1986) (on granting leave  
21 to amend, court awarded costs to defendants who had filed answer); 6 CHARLES A.  
22 WRIGHT ET AL., FED. PRAC. & PROC. § 1486, at 694 (2010) ("The most common  
23 condition imposed on an amending party is costs.").

24 **D. DC Timely Met And Conferred With The Siegels.**

25 Finally, the Siegels complain it took DC between December 22 and January  
26 5 to provide them with its position on their motion. Mot. at 4. They fail to mention  
27 that over these two short weeks, DC and its counsel celebrated the holidays, DC  
28 had to respond to the Siegels' baseless filings with the Ninth Circuit, and DC met

1 and conferred with counsel for the Siegels on discovery issues, this Court's rulings  
2 regarding the accounting process, and this motion. Tokoro Decl. Ex. F at 118. DC  
3 responded promptly and timely to the Siegels' inquiries—in stark contrast to the  
4 months and years the Siegels waited to raise and then pursue these amendments.

5 **IV. CONCLUSION**

6 The Siegels' motion should be denied, for all the reasons explained above.  
7 Were the Court inclined to allow it, the proposed order should be significantly  
8 modified to preserve all of DC's rights and remedies arising out of the Siegels'  
9 proposed dismissals. In addition, DC reserves all rights to challenge the amended  
10 complaint and to seek appropriate discovery on the revised first claim, and to  
11 oppose any renewed Rule 54 motion the Siegels might file.

12 Dated: January 18, 2011

Respectfully Submitted,

13 O'MELVENY & MYERS LLP

14 By: /s/ Daniel M. Petrocelli

15 Daniel M. Petrocelli

16 Attorneys for Defendants

17 CC1:842851.1

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# **EXHIBIT Z**

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Attorneys for Plaintiffs and Counterclaim Defendants  
**JOANNE SIEGEL and LAURA SIEGEL LARSON**

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

10 JOANNE SIEGEL, an individual;  
11 and LAURA SIEGEL LARSON, an  
individual.

13 Plaintiffs.

14

15 WARNER BROS.  
16 ENTERTAINMENT INC., a  
17 corporation; DC COMICS, a  
18 general partnership; and DOES 1-  
10.

## Defendants.

Case No. CV 04-08400 ODW (RZx)

**THIRD AMENDED COMPLAINT  
FOR:**

- [1] DECLARATORY RELIEF RE: TERMINATION, 17 U.S.C. §304(c);
- [2] DECLARATORY RELIEF RE: PROFITS;
- [3] DECLARATORY RELIEF RE: USE OF "S" CREST; and
- [4] ACCOUNTING FOR PROFITS

**DEMAND FOR JURY TRIAL**

2011 FEB -3 AM 11:55  
CLERK U.S. DISTRICT COURT  
CENTRAL DISTRICT CALIF.  
LOS ANGELES

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1 DC COMICS,

2 Counterclaimant,

3 vs.

4  
5 JOANNE SIEGEL, an individual;  
6 and LAURA SIEGEL LARSON, an  
7 individual,

8 Counterclaim Defendants.

9  
10 Plaintiffs JOANNE SIEGEL and LAURA SIEGEL LARSON (hereinafter  
11 the "Plaintiffs"), by and through their attorneys of record, hereby allege as  
12 follows:

13 **JURISDICTION AND VENUE**

14 1. This is a civil action seeking declaratory relief, and an accounting  
15 for profits and related claims arising out of Plaintiffs' termination of prior grants  
16 of copyright in and to the original character and work known as "Superman"  
17 and subsequent "Superman" works pursuant to the United States Copyright Act  
18 of 1976, 17 U.S.C. § 304(c), and defendants' willful misconduct with respect  
19 thereto.

20 2. This Court has subject matter jurisdiction over the claims set forth  
21 in this Complaint pursuant to the United States Copyright Act (hereinafter, the  
22 "Copyright Act"), 17 U.S.C. § 101 *et al.* and 28 U.S.C. §§ 1331, 1332, 1338(a)  
23 and (b).

24 3. This Court has supplemental jurisdiction over the related state  
25 claims herein under 18 U.S.C. § 1367 in that these claims form part of the same  
26 case and controversy as the federal claims herein.

27 4. This Court has personal jurisdiction over the defendants in that  
28 defendants are regularly doing business in the State of California and in this

1 District, and because a substantial part of the relevant acts complained of herein  
2 occurred in the State of California and this District.

3 5. Venue is proper in the United States District Court for the Central  
4 District of California pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1400(a)  
5 because a substantial part of the wrongful acts that give rise to the claims herein  
6 below occurred in this district and because WARNER BROS.

7 ENTERTAINMENT INC. has its principal place of business in this district.

8 **PARTIES**

9 6. Plaintiff JOANNE SIEGEL (hereinafter "Joanne Siegel") is an  
10 individual and citizen of and resides in the State of California, in the County of  
11 Los Angeles, and is and at all times has been a citizen of the United States.

12 Joanne Siegel is the widow of famed comic book creator Jerome (a.k.a. "Jerry")  
13 Siegel.

14 7. Plaintiff LAURA SIEGEL LARSON (hereinafter "Laura Siegel")  
15 is an individual and a citizen of and resides in the State of California, in the  
16 County of Los Angeles, and is and at all times has been a citizen of the United  
17 States. Laura Siegel is the daughter of Jerome Siegel.

18 8. Plaintiffs are informed and believe and based thereon allege that  
19 defendant WARNER BROS. ENTERTAINMENT INC. (hereinafter "Warner  
20 Bros.") is a corporation organized and existing under the laws of the State of  
21 Delaware, which has its principal place of business in Los Angeles County,  
22 California. Warner Bros. is a wholly owned subsidiary of Time Warner Inc.

23 9. Plaintiffs are informed and believe and based thereon allege that  
24 Defendant DC COMICS (hereinafter "DC") is a general partnership organized  
25 and existing under the laws of the State of New York, which has its principal  
26 place of business in the State of New York; and that DC regularly conducts  
27 significant business in the State of California and in the County of Los Angeles.  
28 DC is also a wholly owned subsidiary of defendant Warner Bros. (Warner Bros.

1 and DC are sometimes collectively referred to hereinafter as the "Defendants";  
2 and each reference to Defendants shall also refer to each Defendant).

3 10. Plaintiffs are informed and believe and based thereon allege that on  
4 or about September 30, 1946, the New York corporations, Detective Comics,  
5 Inc., Superman, Inc., All American Comics, Inc., Jolaine Publications, Inc.,  
6 Wonderwoman Publishing, Inc., Hop Harrigan Enterprise, Inc., Gainlee  
7 Publishing Co., Inc., J.R. Publishing Co., Inc., Worlds Best Comics, Inc. and  
8 Trafalgar Printing Co., Inc. were consolidated into the New York corporation  
9 National Comics Publications, Inc., the name of which was later changed to  
10 National Periodical Publications, Inc., and eventually to DC Comics, Inc.; and  
11 further that DC, and Warner Bros., and/or each of them, are the alleged  
12 successor(s)-in-interest to National Periodical Publications, Inc.

13 11. Plaintiffs are informed and believe and based thereon allege that  
14 Time Warner Inc. (hereinafter "Time Warner") is a corporation organized and  
15 existing under the laws of the State of Delaware, which has its corporate  
16 headquarters in the State of New York, and that Time Warner regularly  
17 conducts significant ongoing business in the State of California and in the  
18 County of Los Angeles. Time Warner is the parent company of both Warner  
19 Bros. and DC.<sup>1</sup>

20 12. Plaintiffs are informed and believe and based thereon allege that  
21 Defendant DC never, or rarely, exploits "Superman," independently of its  
22 controlling parent company, Warner Bros.; that even relatively linear functions  
23 such as "Superman" licensing are not handled directly by DC, but are exploited  
24 exclusively through Warner Bros.; that the agreements and other arrangements  
25 between Defendants Warner Bros. and DC regarding "Superman" are not "arms  
26 length" agreements, serve primarily Warner Bros.' interests, and thus, do not

27 28 <sup>1</sup> Plaintiffs have omitted Time Warner Inc. as a party pursuant to the Court's May 19,  
2009 and July 8, 2009 orders. Plaintiffs respectfully reserve all rights to appeal such  
rulings and to reinstate Time Warner in the event the orders are reversed.

1 reflect the appropriate market values of the copyrights to "Superman," at issue  
2 herein.

3       13. Plaintiffs are informed and believe and based thereon allege that  
4 Defendants Warner Bros. and DC are, and at all times material hereto were, the  
5 alter-egos of each other and there exists and has existed at all times material  
6 hereto a unity of interest and ownership among such Defendants such that any  
7 separateness has ceased to exist in that Defendants, and/or each of them, used  
8 assets of the other Defendants, and/or each of them, for its and/or their separate,  
9 individual purposes, and caused valuable assets, property, rights and/or interests  
10 to be transferred to each other without adequate consideration.

11       14. Plaintiffs are informed and believe and based thereon allege that  
12 the fictitiously named Defendants captioned hereinabove as Does 1 through 10,  
13 inclusive, and each of them, were in some manner responsible or legally liable  
14 for the actions, damages, events, transactions and circumstances alleged herein.  
15 The true names and capacities of such fictitiously named defendants, whether  
16 individual, corporate, associate, or otherwise are presently unknown to  
17 Plaintiffs, and Plaintiffs will amend this Complaint to assert the true names and  
18 capacities of such fictitiously named Defendants when the same have been  
19 ascertained. For convenience, each reference herein to a named Defendant shall  
20 also refer to the Doe Defendants and each of them.

21       15. Plaintiffs are informed and believe and based thereon allege that  
22 each of the Defendants was the agent, partner, servant, employee, or employer  
23 of each of the other Defendants herein, and that at all times herein mentioned,  
24 each of the Defendants was acting within the course and scope of such  
25 employment, partnership and/or agency and that each of the Defendants is  
26 jointly and severally responsible for the damages hereinafter alleged.

27       **FACTS COMMON TO ALL CLAIMS FOR RELIEF**

28       16. In 1933 Jerome Siegel conceived the original idea of a cartoon strip

1 featuring a unique man of superhuman strength and powers who would perform  
2 feats of great importance for the public good. Siegel conceived, in essence, the  
3 first "superhero" -- an original concept which embodied our nation's ideals at  
4 the World's darkest hour, became a cultural icon and spawned, what is today, a  
5 booming industry. Jerry Siegel entitled his character -- "Superman."

6 17. In or about 1934, Jerome Siegel authored twenty-four days (four  
7 weeks) of "Superman" comic strips intended for newspaper publication, a  
8 synopsis of comic strips for weeks two, three and four, a paragraph previewing  
9 future "Superman" exploits and a nine page synopsis covering approximately  
10 two months of daily "Superman" newspaper comic strips (at six days per week).  
11 Plaintiffs are informed and believe and based thereon allege that these works,  
12 though originally unpublished, were thereafter included or incorporated in the  
13 early "Superman" comic strips thereafter published from on or about April 18,  
14 1938 to April 13, 1943 (collectively, referred to hereinafter as the "Initially  
15 Unpublished Works").

16 18. In or about 1934, Jerome Siegel and the artist, Joe Shuster  
17 (hereinafter collectively, "Siegel and Shuster") co-authored *fifteen* daily  
18 "Superman" comic strips, consisting of one week (six days) of completely inked  
19 daily "Superman" comic strips and three additional six day weeks of  
20 "Superman" comic strips in penciled form (the "1934 Superman Comic Strip").  
21 "Superman" was submitted by Siegel and Shuster to numerous publishers over  
22 the next few years.

23 19. Although "Superman" was not picked up for publication for some  
24 time, Siegel and Shuster did get other features they created into print with the  
25 Nicholson Publishing Company including "Henri Duval" and "Dr. Occult." In a  
26 letter dated October 4, 1935, the company's owner Malcolm Wheeler-  
27 Nicholson, wrote to Mr. Siegel expressing an interest in publishing "Superman"  
28 in comic book form but Siegel and Shuster rejected his offer. Nicholson

1 became involved with a new comic magazine company, Detective Comics, Inc.  
2 (hereinafter, "Detective Comics") and two Siegel and Shuster features, "Slam  
3 Bradley" and "Spy," which appeared in "Detective Comics No. 1."

4 20. On or about December 4, 1937, Siegel and Shuster, as independent  
5 contractors, entered into an agreement with Detective Comics (the "1937  
6 Agreement") to continue to produce the comic magazine features, "Slam  
7 Bradley" and "The Spy," which agreement provided, in part, that any new and  
8 additional features which Siegel and Shuster produced for use in a comic  
9 magazine were to be first submitted to Detective Comics which reserved the  
10 right to accept or reject same within sixty days.

11 21. One of the early entities to which Siegel had submitted "Superman"  
12 was The McClure Newspaper Syndicate. In or about early 1938, the head of the  
13 syndicate sought Siegel's permission to forward Siegel and Shuster's 1934  
14 Superman Comic Strip material to Detective Comics for potential publication in  
15 its contemplated new magazine, "Action Comics." By this time, "Superman"  
16 and his miraculous powers had already been completely developed by Siegel  
17 and Shuster.

18 22. In or about January–February 1938, when Detective Comics  
19 expressed interest to Siegel and Shuster in publishing their 1934 Superman  
20 Comic Strip in a magazine, Siegel and Shuster cut and pasted their  
21 aforementioned 1934 Superman Comic Strip into more than ninety separate  
22 panels ("Revised 1934 Superman Comic Strip"), so as to render their newspaper  
23 strip more suitable for a magazine layout.

24 23. The "Superman" material described hereinabove, which was the  
25 independent, original creation of Siegel and Shuster, contained virtually all of  
26 the signature elements and characters of the "Superman" mythology and  
27 constituted the formula for the continuing "Superman" series to come. It  
28 depicted and narrated the origin of the "Superman" character, and contained a

1 complete delineation of the literary and pictorial representation of "Superman,"  
2 including without limitation, his habits, character, superhuman powers,  
3 appearance, costume, secret identity and attributes, and the sphere of public  
4 good "Superman" was to enhance.

5 24. By an instrument dated March 1, 1938 (hereinafter, the "1938  
6 Grant"), which had been prepared by Detective Comics, Siegel and Shuster  
7 agreed to the publication of their Revised 1934 Superman Comic Strip by  
8 Detective Comics in consideration for the sum of \$10 per page for this thirteen  
9 page installment equal to a total of \$130.

10 25. Thereafter, Detective Comics published Siegel and Shuster's  
11 "Revised 1934 Superman Comic Strip" in the "June, 1938" issue of "Action  
12 Comics No. 1," which was issued for sale on April 18, 1938.

13 26. Action Comics No. 1 and the predecessor materials created solely  
14 by Siegel and Shuster contained the essential elements of "Superman" which  
15 continue to this day, including without limitation, Superman's origin from the  
16 distant planet, his "back-story" (sent to Earth as an infant in a spaceship by his  
17 scientist father), his core physical and mental traits, his mission as a champion  
18 of the oppressed to use his great powers to benefit humankind, his secret  
19 identity as newspaper reporter, "Clark Kent," his relationship with other key  
20 characters such as the newspaper editor from whom he takes his assignments  
21 and his romantic interest in Lois, who rebuffs Clark as a coward, while  
22 romantically inclined towards "Superman."

23 27. Action Comics No. 1 was followed by further issues published at  
24 regular intervals, with each subsequent issue containing additional "Superman"  
25 material created by Siegel and Shuster.

26 28. Between on or about March, 1938 and on or about September,  
27 1938, Siegel and Shuster continued to create "Superman" strips, stories and  
28 continuities.

1       29. On or about September 22, 1938, Detective Comics, Siegel and  
2 Shuster entered into an agreement with The McClure Newspaper Syndicate  
3 (hereinafter, the "1938 McClure Agreement") regarding the newspaper  
4 syndication of a "Superman" comic strip.

5       30. On or about September 22, 1938, Detective Comics and Siegel and  
6 Shuster therefore entered into an agreement (hereinafter, the "1938 Agreement")  
7 which for the first time provided that Detective Comics would thereby "employ  
8 and retain" Siegel and Shuster to do the "artwork and continuity" for five comic  
9 strips, including "Superman."

10       31. Prior to September 22, 1938, Siegel and Shuster solely created six  
11 comic book issues of "Superman," published as Action Comics Nos. 1 through  
12 6. Of these, Action Comics Nos. 1 through 5 had been published prior to  
13 September 22, 1938; and Action Comics No. 6 was published four days later on  
14 September 26, 1938.

15       32. Action Comics No. 1 is not a "work made for hire." Action  
16 Comics Nos. 2-6, which were thereafter created by Siegel and Shuster prior to  
17 their entering into the 1938 Agreement, are also not "works made for hire."

18       33. On or about December 19, 1939, Detective Comics and Siegel and  
19 Shuster entered into a supplemental agreement (hereinafter, the "1939  
20 Agreement") which raised Siegel and Shuster's per page compensation rate for  
21 the increasingly popular "Superman" comic strip.

22       34. Plaintiffs are informed and believe and thereon allege that the  
23 "Superman" works created by Siegel and Shuster after they entered into the  
24 1938 Agreement with Detective Comics were also not "works made for hire."  
25 The 1938 Agreement for the first time used the term "employ and retain" with  
26 respect to Siegel and Shuster's subsequent work on "Superman," yet Siegel and  
27 Shuster were never employees of Detective Comics. Siegel and Shuster  
28 operated their own independent comic book production business. Without

1 limitation, Siegel and Shuster were not paid a salary, but were consistently paid  
2 on a "per page" basis, and only for materials actually delivered by them to  
3 Detective Comics and published by Detective Comics. Plaintiffs are further  
4 informed and believe and thereon allege that in compensating Siegel and  
5 Shuster, Detective Comics did not withhold or deduct payroll, social security  
6 and other taxes normally deducted from employee salaries; Detective Comics  
7 did not provide employee benefits to Siegel and Shuster; Siegel and Shuster  
8 worked from their own premises (not Detective Comic's premises); determined  
9 their own hours and days of work; supplied, used and paid for their own  
10 instrumentalities, tools and materials; and hired and paid for their own  
11 employees who worked at Siegel and Shuster's instance and expense, under  
12 Siegel and Shuster's direction and full control.

13       35. In or about 1947, Siegel and Shuster filed an action in the Supreme  
14 Court of the State of New York, County of Westchester against National Comics  
15 Publications, Inc. (hereinafter, the "1947 Action") to determine the validity of  
16 the contracts between National Comics Publications, Inc.'s predecessors –in-  
17 interest and Siegel and Shuster with respect to "Superman." Pursuant to a  
18 stipulation of the parties the action was referred for decision to an Official  
19 Referee of the New York Supreme Court. After trial of the action the Official  
20 Referee rendered an opinion dated November 1, 1947. On April 12, 1948, the  
21 Official Referee signed detailed findings of fact and conclusions of law and  
22 entered an interlocutory judgment upholding the contracts in some respects, to  
23 which notices of appeal were filed by all said parties. Settlement negotiations  
24 ensued, resulting in a stipulation of settlement between said parties executed on  
25 or about May 19, 1948 (hereinafter, the "1948 Stipulation"), and the entry in the  
26 New York Supreme Court of a final consent judgment dated May 21, 1948.

27       36. In or about the early 1970's, a dispute arose between Siegel and  
28 Shuster and National Periodical Publications, Inc. regarding the renewal

1 copyright to "Superman," resulting in Siegel and Shuster's filing of an action  
2 against National Periodical Publications, Inc. in the United States District Court  
3 for the Southern District of New York for a declaration that Siegel and Shuster  
4 were entitled to the renewal copyright to "Superman." The District Court held  
5 in Jerome Siegel and Joseph Shuster v. National Periodical Publications, Inc. et  
6 al., 364 F. Supp. 1032 (1973) that the initial "Superman" comic strip, published  
7 in Action Comics No. 1, is a "work for hire" within the meaning of the  
8 Copyright Act, 17 U.S.C. § 26, and that, in any event, the various agreements  
9 between the parties, prior to the action, transferred the renewal copyright in this  
10 material to Detective Comics.

11 37. On appeal, the United States Court of Appeals for the Second  
12 Circuit held in Jerome Siegel and Joseph Shuster v. National Periodical  
13 Publications, Inc. et al., 509 F.2d 909 (2<sup>nd</sup> Cir. 1974), that the District Court  
14 erred in finding that Superman was a "work for hire" under the Copyright Act,  
15 17 U.S.C. § 26, and that "Superman" and his miraculous powers were created  
16 by Siegel and Shuster long before any employment relationship with Detective  
17 Comics. The Second Circuit nonetheless held that the Official Referee's  
18 determination in the 1947 Action that Siegel and Shuster had transferred all  
19 rights in "Superman" to Detective Comics implicitly included a determination  
20 that Siegel and Shuster had transferred the renewal copyright in "Superman" to  
21 Detective Comics; and that this determination was binding under the doctrine of  
22 *res judicata*.

23 38. On or about December 23, 1975, Siegel and Shuster entered into an  
24 agreement with Warner Communications Inc. (hereinafter the "1975  
25 Agreement") the alleged parent company of National Periodical Publications,  
26 Inc., which provided for (i) annual payment of \$20,000 to Siegel and Shuster  
27 each for their respective lifetimes, plus medical benefits to Siegel and Shuster  
28 each; and (ii) that Siegel and Shuster would be given credit on certain

1 "Superman" publications and derivative works as the "creators" of Superman, in  
2 exchange for Siegel and Shuster's acknowledgement that Warner  
3 Communications, Inc. was the exclusive owner of all right, title and interest in  
4 and to "Superman." (The 1937 Agreement, the 1938 Grant, the 1938 McClure  
5 Agreement, the 1938 Agreement, the 1939 Agreement, the 1948 Stipulation and  
6 the 1975 Agreement described hereinabove are hereinafter sometimes referred  
7 to collectively as the "Alleged Grants.")

8 39. On April 3, 1997, Plaintiffs, Joanne Siegel and Laura Siegel,  
9 served by first class mail, postage prepaid, notices of termination, as permitted  
10 by the Copyright Act, 17 U.S.C. § 304(c) (hereinafter, the "Termination  
11 Notices") on each of the Defendants and a number of their subsidiaries,  
12 licensees and affiliates, terminating the Alleged Grants of the renewal copyright  
13 to (i) the copyrightable "Superman" character, (ii) the 1934 Superman Comic  
14 Strip and the Revised 1934 Superman Comic Strip, both published as/in Action  
15 Comics No. 1, (iii) the material published as/in Action Comics Nos. 1-6  
16 (statutory copyright to Action Comics No. 6 was secured on September 26,  
17 1938), (iv) the material published as/in Action Comics Nos. 7- 61 (statutory  
18 copyright to Action Comics No. 61 was secured on April 13, 1943), and/or (v)  
19 subsequent works involving "Superman," all as set forth in the Notices of  
20 Termination (hereinafter sometimes referred to collectively as the "Works").

21 40. Plaintiffs are informed and believe and based thereon allege the  
22 Initially Unpublished Works set forth in the Termination Notices were  
23 incorporated or included in Works published thereafter, to which the  
24 Termination applies.

25 41. Plaintiffs are further informed and believe and based thereon allege  
26 that the copyrights to all the Works were duly renewed.

27 42. The Notices of Termination were drafted, served on Defendants  
28 and filed with the United States Copyright Office, all in full compliance with

1 the Copyright Act, 17 U.S.C. § 304(c), and the regulations promulgated  
2 thereunder by the Register of Copyrights, 37 C.F.R. § 201.10 (2003). (Plaintiffs'  
3 aforesaid exercise of their termination rights under 17 U.S.C. § 304(c) regarding  
4 "Superman" is sometimes hereinafter referred to as the "Termination").

5 43. As the original co-author of each Work Jerome Siegel owned an  
6 undivided fifty percent (50%) of the copyright of each Work prior to any  
7 alleged transfer or assignment of any such Work pursuant to any Alleged Grant.

8 44. The Notices of Termination terminated on April 16, 1999  
9 (hereinafter, the "Termination Date") all prior grants or purported grants of the  
10 renewal copyrights in and to each and/or all the Works for their extended  
11 renewal terms (hereinafter, sometimes referred to individually and collectively  
12 as the "Recaptured Copyrights"), including, but not limited to, the Alleged  
13 Grants.

14 45. On April 16, 1999, the Termination Date, Plaintiffs re-gained  
15 ownership to Jerome Siegel's undivided fifty percent (50%) copyright interest  
16 in and to each and/or all the Works for their extended renewal terms. In  
17 accordance with 17 U.S.C. § 304(c), and as set forth in the Notices of  
18 Termination, Jerome Siegel's surviving son, Michael Siegel, is also entitled to  
19 share in the proceeds from this recaptured interest.

20 46. Defendants have acknowledged that the Notices of Termination are  
21 effective. Defendants have further admitted that Plaintiffs thereby co-own the  
22 copyright(s) to at least the original "Superman" elements authored by Siegel and  
23 Shuster; and that Defendants have a duty to account to Plaintiffs for  
24 Defendants' exploitation of such copyright(s).

25 47. On April 16, 1997, in response to the service of the Notices of  
26 Termination, John A. Schulman, Executive Vice President and General Counsel  
27 of Defendant Warner Bros., wrote a letter to Joanne Siegel, stating in relevant  
28 part:

1           “As to the Notices of Termination, I wasn’t surprised  
2           at their arrival...After the effective date of the  
3           termination, there will still remain 14 years of  
4           copyright protection left to the joint copyright holders  
5           of the original Superman elements. Those are what we  
6           should share.”

7       48. Similarly, on October 10, 1997, Paul Levitz, President and  
8       Publisher of Defendant DC Comics, wrote a letter to Plaintiffs, stating in  
9       relevant part:

10           “The [Superman] rights involved are non-exclusive;  
11           they are shared with DC. Since both you and DC  
12           would have these rights, we would each have the  
13           obligation to pay the other for using those rights if you  
14           did not re-grant them to DC.”

15       49. Yet, on April 15, 1999, one day before the Termination Date,  
16       Defendant DC, by its attorneys (Fross Zelnick, *et al*) sent a letter to the  
17       Plaintiffs’ attorney, Arthur J. Levine, frivolously denying the validity of the  
18       termination with respect to *any* “Superman” copyrights, stating in relevant part:

19            “[Y]ou are hereby put on notice that DC Comics  
20           rejects both the validity and scope of the notices and  
21           will vigorously oppose any attempt by your clients to  
22           exploit or authorize the exploitation of any copyrights,  
23           or indeed, any rights at all, in Superman.”

24       50. Defendant DC’s April 15, 1999 letter constituted a thinly veiled  
25       threat that if Plaintiffs ever attempted to exploit *any* of their recaptured  
26       copyright interests in “Superman,” Defendants would engage in a campaign of  
27       intimidation, including, but not limited to, instituting frivolous litigation against  
28       Plaintiffs and using Defendants’ enormous market power to restrict Plaintiffs’

1 ability to exploit their Recaptured Copyright interests. Given that Time Warner  
2 is one of the largest media companies in the world with over \$38 billion in  
3 annual revenues, Defendants' threats had a devastating and chilling effect on  
4 Plaintiffs' freedom to exploit the copyright interests they had properly regained  
5 under the Copyright Act, 17 U.S.C. § 304(c), thereby damaging Plaintiffs and  
6 causing them great emotional distress.

7        51.    In the nearly 9 ½ years since the Termination Date, none of the  
8 Defendants has ever accounted to the Plaintiffs for any proceeds or profits  
9 whatsoever from their ongoing exploitation of “Superman” and the jointly  
10 owned Recaptured Copyrights.

## **FIRST CLAIM FOR RELIEF**

12 (Declaratory Relief Re: Termination, 17 U.S.C. § 304(c) - Against All  
13 Defendants)

14 52. Plaintiffs re-allege and incorporate by reference paragraphs 1  
15 through 51 inclusive, as though fully set forth herein.

16       53. By reason of the foregoing facts, an actual and justiciable  
17 controversy has arisen and now exists between Plaintiffs and Defendants under  
18 Federal copyright law, 17 U.S.C. §§ 101 *et seq.*, concerning their respective  
19 rights and interests in and to the copyright to various “Superman” works, for  
20 which Plaintiffs desire a declaration of rights.

21 54. Plaintiffs contend and Defendants deny that:

22                   a.     The Notices of Termination terminated on April 16, 1999 all  
23 prior grants, assignments or transfers of copyrights for the extended renewal  
24 term in and to each and/or all of the Works (as defined in paragraph 39  
25 hereinabove) to any of the Defendants and other parties duly served with the  
26 Notices of Termination, including their predecessors-in-interest; and

27 b. As of the effective Termination Date, April 16, 1999,  
28 Plaintiffs owned and continue to own an undivided fifty percent (50%) of the

1 Recaptured Copyrights to each and/or all the Works for their renewal terms.

2       55. A declaration of the Court is necessary pursuant to the Declaratory  
3 Judgment Act, 28 U.S.C. §§ 2201 et seq., so that the parties may know their  
4 respective rights and obligations with respect to the Termination and the  
5 copyright interests thereby recaptured by Plaintiffs.

## **SECOND CLAIM FOR RELIEF**

7 (Declaratory Relief Re: Profits from Recaptured Copyrights - Against All  
8 Defendants)

9       56. Plaintiffs re-allege and incorporate by reference paragraphs 1  
10 through 55 inclusive, as though fully set forth herein.

11        57. By reason of the foregoing facts, an actual and justiciable  
12 controversy has arisen and now exists between Plaintiffs and Defendants  
13 concerning how Profits from Recaptured Copyrights should be defined for  
14 purposes of Defendants and Plaintiffs accounting to one another as joint owners  
15 of the Recaptured Copyrights.

16 58. Plaintiffs contend and Defendants deny that:

17 a. Profits include Defendants' revenues from the post - April  
18 16, 1999 exploitation of the Recaptured Copyrights in foreign territories, when  
19 such exploitation results from the predicate exercise *in the United States* of any  
20 right(s) under the Recaptured Copyrights by any Defendant, their licensees or  
21 assigns:

22 b. There should be no *apportionment* of Profits since Plaintiffs  
23 are entitled to fifty percent (50%) of such Profits as *joint owners* of the  
24 Recaptured Copyrights;

25 c. Alternatively, *apportionment*, if any, should apply only to  
26 profits from the exploitation of the Recaptured Copyrights in *derivative works*  
27 *created by a Defendant*, but not to profits from mere *licensing* of the Recaptured  
28 Copyrights. Any such apportionment should weigh heavily in Plaintiffs' favor,

1 since the value of the "Superman" franchise exploited by the Defendants  
2 ("Superman Franchise") is largely attributable to the unique "Superman"  
3 mythology protected by the Recaptured Copyrights. The Superman Franchise  
4 capitalizes on the success of, and is hardly distinguishable from, the underlying  
5 Recaptured Copyrights co-owned by Plaintiffs;

6                   d. Profits include profits from any merchandise or other  
7 derivative works created, produced or manufactured on or after the Termination  
8 Date, April 16, 1999, notwithstanding that the underlying licensing agreement  
9 for such exploitations may have been executed prior thereto;

10                   e. Profits are not limited to the Profits of Defendant DC,  
11 Warner Bros.' wholly owned subsidiary, but include the Profits of Defendant  
12 Warner Bros., as well; and

13                   f. In determining Profits, deductible costs should include only  
14 reasonable costs directly attributable to the exploitation of the Recaptured  
15 Copyrights, of the type customarily deducted in arms' length agreements to  
16 exploit copyrights of comparable value, all in compliance with Generally  
17 Accepted Accounting Principles ("GAAP").

18                   59. A declaration of the Court is necessary pursuant to the Declaratory  
19 Judgment Act, 28 U.S.C. §§ 2201 *et seq.* so that the parties may know their  
20 respective rights and obligations with respect to Profits from the exploitation of  
21 the Recaptured Copyrights after the Termination Date.

22                   **THIRD CLAIM FOR RELIEF**

23 (Declaratory Relief Re: Use of the "Superman" Crest - Against All Defendants)

24                   60. Plaintiffs re-allege and incorporate by reference paragraphs 1  
25 through 59 inclusive, as though fully set forth herein.

26                   61. By reason of the foregoing facts, an actual and justiciable  
27 controversy has arisen and now exists between Plaintiffs and Defendants  
28 concerning whether Plaintiffs are entitled, after the Termination Date, to

1 commercially exploit the "Superman" crest comprised of a large red "S"  
2 centered on a broad triangular yellow field, first appearing (as part of  
3 "Superman's" costume, centered on and highlighting Superman's "V" shaped  
4 muscular chest) in the 1934 Superman Comic Strip and the 1934 Revised  
5 Superman Comic Strip created by Siegel and Shuster and published as Action  
6 Comics No. 1, and in only slightly revised form in subsequent Works  
7 (hereinafter the "Superman Crest"); and whether Defendants' duty to account,  
8 as non-exclusive joint owners of such Recaptured Copyrights, includes Profits  
9 from the licensing of this crest.

10 62. Defendants allege a trademark interest in a "Superman" shield  
11 (hereinafter the "Superman Shield" and/or "Superman Trademark") which is  
12 also comprised of a large red "S" on a broad triangular yellow field, first  
13 appearing in later Works, as part of "Superman's" costume, centered on and  
14 highlighting Superman's "V" shaped muscular chest, with the upper corners of  
15 the triangular crest slightly cropped.

16 63. Plaintiffs contend and Defendants deny that:

17 a. The Recaptured Copyrights include the copyright to the  
18 "Superman" crest comprised of a large red "S" centered on a broad triangular  
19 yellow field, first appearing as part of "Superman's" costume, centered on and  
20 highlighting Superman's "V" shaped muscular chest, in the 1934 Superman  
21 Comic Strip and the Revised 1934 Superman Comic Strip published as Action  
22 Comics No. 1, and appeared in subsequently published Works in only slightly  
23 revised form (hereinafter the "Superman Crest").

24 b. Defendants' alleged Superman Trademark design arose  
25 directly from, and is substantially identical to, Siegel and Shuster's copyrighted  
26 Superman Crest;

27 c. Defendants receive significant proceeds and value from the  
28 utilization and copying of the Superman Crest and/or substantially identical

1 | Superman Shield for which Defendants must account to Plaintiffs;

2 d. In turn, Plaintiffs should likewise be allowed to exercise  
3 their rights under copyright with respect to the Superman Crest, including  
4 without limitation the right to commercially exploit the Superman Shield in  
5 merchandise;

6 e. Defendants, in any event, cannot use the alleged Superman  
7 Trademark or any other purported trademark interest regarding "Superman" to  
8 prevent, hinder or restrain Plaintiffs' use, exercise or exploitation of their rights  
9 under the Copyright Act in any of the jointly owned Recaptured Copyrights.

10       64. A declaration of the Court is necessary pursuant to the Declaratory  
11 Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, so that the parties may know their  
12 respective rights and obligations with respect to the Superman Crest and the  
13 Superman Shield.

## **FOURTH CLAIM FOR RELIEF**

## 15 (Accounting for Profits - Against All Defendants)

16 65. Plaintiffs re-allege and incorporate by reference paragraphs 1  
17 through 64 inclusive, as though fully set forth herein.

18        66. On or after the Termination Date, April 16, 1999, Defendants  
19 and/or each of them have licensed and/or commercially exploited and will  
20 continue to license or exploit the Recaptured Copyrights, including without  
21 limitation, *via* merchandising, publishing, and derivative motion picture and  
22 television programming.

23        67. As result of such licensing and/or commercial exploitation of the  
24 Recaptured Copyrights on or after April 16, 1999, Defendants and/or each of  
25 them have received and will continue to receive substantial Profits, fifty percent  
26 (50%) of which is payable to Plaintiffs as the joint owner of the Recaptured  
27 Copyrights.

28 68. Defendant Warner Bros. has acted and continues to act in most

1 instances as the effective joint-owner and licensor (as opposed to licensee) of  
2 the Recaptured Copyrights; and, as such, Warner Bros., along with the other  
3 Defendants, owes a duty to account to Plaintiffs.

4 69. To date, the Profits received by Defendants and/or each of them  
5 from such licensing and/or commercial exploitation on or after April 16, 1999 is  
6 estimated to be in excess of \$50 million, however the exact sums actually  
7 received and to be received by Defendants and/or each of them, are unknown to  
8 Plaintiffs at this time, for these amounts can be properly determined only by an  
9 accounting.

10 70. Plaintiffs have demanded an accounting by Defendants on a  
11 continuing basis of all amounts received by them and/or payable to them from  
12 such licensing and other commercial exploitation on or after April 16, 1999, and  
13 that Defendants pay Plaintiffs their fifty percent (50%) share of all such Profits.

14 71. In nearly 9 ½ years since the Termination Date, Defendants have,  
15 nonetheless, never accounted to or paid any Profits whatsoever to Plaintiffs.

16 72. Plaintiffs at no time waived their rights to receive their share of such  
17 Profits, nor have Plaintiffs at any time consented to the use and exploitation of  
18 the Recaptured Copyrights in the United States or any foreign territories.

19 73. Plaintiffs are entitled to an ongoing accounting from Defendants  
20 regarding all amounts received, realized by or payable to Defendants on or after  
21 April 16, 1999 from the licensing and any other commercial exploitation of the  
22 Recaptured Copyrights and "Superman Franchise," and to the payment by  
23 Defendants to Plaintiffs of fifty percent (50%) of all such Profits.

24

25 WHEREFORE, Plaintiffs pray for relief as follows:

26

**PRAYER FOR RELIEF**

27

**ON THE FIRST CLAIM FOR RELIEF**

28

74. For a declaration as follows:

1 a. That pursuant to the Copyright Act, 17 U.S.C. § 304(c),  
2 Plaintiffs validly terminated on April 16, 1999 all prior grants, assignments or  
3 transfers to any of the Defendants and any of their predecessors-in-interest, of  
4 the renewal copyrights in and to each and/or all of the Works; and

5 b. That, as of the Termination Date, Plaintiffs owned and  
6 continue to own fifty percent (50%) of the aforesaid Recaptured Copyrights.

7 ON THE SECOND CLAIM FOR RELIEF

8 75. For a declaration as follows:

9 a. That as joint owners of the Recaptured Copyrights, Plaintiffs  
10 are entitled to an accounting for Profits received or payable to the Defendants;

11 b. That Profits include Defendants' revenues from the post -  
12 April 16, 1999 exploitation of the Recaptured Copyrights in territories outside  
13 of the United States whenever such exploitation is based on the predicate  
14 *exercise in the United States* of any right(s) in and to the Recaptured Copyrights  
15 by any Defendant, their licensees or assigns;

16 c. That there should be no *apportionment* of Profits since  
17 Plaintiffs are entitled to fifty percent (50%) of such Profits as joint owners of  
18 the Recaptured Copyrights;

19 d. Alternatively, that apportionment should apply only to profits  
20 from the exploitation of the Recaptured Copyrights in *derivative works created*  
21 *by a Defendant*, but not to profits from *licensing* of the Recaptured Copyrights;

22 e. That apportionment, if any, should weigh strongly in  
23 Plaintiffs' favor, since the value of the Superman Franchise is largely  
24 attributable to the unique "Superman" character and other elements created by  
25 Siegel and Shuster and protected by the Recaptured Copyrights, in a percentage  
26 that the court may deem just and proper;

27 f. That Profits include profits from any merchandise or other  
28 derivative works created, produced or manufactured on or after the Termination

1 Date, April 16, 1999, notwithstanding that underlying licensing for such  
2 exploitation may have occurred prior thereto;

3 g. That Profits include the Profits of Defendants DC, Warner  
4 Bros. and Time Warner, their subsidiaries and divisions; and

5 h. That in determining Profits, only reasonable costs directly  
6 attributable to the exploitation of the Recaptured Copyrights, of the type  
7 customarily deducted in arms' length agreements to exploit copyrights of  
8 comparable value to the Recaptured Copyrights, should be deducted from gross  
9 revenues, all in compliance with GAAP.

10 ON THE THIRD CLAIM FOR RELIEF

11 76. For a declaration as follows:

12 a. That by the Termination, Plaintiffs recaptured a fifty percent  
13 (50%) interest in the copyright to the Superman Crest created by Siegel and  
14 Shuster;

15 b. That Defendants' Superman Shield design arose directly  
16 from, and is substantially identical to, the copyrighted Superman Crest created  
17 by Siegel and Shuster;

18 c. That Defendants must account to Plaintiffs for fifty percent  
19 (50%) of the proceeds they receive from the licensing or other exploitation of  
20 the Superman Crest and/or Superman Shield;

21 d. That Plaintiffs, as co-owners of the copyright in and to the  
22 Superman Crest, likewise are permitted to license or otherwise exploit the  
23 Superman Crest, subject to a duty to account to Defendants for any such  
24 exploitation; and

25 e. That Defendants cannot use their alleged trademark in the  
26 Superman Shield or any other alleged trademark interest with respect to  
27 "Superman" to prevent, hinder or restrain Plaintiffs' use, exercise or  
28 exploitation of Plaintiffs' rights under the Copyright Act in the jointly owned

1 Recaptured Copyrights.

2 ON THE FOURTH CLAIM FOR RELIEF

3 77. For an accounting by the Defendants, jointly and severally, of any  
4 and all proceeds from the licensing and any other exploitation of the Recaptured  
5 Copyrights or Superman Franchise on or after the Termination Date, April 16,  
6 1999;

7 78. For 50% of any and all proceeds from the licensing and any other  
8 exploitation of the Recaptured Copyrights or "Superman Franchise" on or after  
9 April 16, 1999 pursuant to such accounting; and

10 79. For the imposition of a constructive trust for the benefit of  
11 Plaintiffs on all sums received and to be received by the Defendants, jointly or  
12 severally, derived from the licensing and any other exploitation of the  
13 Recaptured Copyrights or "Superman Franchise" on or after April 16, 1999.

14 ON ALL CLAIMS FOR RELIEF

15 80. For Plaintiffs' costs of suit;

16 81. For interest at the highest lawful rate on all sums awarded Plaintiffs  
17 other than punitive damages;

18 82. For reasonable attorneys' fees; and

19 83. For such other and further relief as the Court may deem just and  
20 proper.

21 Dated: January 31, 2011

22 TOBEROFF & ASSOCIATES, P.C.



23  
24 Marc Toberoff  
25 Attorneys for Plaintiffs,  
26 JOANNE SIEGEL and LAURA  
27 SIEGEL LARSON  
28

## **JURY TRIAL DEMANDED**

Plaintiffs hereby request a trial by jury on each claim for relief alleged in the Complaint for which trial by jury is allowable.

Dated: January 31, 2011

## TOBEROFF & ASSOCIATES, P.C.

Marc Toberoff  
Attorneys for Plaintiffs,  
JOANNE SIEGEL and LAURA  
SIEGEL LARSON

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California. I am over the age of eighteen  
4 years and not a party to the within action; my business address is: 2049 Century Park East, Suite 2720,  
Los Angeles, California 90067.

5 On February 3, 2011, I served the attached documents described as

6 **THIRD AMENDED COMPLAINT**

7 as follows:

8 [ ] :BY MAIL:

9 As follows: I am "readily familiar" with the firm's practice of collection and processing  
10 correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on  
11 that same day with postage thereon fully prepaid at Los Angeles California in the ordinary course of  
12 business. I am aware that on motion of the party served, service is presumed invalid if postal  
cancellation date or postage meter date is more than one day after date of deposit for mailing in  
affidavit. I placed \_\_\_\_\_ the original X a true copy thereof enclosed in sealed envelope(s) addressed  
as follows:

13 [X] :BY HAND:

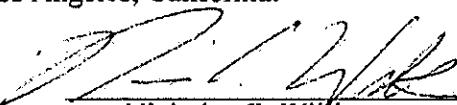
14 As follows: I delivered to the address listed below by hand the documents listed herein.

15 Daniel M. Petrocelli, Esq.  
16 O'MELVENY & MYERS LLP  
17 1999 Avenue of the Stars, 7<sup>th</sup> Floor  
Los Angeles, CA 90067

18 [X] :(FEDERAL) – I declare that I am employed in the office of a member of the bar of this court at  
whose direction the service was made.

20 I declare under penalty of perjury that the foregoing is true and correct.

21 EXECUTED on February 3, 2011, in Los Angeles, California.

22   
23 Nicholas C. Williamson