EXHIBIT AA

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

JOANNE SIEGEL, an individual; and LAURA SIEGEL LARSON, an individual,

Plaintiffs,

vs.

WARNER BROS. ENTERTAINMENT INC., a corporation; TIME WARNER INC., a corporation; DC COMICS, a general partnership; and DOES 1-10,

Defendants.

DC COMICS,

Counterclaimant,

vs.

JOANNE SIEGEL, an individual; and LAURA SIEGEL LARSON, an individual,

Counterclaim Defendants.

Case No: CV 04-8400 ODW (RZx)

Hon. Otis D. Wright II, U.S.D.J.

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR ENTRY OF A PARTIAL JUDGMENT UNDER FED. R. CIV. P. 54(B) AND FOR STAY OF REMAINING CLAIMS PENDING APPEAL; MEMORANDUM OF POINTS AND AUTHORITIES

Complaint filed: October 8, 2004
Trial Date: None Set

Date: March 21, 2011
Time: 1:30 p.m.
Place: Courtroom 11

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 21, 2011 at 1:30 p.m., or as soon thereafter as counsel may be heard, in Courtroom 11 of the above-captioned Court, located at 312 N. Spring Street, Los Angeles, California, 90012, plaintiff Laura Siegel Larson will and hereby does respectfully move the Court for certification pursuant to Fed. R. Civ. P. 54(b) of the Court's March 26, 2008 and August 12, 2009 orders, which granted partial summary judgment upholding plaintiffs Joanne Siegel[1] and Laura Siegel Larson's ("Plaintiffs") copyright notices of termination filed pursuant to 17 U.S.C. § 304(c) regarding the world famous character Superman. These detailed decisions also clearly determined which Superman comic books and newspaper strips had been recaptured by Plaintiffs' notices of termination. The Court's orders are a "final" disposition of Plaintiffs' First Claim for Relief and defendants' related counterclaims, and there is no just reason to delay entering the orders as an immediately appealable judgment with respect to such claim.

Both sides in this action have indicated a clear intent to appeal these decisions. Any errors in such decisions, particularly as to the Superman works recaptured by Plaintiffs, will mean that the complex accounting claims remaining in this case will need to be re-tried. The immediate appeal of such orders therefore serves the interests of judicial efficiency, while decreasing any prejudice to or hardship on the parties. Such interests of efficiency and fairness also support a stay of the remaining accounting claims pending disposition of the parties' appeals.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place in person on July 13, 2010. The parties further met and conferred telephonically on August 5, 2010. Defendants informed Plaintiffs that they would oppose this motion on the record, in connection with a separate motion. *See* Docket

[1] Joanne Siegel passed away on February 13, 2011. Plaintiff Laura Siegel Larson filed a Statement re: Death of a Party on February 18, 2011. Laura Siegel Larson was named in Joanne's Siegel's will as the executor of Joanne Siegel's estate, and will shortly file a motion or stipulation for substitution pursuant to F.R.C.P. 25(a). For convenience, the motion refers to "Plaintiffs" and the "Siegels."

No. 640.

Plaintiffs' motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the pleadings and records on file in this action, such additional authority and argument as may be presented in any reply and at the hearing on this motion, and such other matters of which this Court may take judicial notice.

Dated: February 18, 2011

RESPECTFULLY SUBMITTED,

Marc Toberoff
TOBEROFF & ASSOCIATES, P.C.

Attorneys for Plaintiff
Laura Siegel Larson

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INTRODUCTION

Plaintiffs Joanne Siegel and Laura Siegel Larson's First Claim for Relief, as well as Defendant DC Comics' ("DC") related First through Fourth Counterclaims, have been fully adjudicated, and a final judgment should be entered thereon under F.R.C.P. 54(b). On October 16, 2010, this Court denied *without prejudice* Plaintiffs' prior Rule 54(b) motion. Then, on December 15, 2010, in a status conference regarding the direction of this case, the Court indicated, while discussing the complexities of the remaining "accounting" claims, that the Ninth Circuit's guidance as to the threshold First Claim might well be advisable *before* the accounting claims are tried. In response, Plaintiffs sought leave to amend their complaint to resolve any confusion and to eliminate the superfluous language that Defendants had exploited in their opposition to Plaintiffs' original Rule 54(b) motion. *See* Docket No. 637. On January 31, 2011, the Court granted Plaintiffs' motion for leave to amend, and Plaintiffs promptly filed their Third Amended Complaint on February 3, 2011. Docket No. 644 ("TAC").

There are no barriers to entry of final judgment on the First Claim in the Third Amended Complaint. As Plaintiffs previously noted, the First Claim sought a declaration that Plaintiffs' notices of termination ("Termination" or "Siegel Termination") pursuant to the Copyright Act were valid, which required the Court: (a) to determine that the Termination complied with section 304(c) of the Copyright Act and the regulations promulgated thereunder; and (b) to determine those works recaptured by the Termination, no more, no less. In deciding the First Claim, the Court did exactly that. *See Siegel v. Warner Bros. Ent. Inc.*, 542 F. Supp. 2d 1098 (C.D. Cal. 2008), 658 F. Supp. 2d 1036 (C.D. Cal. 2009). Specifically, the Court found in two lengthy published decisions that the Termination is valid and that, as of April 16, 1999, the Plaintiffs became co-owners with Defendants of the original Superman copyrights in *Action Comics*, No. 1, as well as *Action Comics*, No. 4, *Superman*, No. 1 (pages 3-6), and the first two weeks of the Superman newspaper

strips. *Siegel*, 542 F. Supp. 2d at 1130, 1145; 658 F. Supp. 2d at 1063-83.

It is also indisputable that DC's First through Fourth Counterclaims that sought to invalidate the Termination have been fully adjudicated. For instance, Defendants cannot dispute that their Third and Fourth Counterclaims pertaining to their purported "settlement agreement" defense was decided, when the Court held, after thorough analysis, that no such contract exists. 542 F. Supp. 2d at 1137-39.

Resolution of all these issues by the Ninth Circuit will also avoid unnecessary re-litigation in the related action filed by DC on May 14, 2010, *DC Comics v. Pacific Pictures Corporation, et al.* ("*DC Comics*"), Case No. 10-03633 ODW (RZx). In *DC Comics*, which concerns the mirror-image termination by the estate of Joseph Shuster (Superman's other co-creator), DC raised "work for hire" and other defenses ***identical*** to those already adjudicated here with respect to the exact same Superman works and copyright grants. DC also intends to bring duplicative motions for reconsideration in this case (*see, e.g.*, Docket No. 623 at 5). DC is effectively "appealing" this case under the thinly veiled guise of the *DC Comics* action and such motions. The proper forum for "appeal," however, is the Ninth Circuit.

The remaining Second, Third and Fourth Claims to be tried in this case are Plaintiffs' separate accounting claims as to the profits owed Plaintiffs since April 16, 1999 (the effective Termination date) from Defendants' exploitation of the core Superman copyrights co-owned with Plaintiffs. *See* Docket No. 602 ("Joint Status Report"), at 16:8-23. Such accounting claims present complex new factual and legal issues which are entirely different than those resolved by the First Claim and require the expenditure of considerable resources. However, because the First Claim determined the recaptured Superman works for which DC must account, any errors in such decisions by the prior Court would necessarily require re-trial of the complex accounting claims, wasting resources. In contrast, streamlining this case by entry of judgment under Rule 54(b) benefits both the parties and this Court by expediting final resolution of the threshold First Claim. As the parties have noted, such a

resolution will also promote settlement of this litigation, now in its seventh year.

Lastly, because the Ninth Circuit's decision regarding Plaintiffs' First Claim will control the outcome in the pending "accounting" trial, this Court should exercise its discretion to stay this action pending completion of such appeal.

FACTUAL BACKGROUND

This case arises out of Plaintiffs Joanne Siegel and Laura Siegel Larson's proper exercise of their termination right under 17 U.S.C. § 304(c), to recapture Jerome Siegel's original copyrights in "Superman." On October 8, 2004, Plaintiffs commenced the instant action, for declaratory relief that their Termination is valid. Plaintiffs also brought claims for an accounting of Superman profits, after April 16, 1999, the effective Termination date. *See* Docket No. 1. DC counterclaimed that the Termination was invalid and to exclude Superman works as purportedly "made for hire." *See* Docket No. 646, Second Amended Counterclaim ("Counterclaims"), ¶¶ 68-69, 70-76, 90-96, 97-101, 102-113, 118-20, 132-35. The Siegels' Third Amended Complaint ("TAC") contains the following causes of action:

- Plaintiffs' First Claim for declaratory relief to affirm the validity of the Termination and the Superman works thereby recaptured;
- Plaintiffs' Second, Third, and Fourth Claims for an accounting and declaratory relief as to the principles to be applied in such accounting.

DC asserted the following counterclaims, among others:

- First Counterclaim for declaratory relief that the Termination was invalid;
- Second Counterclaim for declaratory relief that the Siegels' claims were barred by the statute of limitations; and
- Third and Fourth Counterclaims alleging that the parties had purportedly consummated a settlement agreement assigning DC the Siegels' recaptured copyrights.

On April 30, 2007, the parties filed cross-motions for partial summary judgment. Plaintiffs sought summary judgment in relevant part as follows.

- That the Termination is valid as a matter of law with respect to at least the original Superman story published in *Action Comics,* No. 1, and that Plaintiffs thereby recaptured Siegel's co-authorship share of the copyrights therein (*see* TAC, ¶¶ 53-54);
- That the defenses to the Termination alleged in Defendants' First and Second Counterclaims and parts of their Fifth Counterclaim lack merit.
- That Defendants' Third and Fourth Counterclaims should be dismissed because the parties failed to consummate a binding settlement agreement to license Plaintiffs' recaptured copyrights (Counterclaims, ¶¶ 97-105).

Docket No. 602 at 6-7. Defendants sought partial summary judgment in relevant part: that Plaintiffs allegedly failed to terminate certain "promotional announcements" ("Ads"), containing a tiny black and white copy of the cover of Action Comics No. 1. *Id.* at 7.

The Court issued its ruling on the parties' partial summary judgment motions on March 26, 2008. *See Siegel,* 542 F. Supp. 2d 1098 (C.D. Cal. 2008). The Court held that "all the Superman material contained in *Action Comics,* Vol. 1, is not a work made for hire and therefore is subject to termination." *Id.* at 1130. The Court also dismissed Defendants' defenses to the Termination, such as their purported "statute of limitations" defense. *Id.* at 1132-36. The Court also adjudicated the Third and Fourth Counterclaims, holding that, contrary to Defendants' claims, "the parties' settlement negotiations did not result in an enforceable agreement." *Id.* at 1139. The Court also held that the Ads, due to their slightly earlier publication, fell outside the Termination, but severely limited their scope. *Id.* at 1136.

After the Court's decision, Defendants sought additional partial summary judgment that Jerome Siegel's contribution to all Superman works published after *Action Comics,* No. 1 were excluded from the Termination as alleged "works for hire." Plaintiffs asserted that such works were not "made for hire," and that such fact-intensive "work for hire" issues were for the trier of fact. On August 12, 2009, the

Court adjudicated the "work-for-hire" issues as follows: in addition to *Action Comics*, No. 1, *Action Comics*, No. 4, *Superman*, No. 1 (pages 3-5), and the first two weeks of the Superman "newspaper comic strip[s]" were ***not*** "works for hire," were recaptured by Plaintiffs, and that all of the remaining works listed in the Terminations, including years of Superman newspaper strips, *Superman*, No. 1-6, and *Action Comics*, Nos. 2-3 and 5-61, were "works for hire," and excluded from the Termination. *See Siegel*, 658 F. Supp. 2d 1036.

Both sides sought reconsideration – Defendants, on the grounds that the Termination allegedly did not encompass the first two weeks of the Superman newspaper strips; Plaintiffs, on the grounds that that the remaining Superman newspaper strips were "works-for-hire," and that, in any event, this presented issues of material fact inappropriate for summary judgment. The Court denied both sides' motions for reconsideration. *Siegel*, 690 F. Supp. 2d 1048 (C.D. Cal. 2009).

In light of these rulings, upholding the Termination and determining the precise Superman works recaptured, Plaintiffs moved on August 12, 2010 for entry of final judgment on the severable First Claim under F.R.C.P. 54(b), to permit both sides' immediate appeal as to this threshold claim. *See* Docket No. 618. Defendants opposed the motion, arguing that the First Claim of the Second Amended Complaint had not been fully decided because it supposedly incorporated the remaining "accounting" claims, due to paragraph 54(c)'s general statement that Plaintiffs, as 50% co-owners of the recaptured copyrights, would be entitled as a matter of law to an accounting of 50% of the profits therefrom. *See* Docket No. 378 at ¶ 54(c); No. 624 at 9-11. On October 13, 2010, this Court denied the motion *without prejudice* to Plaintiffs renewing their Rule 54(b) motion at a later date. Docket No. 630.

On December 15, 2010, the Court held a conference regarding the status and direction of this case. While discussing the complexities of the remaining "accounting" claims to be tried, the Court indicated that the Ninth Circuit's guidance might now be advisable *before* the complex accounting claims were tried. Plaintiffs

then brought a motion for leave to amend their complaint, to eliminate their Fifth Claim for unfair competition, confirm the removal of Time Warner as a defendant, and, in light of the Court's statements, to streamline the First Claim by removing the superfluous language that DC used to argue that the First Claim had not been completely decided. Docket No. 637. Plaintiffs' central justification for their motion was that amendment would "facilitate[] immediate appellate review under F.R.C.P. 54(b) of the many threshold issues decided under the First Claim, if this Court deems such review advisable." *Id.* at 1. In opposing the motion to amend, Defendants likewise focused on the Rule 54(b) judgment facilitated by such amendment. On January 31, 2011, the Court granted the motion, and on February 3, 2011, Plaintiffs promptly filed their Third Amended Complaint. There are no further obstacles to the Court's entry of judgment on the First Claim per Rule 54(b).

ARGUMENT

I. JUDGMENT SHOULD BE ENTERED UNDER F.R.C.P. 54(b)

A. F.R.C.P. 54(b) Permits a Trial Court to Enter a Final Judgment as to Orders That Decide a Claim

F.R.C. P. 54(b) allows a district court to certify as final and immediately appealable orders that, like Judge Larson's orders, resolve claim(s) in a case:

> When more than one claim for relief is presented in an action … or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

To be eligible for entry of judgment under Rule 54(b), the order must constitute "an ultimate disposition of an individual claim entered in the course of a multiple claims action," and there must be "no just reason" to delay appellate review of the order until the conclusion of the entire case. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7-8 (1980).

In deciding whether appellate review is appropriate, courts "must take into account judicial administrative interests as well as the equities involved." *Id.* at 9.

Courts must weigh "such factors as whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." *Id*. at 8. The Ninth Circuit embraces a "pragmatic approach focusing on severability [of claims] and efficient judicial administration." *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.* ("*Continental*"), 819 F.2d 1519, 1525 (9th Cir. 1987). Thus, "claims certified for appeal do not need to be separate and independent from the remaining claims, so long as resolving the claims would 'streamline the ensuing litigation.'" *Noel v. Hall*, 568 F.3d 743, 747 (9th Cir. 2009) (citations omitted).

1. A District Court's Entry of a Rule 54(b) Judgment is Rarely Reversed by the Ninth Circuit

The Ninth Circuit "reviews the certification of an appeal under Rule 54(b) for abuse of discretion," *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991), and the "issuance of a Rule 54(b) order is a fairly routine act that is reversed only in the rarest instances." *James v. Price Stern Sloan*, 283 F.3d 1064, 1068 n.11 (9th Cir. 2002). Since 2000, the Ninth Circuit has upheld the entry of judgment under Rule 54(b) in virtually every case that Plaintiffs could locate. *See, e.g., Stanley v. Cullen*, 2011 U.S. App. LEXIS 1912, at *27-28 (9th Cir. Jan. 31, 2011) (expressly analyzing and approving entry of Rule 54(b) judgment); *see* Appendix I (collecting cases). Typically, the Ninth Circuit simply notes that a Rule 54(b) judgment has been entered and decides the merits of the appeal before it. *See, e.g., Destfino v. Reiswig*, 2011 U.S. App. LEXIS 1375, at *2-3 (9th Cir. Jan. 21, 2011) (noting entry of Rule 54(b) judgment and approving it by implication); Appendix I (collecting cases). Out of the approximately 100 cases Plaintiffs identified during this period, the Ninth Circuit found a Rule 54(b) judgment improper only three times, and upheld the entry of 54(b) judgment in every other instance.[2]

[2] Twice, the trial court missed a procedural step and failed to certify that there was "no just reason for delay." *See Nat'l Ass'n of Home Builders v. Norton*, 325 F.3d 1165, 1167 (9th

B. <u>The First Claim and the Related Counterclaims Have Been Fully Resolved and Are Ripe for Judgment</u>

1. The Severable First Claim Has Been Fully Adjudicated

The First Claim, as amended, requests ***only*** the following relief:

74. For a declaration as follows:

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

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

TAC, ¶ 74. The Court's orders unambiguously upheld the validity of the Siegel Termination and determined all the copyrighted Superman works (*e.g.*, *Action Comics*, No. 1) thereby recaptured and co-owned equally by Plaintiffs and DC. *See Siegel*, 542 F. Supp. 2d at 1130; 658 F. Supp. 2d 1036. The orders unambiguously constitute an "ultimate disposition" of the Siegels' First Claim, and there exists "no just reason to delay" its appellate review. *Curtiss-Wright*, 446 U.S. at 7-8; F.R.C.P. 54(b). The First Claim is clearly "severable" from the remaining accounting claims because it is directed at only two issues: (1) was the Termination valid?; and (2) which copyrighted Superman Works were thereby recaptured?

Plaintiffs' remaining Second, Third, and Fourth claims seek an accounting of profits from the recaptured Superman copyrights. The legal issues are distinct: the validity and scope of the Siegel Termination is determined under the Copyright Act, while Defendants' accounting is governed by state-law accounting principles applicable to property co-owners. *See Zuill v. Shanahan*, 80 F.3d 1366, 1371 (9th Cir. 1996). This Court has clearly recognized the distinction between these claims:

Cir. 2003) (the district court never made the "requisite 'express determination that there is no just reason for delay'") (quotations omitted) (later 54(b) appeal upheld at 340 F.3d 835); *Las Vegas Sands, Inc. v. Culinary Workers' Local Union # 226*, 32 Fed. Appx. 459, 460 (9th Cir. 2002) (the district court did not "compl[y] with Rule 54(b)'s express certification procedure" and "failed to certify expressly that there was 'no just reason for delay'"). The sole substantive exception was where the case was not "complex" and where "the factual issues overlap entirely – not just substantially" between the claims. *Wood v. GCC Bend, LLC*, 422 F.3d 873, 882 (9th Cir. 2005).

> "[T]*here* are only five claims left to try before the Court: A state law claim for unfair competition … [Fifth Claim (deleted in the TAC)]; declaratory relief that plaintiffs have successfully terminated the grant to the copyright in various Superman works [First Claim]; and three claims requesting an accounting of profits [Second, Third and Fourth Claims]."

Docket No. 379 at 1.

The legal issues and facts **fully decided** by the Court as to the First Claim (*e.g.*, Siegel and Shuster's creation of original Superman works in the 1930s that were not "works for hire"; their copyright grants; the Termination's compliance with both the Copyright Act and the regulations promulgated thereunder; and that Defendants' alleged defenses to the Termination lack merit), and as to DC's First through Fourth Counterclaims, contesting the Termination, are separate from the **undecided** legal issues and facts relating to the remaining accounting claims and trial (*e.g.*, DC's profits from post-1999 Superman derivative works; whether and how such profits should be "apportioned"; whether Defendants can use their trademarks to dilute Plaintiffs' Superman copyright profits even further; and what changes to a pre-1999 Superman work render it a post-1999 derivative work for which DC must account). Accordingly, the Ninth Circuit would never have to decide the legal or factual issues relating to the validity of the Siegel Termination "more than once" if such issues are now appealed**.** *Curtiss-Wright*, 446 U.S. at 8.[3]

The First Claim is therefore clearly severable. It is undisputed that the Siegels could have brought the First Claim alone, and sued later if Defendants failed to properly account to them as co-owners of the recaptured Superman copyrights. Because a claim for declaratory relief as to copyright "co-ownership" is distinct from an "accounting" claim, and may be brought separately, it is far different from a legal claim (*e.g.*, for breach of contract), where "liability" and "damages" do not stand on

[3] Even if there was some overlap between the First Claim and the undecided claims, as argued by Defendants, that would ***not*** prevent entry of judgment under Rule 54(b). *See Wood*, 422 F.3d at 881 ("We do not mean to suggest that claims with overlapping facts are foreclosed from being separate for purposes of Rule 54(b). Certainly they are not."); *Continental*, 819 F.2d at 1519 ("[The 9th Circuit has] upheld Rule 54(b) certification even though the remaining claims would require proof of the same facts involving the dismissed claims"); *Texaco, Inc.*, 939 F.2d at 798 ("Rule 54(b) claims do not have to be separate from and independent of the remaining claims…").

their own and thus do not usually form the basis for a 54(b) judgment.

Notably, the entry of a Rule 54(b) judgment on copyright "ownership" claims has been consistently approved where, as here, there were outstanding "accounting" claims. *See Gordon v. Vincent Youmans, Inc.*, 358 F.2d 261, 262 (2d Cir. 1965) (accepting appeal of Rule 54(b) judgment as to copyright ownership only, even though the plaintiff also demanded an "accounting" based on that ownership); *Rodrigue v. Rodrigue*, 218 F.3d 432, 434 (5th Cir. 2000) (accepting appeal of Rule 54(b) judgment as to copyright ownership in multi-claim case, where ownership directly affected the monies owed on other claims).

2. DC's First Through Fourth Counterclaims Have Also Been Fully Adjudicated

There can also be no dispute that Defendants' First, Second, Third and Fourth Counterclaims have been fully adjudicated and resolved, and accordingly, judgment should be entered on such counterclaims as well. *See* F.R.C.P. 54(b) (judgment may be entered on "a claim, counterclaim, crossclaim, or third-party claim"); *Reiter v. Cooper*, 507 U.S. 258, 265 (1993) (54(b) permits judgment on any counterclaim).

Each such Counterclaim sought to render the Termination *as a whole* invalid or moot. The First Counterclaim sought a declaration that the Termination was ineffective as a matter of law on three alleged grounds, each expressly adjudicated and rejected by the Court. *Compare* Counterclaims, ¶¶ 68-69 *with Siegel*, 542 F. Supp. 2d at 1131-32 (failure to list May 21, 1948 consent judgment did not affect termination); ¶¶ 70-76 *with* 542 F. Supp. 2d at 1132-34 (acceptance of benefits did not affect termination rights); ¶¶ 86-89 *with* 542 F. Supp. 2d at 1117-19 (Siegel Terminations were timely).

The Second Counterclaim sought declaratory relief that Plaintiffs' claims were barred by the statute of limitations, which was analyzed and rejected by the Court. *Compare* Counterclaims, ¶¶ 90-96 *with Siegel*, 542 F. Supp. 2d at 1134-36.

The Third and Fourth Counterclaims sought relief for breach of contract, based

on a purported October 2001 settlement agreement, but the Court definitively found that no such contract existed. *Compare* Counterclaims, ¶¶ 97-101 *with Siegel*, 542 F. Supp. 2d at 1137-39. DC has repeatedly stated that it intends to bring yet another motion for reconsideration, this time as to its supposed settlement agreement defense. *See, e.g.*, Docket No. 623 at 5. The Ninth Circuit is a more appropriate forum to contest the decisions of another district court judge, and, in any event, since an appeal will ultimately ensue it makes much more sense to allow such appeal at this juncture.

3. No "Additional Issues" Need Be Decided to Resolve the First Claim

As shown above, the First Claim implicates only two already-decided legal issues: (1) whether the Siegel Termination is valid; and (2) which Superman *works* were successfully recaptured by the Termination. Yet, in opposition to Plaintiffs' motion for leave to amend their complaint, Defendants argued, by mischaracterizing the First Claim, that, even as amended, it supposedly includes undecided issues.

Literary Elements: Defendants erroneously argued that "the scope of the [Siegels'] recaptured copyrights" would still need to be decided before judgment can be entered on the First Claim. Docket No. 640 at 6. This is a "red herring." The amended First Claim asks only for declaratory relief as to which Superman ***works*** (*e.g.*, *Action Comics*, No. 1) were recaptured by the Termination, not their precise literary contents. Defendants purposely confuse and conflate the "scope" of the Termination (*i.e.*, which *works* were thereby recaptured) with a detailed literary analysis of each such work. The former is clearly part of the severable First Claim and has just as clearly been decided. The latter, **the determination of literary elements, is *not* part of the declaratory relief requested in the First Claim**, At most, such literary elements are relevant to the accounting claims as Defendants assert that the Superman profits for which they must account should be reduced (*i.e.*, "apportioned") in that proportion of magnitude that the Superman elements contained in Plaintiffs' recaptured works bear to all Superman elements. *See* Docket

No. 336 at 1:13-18.

(a) "Dicta": Defendants will likely claim that the issue of whether certain statements by Judge Larson, regarding *Action Comics*, No. 1's literary elements, were "dicta" relates to the First Claim. However, as set forth above the First Claim does not seek relief as to the literary elements contained in *Action Comics*, No. 1, or in any other works. *See* TAC, ¶ 74. Moreover, Defendants strenuously argued that Judge Larson fully ***decided*** on summary judgment the elements contained in *Action Comics*, No. 1, and that such was not "dicta." *See* Docket No. 348 at 44 ("Not only were such findings [as to the description of elements in *Action Comics*, No. 1] central to the Court's decision in *Siegel* [542 F. Supp. 2d 1098], they were soundly based on undisputed facts and properly established by Defendants and the record.").

(b) "Ads": Defendants also argued that issues relating to the "Ads" must be decided before the First Claim is completed. This is incorrect. There are two issues with respect to the Ads: (1) whether the minimal Ads were recaptured by Plaintiffs' Termination, which relates to the First Claim and has clearly been decided; *see Siegel*, 542 F. Supp. 2d at 1126; and (2) the impact, if any, that the Ads have on Defendants' accounting, which relates to the accounting claims, not the First Claim.

As to the first issue and the First Claim, the Court ruled that, although Plaintiffs had recaptured *Action Comics*, No. 1, the derivative Ads, depicting a greatly reduced black & white copy of the cover of *Action Comics*, No. 1, were not subject to the Termination. *See Siegel*, 542 F. Supp. 2d at 1126.

The second issue – the impact of the Ads, if any, on Defendants' accounting – is clearly not part of the First Claim, as even Defendants have admitted. *See* Docket No. 349 at 41-43; Counterclaims, ¶ 137(b) ("Any accounting of profits for exploitation of Superman would be reduced to account for the value of the appearance of Superman based upon the Siegels' failure to terminate the [Ads].").

Declaratory relief as to the Ads' original literary elements, *if any*, (like the

literary elements contained in the recaptured works) is nowhere part of the First Claim. It relates, at best, to "apportionment," if any, and to accounting mechanics.

Notwithstanding the above, the Court, in fact, already determined the Ads' very limited content, holding that the greatly reduced black and white cover of *Action Comics*, No. 1 in the Ads contains nothing more than "the image of a person with extraordinary strength who wears a black and white leotard and cape," and "nothing concerning the Superman storyline" as it was divorced from the Superman character contained in *Actions Comics*, No. 1. 542 F. Supp. 2d at 1126; Docket No. 331 at 1 (denying Defendants' motion for reconsideration of the Court's ruling as to the Ads' content, and stating that the "findings concerning ***the scope of the copyrightable material*** contained in the promotional announcements ***were meant to be binding*** and not, as suggested by Defendants, merely advisory") (emphasis added).

Moreover, like the "dicta" issue, Defendants themselves always argued that the "Ads" issue has been decided, and characterized Plaintiffs' motion for clarification/reconsideration regarding the Court's exclusion of the Ads from the Termination[4] as "a collection of previously raised arguments rejected by the court on summary judgment." Docket No. 348 at 4. Defendants cannot credibly now argue the opposite, or argue that Plaintiffs' motion for clarification/reconsideration of this decided issue is a reason to deny entry of a Rule 54(b) judgment.

Defendants' Counterclaims: Defendants also speciously argued that the Court must resolve their purported "settlement" and "statute-of-limitations" defenses before a Rule 54(b) judgment could be entered on the amended First Claim. Docket No. 640 at 6. Yet, both of those purported defenses were already exhaustively adjudicated and decided against Defendants in lengthy published decisions. *Siegel*,

[4] After the Court decided that the Ads were not terminated, but that their content was very limited, Plaintiffs moved for clarification/reconsideration as to the effect the Ads would have on Defendants' accounting obligations. Docket Nos. 300, 312. The Court denied Plaintiffs' motion without prejudice, stating that "[s]hould plaintiffs wish for the Court to deal with the questions identified in their motion, they may append them to those issues identified in the March 31, 2008 Order requiring further briefing." Docket No. 327 at 4. Plaintiffs did so, and the issue was included in the "Additional Issues" briefing, and identified as an outstanding issue in the parties' status report. Docket No. 602 at 9.

542 F. Supp. 2d at 1134-36 (statute of limitations has not run), 1136-39 (no settlement agreement). Defendants' threatened motions for reconsideration do not render the Court's prior decisions less "final." In fact, Defendants' stated desire to "appeal" such decisions favors entry of judgment on the First Claim and appeal to the Ninth Circuit now – not burdening this Court with endless re-litigation.

C. Judicial Efficiency and Economy Strongly Support the Entry of a Rule 54(b) Judgment

1. The First Claim Should Be Finalized Before Proceeding With the Accounting Trial So As to Avoid a Re-Trial

Both sides have estimated that substantial resources of both the Court and the parties will be required for the accounting trial. *See* Docket No. 602 at 2. Entry of judgment and an immediate appeal of the Court's rulings on the First Claim would finally determine the validity of the Termination, the Superman works for which an accounting is owed, finally resolve DC's related counterclaims and defenses, and promote the efficient resolution of the accounting litigation that depends on such threshold decisions, and is subject to reversal if any are incorrect.

Courts routinely grant Rule 54(b) motions where, as here, it would streamline the issues, conserve judicial resources and promote settlement. *See Texaco*, 939 F.2d at 798 (approving entry of judgment where "the legal issues now appealed will streamline the ensuing litigation"). Entry of judgment on adjudicated claims under Rule 54(b) is especially appropriate where, as here, the claims determine the scope and contours of trial as to remaining issues, the trial is likely to be protracted, and the Court will avoid wasting precious resources in a re-trial. *See Adidas Am., Inc. v. Payless Shoesource, Inc.*, 166 Fed. Appx. 268, 270–71 (9th Cir. 2006) (approving Rule 54(b) judgment where appellate reversal of partial summary judgment after final resolution of the lawsuit would require a second trial); *Torres v. City of Madera*, 655 F. Supp. 2d 1109, 1135 (E.D. Cal. 2009) (granting 54(b) judgment where "if [the parties] were to wait until after trial to appeal the court's ruling, it would result in a second, duplicative and costly trial"); *Advanced Magnetics, Inc. v. Bayfront Partners,*

Inc., 106 F.3d 11, 16 (2d Cir. 1997) (holding that a 54(b) judgment is appropriate "where an expensive and duplicative trial could be avoided").

Specifically, the prior Court decided on summary judgment the fact-intensive question of which works listed in the Termination were successfully recaptured by Plaintiffs, and which works were exempt from the Termination as "works made for hire." *See Siegel*, 542 F. Supp. 2d at 1126-30, 658 F. Supp. 2d 1036. These "work for hire" rulings were contested ***by both sides***, each filing motions for reconsideration that were denied. *Siegel*, 690 F. Supp. 2d 1048. Defendants contended that the key first two weeks of newspaper strips – containing Superman's famous origin story on Krypton – had not been recaptured. *Id.* at 1050-73. Plaintiffs contended that the remaining 1,100 "Superman" newspaper strips – which included many key elements such as X-ray vision, numerous other superpowers and the "Daily Planet" – were not "works for hire," and that, in any event, this issue, acknowledged by the Court as "on the outer boundaries of what would constitute a work made for hire" should not have been decided on summary judgment. *Siegel*, 658 F. Supp. 2d at 1080.

It is clear from these extensive motions that both sides intend to appeal such decisions (*see* Docket Nos. 567, 569, 576-79, 583, 585-86, 588-89), and equally clear that such appeals will have a decisive impact on the complex accounting claims to be tried by this Court. This, combined with Defendants' clear intent to appeal the Court's denial of their purported "settlement" and statute of limitations defenses to the First Claim, all point to entry of a Rule 54(b) judgment and the Ninth Circuit.

There is no good reason to delay this inevitable appeal. Defendants strenuously contend that an "accounting" for profits will have to consider each literary element (*e.g.*, a new super-power or villain) in determining the profits Plaintiffs are owed. As such, any errors in such "work for hire" rulings (covering hundreds of separate works, including 1,100 newspaper strips and five years of comic books) would mean that the "wrong" works and elements are being considered in the accounting trial. In turn, that would mean that the determination of profits in the

"accounting" trial will be wrong, and that the time-consuming accounting claims would have to be re-tried. This very real potential for duplicative trials weighs heavily in favor of granting a Rule 54(b) motion. *See Torres*, 655 F. Supp. 2d at 1135. It is far more efficient to have such appellate review *before* the parties and the Court expend significant resources mounting an accounting trial (concerning thousands of derivative Superman products) that may be fatally flawed from the start.

2. The Ninth Circuit's Resolution of the Validity and Scope of the Superman Terminations Will Promote Settlement

The Siegel Termination, as well as the mirror-image termination notice filed by the Shuster estate ("Shuster Termination"), will have a considerable impact on Defendants' future exploitation of Superman. In fact, as of October 26, 2013, when the Shuster Termination becomes effective, the Siegels and Shuster estate will own the entirety of the original Superman copyrights and, consistent with the legislative objective of the Copyright Act's termination provisions,[5] Defendants will be required to obtain a fair new license from them to produce new Superman works. If the Siegel Termination is upheld, so too will the Shuster Termination. Accordingly, the Ninth Circuit's final determination of the validity of the Siegel Termination and the Superman works thereby recaptured is a much more central economic concern to Defendants than a studio accounting trial.

The Ninth Circuit's decision as to the First Claim, and even the prospect of such decision, will promote timely settlement of this action *and* the closely related *DC Comics* action regarding the twin Shuster Termination. *See Curtiss-Wright Corp.*, 446 U.S. at 8 n.2 (a court, in deciding a 54(b) motion, should assess whether "appellate resolution of the certified claims would facilitate a settlement of the

[5] *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 172-73 n.39 (1985) (stating that "[t]he principal purpose of… § 304 was to provide added benefits to authors …. [and] to relieve authors of the consequences of ill-advised and unrenumerative grants") (citing H.R. Rep. No. 94-1476 at 124 (1976)). *See also N.Y. Times v. Tasini*, 533 U.S. 483, 496 121 S. Ct. 2381, 150 L. Ed. 2d 500 (2001) (stating that the overall intent of the 1976 Act to "enhance the author's position" and to adjust "the author/publisher balance," emphasizing the "inalienable authorial right to revoke a copyright transfer").

remainder of the claims."); *Wood*, 422 F.3d at 882 n.6 ("[I]n a proper case settlement prospects might outweigh piecemeal appeal concerns."); *Whitney v. Wurtz*, 2007 U.S. Dist. LEXIS 60077, at *5 (N.D. Cal. Aug. 16, 2007) (factors include "whether immediate appellate resolution will foster settlement of the remaining claims").

Given the considerable value of the Superman franchise at issue, it is far less likely that these cases will be settled at the trial court level, before the parties are certain of the appellate outcome. This case has thus dragged on for six long years, and the *DC Comics* action has just begun. The Ninth Circuit's input at this important juncture will promote long-awaited settlement of the *entire* Superman dispute.

3. DC's Transparent Attempt to Re-Litigate All Issues in Its New Action Further Justifies Entry of Judgment and Appeal

Unhappy with the rulings against it in this case, DC ignored them in filing the *DC Comics* suit and attacking the twin Shuster Termination on many of the same grounds DC had unsuccessfully attacked the Siegel Termination here. *Compare, e.g.*, *DC Comics*, Docket No. 49 (First Amended Complaint), ¶¶ 153-54, 158-59 (alleging rejected "work-for-hire" arguments) with *Siegel*, 542 F. Supp. 2d at 1126-30; 658 F. Supp. 2d at 1063-68, 1083; ¶¶ 155-57 (alleging rejected "Ad" arguments) with 542 F. Supp. 2d at 1126; and ¶¶ 125-28 (alleging rejected argument that a May 21, 1948 consent judgment was not a "grant") with 542 F. Supp. 2d at 1131. It would be totally inefficient and unfair to permit DC to re-litigate everything decided in six years of hard-fought litigation under the guise of a supposed new suit.

As Siegel and Shuster co-authored the Superman works in question, any decisions as to the validity and application of the Siegel Termination logically apply with equal force to the Shuster Termination. A Rule 54(b) *judgment* in this case will have ***collateral estoppel*** effect in the *DC Comics* case and will thereby likewise avoid wasteful re-litigation, and potentially inconsistent rulings, in that closely related action. *See Brown v. Dunbar*, 376 Fed. Appx. 786, 787 (9th Cir. 2010) (approving district "court's orders [that] found preclusive the partial final judgment under

Federal Rule of Civil Procedure 54(b)").[6]

II. THIS ACTION CAN BE STAYED PENDING AN APPEAL

A district court possesses the inherent power to control its docket and promote efficient use of judicial resources by staying proceedings. *See Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case."). "If a district court certifies claims for appeal pursuant to Rule 54(b), it should stay all proceedings on the remaining claims if the interests of efficiency and fairness are served by doing so." *Doe v. Univ. of California*, 1993 U.S. Dist. LEXIS 12876, at *5 (N.D. Cal. Sept. 2, 1993) (citation omitted). *See Matek v. Murat*, 862 F.2d 720, 732 n.18 (9th Cir. 1988) (affirming stay of proceedings after entry of judgment under Rule 54(b) pending the appeal); *Roe v. City of Spokane*, 2008 U.S. Dist. LEXIS 82528, at *17-18 (E.D. Wash. Oct. 16, 2008) (granting entry of judgment under Rule 54(b) and a stay, where a trial could "waste judicial resources"). As both the validity of the Siegel Termination, and the copyrighted works recaptured, that were decided under the First Claim, control the pending "accounting" trial, this Court should exercise its discretion to stay this accounting action until the appeal of such underlying issues is complete.

CONCLUSION

For the foregoing reasons, the Court should enter judgment on Plaintiffs' First Claim, and DC's First, Second, Third and Fourth Counterclaims pursuant to F.R.C.P. 54(b), and stay the remainder of the accounting action pending appeal.

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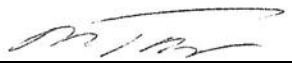
[6] *See also Continental*, 819 F.2d at 1525 ("[A] 54(b) ruling in fact has res judicata ramifications."); *Flores v. Emerich & Fike*, 2008 U.S. Dist. LEXIS 49385, at *28-29 (E.D. Cal. June 17, 2008) (where a court has "entered final judgment pursuant to Rule 54(b) … there has been a final judgment" for preclusion purposes).

Dated: February 18, 2011

RESPECTFULLY SUBMITTED,



Marc Toberoff
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Laura Siegel Larson

APPENDIX I

Post-January 1, 2000 cases identified by Plaintiffs where the Ninth Circuit expressly analyzed and upheld a district court's entry of a Rule 54(b) judgment:

Stanley v. Cullen, 2011 U.S. App. LEXIS 1912 (9th Cir. Jan. 31, 2011); *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1084-1085 (9th Cir. 2010); *Noel v. Hall*, 568 F.3d 743, 747 (9th Cir. 2009); *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 955 (9th Cir. 2006); *SEC v. Capital Consultants LLC*, 453 F.3d 1166, 1174 (9th Cir. 2006); *Adidas Am., Inc. v. Payless Shoesource, Inc.*, 166 Fed. Appx. 268, 270 (9th Cir. 2006); *Webster v. Woodford*, 369 F.3d 1062, 1066 (9th Cir. 2004); *Noel v. Hall*, 341 F.3d 1148, 1154 n.3 (9th Cir. 2003); *Kasdan, Simonds, McIntyre, Epstein & Martin v. World Sav. & Loan Ass'n (In re Emery)*, 317 F.3d 1064, 1068 (9th Cir. 2003); *Lovell v. Chandler*, 303 F.3d 1039, 1047 (9th Cir. 2002).

Post-January 1, 2000 cases identified by Plaintiffs where the Ninth Circuit simply noted entry of a Rule 54(b) judgment by a district court and approved it by implication:

Destfino v. Reiswig, 2011 U.S. App. LEXIS 1375, at *2-3 (9th Cir. Jan. 21, 2011); *Flores v. Emerich & Fike*, 385 Fed. Appx. 728, 730 (9th Cir. 2010); *Eichler v. Sherbin*, 2010 U.S. App. LEXIS 14480 (9th Cir. June 23, 2010); *Brown v. Dunbar*, 376 Fed. Appx. 786, 787 (9th Cir. 2010); *Francis v. United States*, 376 Fed. Appx. 792, 792-793 (9th Cir. 2010); *Sloan v. Oakland Police Dep't*, 376 Fed. Appx. 738, 740 (9th Cir. 2010); *Ra Med. Sys. v. PhotoMedex, Inc.*, 373 Fed. Appx. 784, 786 (9th Cir. 2010); *Bradlow v. Castano Group*, 365 Fed. Appx. 883, 885 (9th Cir. 2010); *Ewing v. City of Stockton*, 588 F.3d 1218, 1221 (9th Cir. 2009); *McIlwain v. Or. Dep't of Revenue*, 334 Fed. Appx. 99, 100 (9th Cir. 2009); *City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 869 (9th Cir. 2009); *SNTL Corp. v. Ctr. Ins. Co. (In re SNTL Corp.)*, 571 F.3d 826, 834 (9th Cir. 2009); *Brookhaven Typesetting Servs. v. Adobe Sys.*, 332 Fed. Appx. 387, 389 (9th Cir. 2009); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1131 (9th Cir. 2009); *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 563 F.3d 777, 783 (9th Cir. 2009); *Darian v. Accent Builders, Inc.*, 342 Fed. Appx. 254, 255 (9th Cir. 2009); *United States v. Rich*, 317 Fed. Appx. 630, 631 (9th Cir. 2008); *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1254 (9th Cir. 2008); *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 538 F.3d 1090, 1094 (9th Cir. 2008); *United States v. Park*, 536 F.3d 1058, 1061 n.2 (9th Cir. 2008); *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 290 Fed. Appx. 60, 61 (9th Cir. 2008); *Hanford Nuclear Reservation Litig. v. E.I. DuPont de Nemours & Co. (In re Hanford Nuclear Reservation Litig.)*, 534 F.3d 986, 999 (9th Cir. 2008); *Wolkowitz v. FDIC (In re Imperial Credit Indus.)*, 527 F.3d 959, 965 (9th Cir. 2008); *Torres v. City of Madera*, 524 F.3d 1053, 1055 (9th Cir. 2008); *Nat'l Wildlife Fedn v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 927 (9th Cir. 2008); *City of Rialto v. United States DOD*, 274 Fed. Appx. 515, 516-517 (9th Cir. 2008); *Williams v. Boeing Co.*, 517 F.3d 1120, 1126 (9th Cir. 2008); *Price v. Sery*, 513 F.3d 962, 966 (9th Cir. 2008); *Harris v. Gulf Ins. Co.*, 259 Fed. Appx. 952, 953 (9th Cir. 2007); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007); *Quach v. Cross*, 252 Fed. Appx. 775, 776 (9th Cir. 2007); *Holland Am. Line, Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 455 (9th Cir. 2007); *Nat'l Wildlife Fed'n*

v. Nat'l Marine Fisheries Serv., 481 F.3d 1224, 1233 (9th Cir. 2007); *Davis v. City of Las Vegas*, 478 F.3d 1048, 1053 (9th Cir. 2007); *Leonard v. City of Los Angeles*, 208 Fed. Appx. 517, 519 (9th Cir. 2006); *Wood v. Lundgren*, 205 Fed. Appx. 599, 600 (9th Cir. 2006); *DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1036 (9th Cir. 2006); *Smelt v. County of Orange, California*, 447 F.3d 673, 678 (9th Cir. 2006); *Veliz v. Cintas Corp.*, 181 Fed. Appx. 621, 622 (9th Cir. 2006); *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1041 (9th Cir. 2005); *Karboau v. Lawrence*, 135 Fed. Appx. 961, 962 (9th Cir. 2005); *Menotti v. City of Seattle*, 409 F.3d 1113, 1119 (9th Cir. 2005); *Hambleton Bros. Lumber Co. v. Balkin Enters.*, 397 F.3d 1217, 1224 (9th Cir. 2005); *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 737 (9th Cir. 2005); *Gausvik v. Perez*, 392 F.3d 1006, 1008-1009 (9th Cir. 2004); *Easter v. Am. West Fin.*, 381 F.3d 948, 956 (9th Cir. 2004); *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1158 (9th Cir. 2004) (reversed on other grounds, 545 U.S. 913); *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1133 (9th Cir. 2004); *Bay Inst. of San Francisco v. United States*, 87 Fed. Appx. 637, 639 (9th Cir. 2004); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1199 (9th Cir. 2003); *City of St. Paul v. Evans*, 344 F.3d 1029, 1033 (9th Cir. Alaska 2003); *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 942 (9th Cir. 2003) (overruled on other grounds, 599 F.3d 946); *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 840 (9th Cir. 2003); *McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1090 (9th Cir. 2003); *Goodell v. Eoff*, 73 Fed. Appx. 235, 236 (9th Cir. 2003); *Modahl v. County of Kern*, 61 Fed. Appx. 394, 396 (9th Cir. 2003); *Forum Ins. Co. v. Comparet*, 62 Fed. Appx. 151, 152 (9th Cir. 2003); *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003); *Estate of Perez v. Jacobo*, 57 Fed. Appx. 296, 299 (9th Cir. 2003); *O'Connor v. Boeing N. Am.*, 311 F.3d 1139, 1145 (9th Cir. 2002); *Franklin v. Fox*, 312 F.3d 423, 429 (9th Cir. 2002); *Hall v. Raytheon Missile Sys. Co.*, 51 Fed. Appx. 678, 679 (9th Cir. 2002); *Medical Lab. Mgmt. Consultants v. ABC*, 306 F.3d 806, 809 (9th Cir. 2002); *EEOC v. UPS*, 306 F.3d 794, 796 (9th Cir. 2002); *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 879 (9th Cir. 2002); *Dodge v. Johnson*, 41 Fed. Appx. 138, 139 (9th Cir. 2002); *In re Hanford Nuclear Reservation Litig. v. E. I. Dupont*, 292 F.3d 1124, 1132 (9th Cir. 2002); *Everett Assocs. v. Transcon. Ins. Co.*, 35 Fed. Appx. 450, 451 (9th Cir. 2002); *Avid Identification Sys. v. Schering-Plough Corp.*, 33 Fed. Appx. 854, 855 (9th Cir. 2002); *Miranda v. Clark County*, 279 F.3d 1102, 1105 (9th Cir. 2002) (overruled on other grounds, 319 F.3d 465); *Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001); *Hall v. Raytheon Missile Sys. Co.*, 18 Fed. Appx. 669, 670 (9th Cir. 2001); *Lonberg v. Sanborn Theaters, Inc.*, 2001 U.S. App. LEXIS 21065 (9th Cir. Sept. 27, 2001); *Kelly v. Heron Ridge, Inc.*, 16 Fed. Appx. 695, 696 (9th Cir. 2001); *Holley v. Crank*, 258 F.3d 1127, 1133 (9th Cir. 2001) (reversed on other grounds, 537 U.S. 280); *Neilson v. Chang (in Re First T.D. & Inv. Inc.)*, 253 F.3d 520, 523 (9th Cir. 2001); *Boulder Fruit Express & Heger Organic Farm Sales v. Transp. Factoring, Inc.*, 251 F.3d 1268, 1270 (9th Cir. 2001); *Laughon v. Int'l Alliance of Theatrical Stage Emples.*, 248 F.3d 931, 934 (9th Cir. 2001); *County of Tuolumne v. Sonora Community Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001); *Wright v. Dunbar*, 1 Fed. Appx. 656, 658 (9th Cir. 2001); *White v. Lee*, 227 F.3d 1214, 1226 (9th Cir. 2000); *McGee v. Craig*, 2000 U.S. App. LEXIS 21964, at *2-3 (9th Cir. Aug. 18, 2000); *Wright v. Riveland*, 219 F.3d 905, 911 (9th Cir. 2000); *Arab Monetary Fund v. Hashim (In re Hashim)*, 213 F.3d 1169, 1171 (9th Cir. 2000); *Gaulocher v. Arizona*, 2000 U.S. App. LEXIS 9616 (9th Cir. May 4, 2000); *Hymore v. City of Sacramento*, 2000 U.S. App. LEXIS 8995 (9th Cir. May 4, 2000); *DeBoer v. Pennington*, 206 F.3d 857, 863 (9th Cir. 2000) (vacated on other grounds, 532 U.S. 992); *Adams v. Hawaii*, 2000 U.S. App. LEXIS 3292 (9th Cir. Mar. 1, 2000).

EXHIBIT BB

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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)

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

DECLARATION OF DANIEL M. PETROCELLI; RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS; AND [PROPOSED] ORDER FILED CONCURRENTLY HEREWITH

The Hon. Otis D. Wright II

Hearing Date: March 21, 2011
Hearing Time: 1:30 pm
Courtroom: 11

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I. INTRODUCTION

Plaintiffs' renewed motion for judgment does not meet the requirements of Rule 54(b) and should be denied. First, it proceeds from the premise—repeated on virtually every page of their brief—that their First Claim for Relief has been "fully adjudicated" and "**fully decided**." Mot. at 1:2-4, 9:5 (emphasis in original). This is incorrect. Significant issues remain unresolved precluding issuance of a judgment on the First Claim for Declaratory Relief. On October 13, 2010, the Court denied plaintiffs' initial Rule 54(b) motion as "premature" for this very reason:

> The outstanding issues discussed [in the parties' December 2009 joint filing] 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. Docket No. 630 at 2.

Nothing has changed. The "promotional announcement" issue—or "Ads" issue, as plaintiffs call it—bears directly on the scope of copyright interests sought to be adjudicated in the First Claim, and it has not been decided. The same is true of the "dicta" issue raised by plaintiffs, in which they continue to challenge statements in the Court's summary judgment order defining the limited copyright interests they recaptured. Plaintiffs try to recharacterize these and other unresolved substantive issues as purely "accounting" matters, but that assertion is plainly wrong. Plaintiffs made the same argument in their initial Rule 54 motion, it was correctly rejected by the Court, and does not warrant reconsideration now.

In short, notwithstanding plaintiffs' recent amendment to reconfigure their complaint, the First Claim still seeks a declaration defining their "respective rights and obligations with respect to the Termination and the copyright interests thereby recaptured by plaintiffs." These "rights and obligations" have yet to be adjudicated. Thus, a Rule 54(b) judgment cannot issue, and this motion should again be denied.

Second, no conceivable efficiency will result from a partial judgment and interlocutory appeal at this very late stage. After six years of litigation, we are on

the eve of concluding the case. In May, DC's experts will produce an accounting of profits attributable to plaintiffs' recaptured rights. If plaintiffs challenge any part of that accounting, the disputed issues, together with the various open issues the parties have identified to the Court, can be decided by the Court—with the assistance of a special master, if the Court wishes. Subject to the Court's busy calendar, this remaining work can be completed by the end of summer or early fall. A final judgment can then be entered on the entirety of the case, and the parties can pursue their appellate rights with the benefit of a final, complete record.

To be clear, it is this finality that plaintiffs seek to avoid by their Rule 54(b) motion. Based on the Court's prior rulings, plaintiffs have received limited rights in Superman and were unsuccessful in the first trial on the alter-ego issues. As a result, plaintiffs are well aware that the impending accounting will yield only a modest recovery. It is for that reason that plaintiffs prefer to avert the accounting and see if they can win greater rights in the Ninth Circuit. Plaintiffs' tactical desires aside, putting a sudden halt to this case just as it is drawing to a final close after six years of expensive, protracted litigation would be fundamentally unfair and prejudicial to DC. It also would produce inexcusable delay and inefficiency: the completion of the case would be delayed indefinitely pending the interlocutory appeal; after the appeal, the case would return to this Court to rule on the various open issues and conduct the accounting trial; and after a final judgment is entered, the case would be appealed—*again*. Plaintiffs' approach thus guarantees two appeals and untold years to conclude the case. In contrast, if plaintiffs are required to follow the time-honored process of litigating a case to final judgment, all proceedings in this Court can be finished this year, there will be a single appeal of all issues challenged, and the litigation will be over in a much shorter time.

Finally, plaintiffs are badly mistaken in asserting that granting their motion will promote settlement. The self-evident fact is that the sooner there is a final

judgment on all liability and damages issues, the clearer the value of plaintiffs' rights, and the better the prospects for settlement.

II. PLAINTIFFS MISSTATE THE LAW AND DO NOT MEET THE DEMANDING TEST FOR RULE 54(B) CERTIFICATION.

There is a "historic federal policy against piecemeal appeal." FED. R. CIV. P. 54(b) Advisory Comm. Note, 5 F.R.D. 433, 473 (1946). Rule 54(b) creates a narrow exception. It provides that where an action "presents more than one claim for relief …, the court may direct entry of a final judgment as to one, … if the court expressly determines that there is no just reason for delay." FED. R. CIV. P. 54(b).

The threshold requirement for Rule 54(b) certification is that *final judgment* has been entered on an *entire* claim—rulings on elements underlying the claim are insufficient. *E.g.*, *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956). Only if this finality requirement has been met may the district court exercise its discretion to evaluate whether such an appeal would enhance efficiency. *Nat'l Ass'n of Home Builders v. Norton*, 325 F.3d 1165, 1167 (9th Cir. 2003). Plaintiffs' assertion that Rule 54(b) certifications are reversed only for "abuse of discretion," Mot. at 7, is erroneous. The threshold inquiry—*i.e.*, whether an entire claim has been finally resolved—is reviewed *de novo*. *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 954 (9th Cir. 2006); *Sears*, 351 U.S. at 437 (district court "cannot, in the exercise of its discretion, treat as 'final' that which is not 'final'").

A. There Has Been No Final Judgment On Plaintiffs' First Claim.

1. Substantive Issues Remain Undecided.

The "requirement of finality is a statutory mandate and not a matter of discretion." *W.L. Gore & Assocs., Inc. v. Int'l Med. Prosthetics Research Assocs., Inc.*, 975 F.2d 858, 862 (Fed. Cir. 1992). The Court's October 13, 2010, order rightly held that any Rule 54(b) certification would be "premature" because of the unresolved issues that "bear directly on the finality of the claim for declaratory relief which Plaintiffs move to certify for appeal." Docket No. 630 at 2.

Promotional Ads. As just one example, the Court observed:

> *[T]he 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. Docket No. 630 at 2 (emphases added).

In recently amending their complaint, plaintiffs removed references to an accounting on their First Claim for relief. However, the First Claim and paragraph 55 of the complaint—quoted and cited by the Court above—remain and still seek a declaration defining the parties' "respective rights and obligations with respect to the Termination and the copyright interests thereby recaptured by plaintiffs." Docket 644 ¶ 55. Plaintiffs concede the Ads issue bears directly "on the scope of Plaintiffs' recaptured copyrights." Docket No. 602 at 16:9. That Ads issue—like several other open issues—has not been fully decided, and plaintiffs' contention that it relates only to the accounting is indefensible. Plaintiffs made *exactly that argument* in their initial Rule 54(b) motion, and the Court rejected it:

What Plaintiffs Argued Before	What Plaintiffs Again Argue Now
"The second issue—the impact of the Ads, if any, on Defendants' pending accounting under the Second through Fourth Claims—is not in the First Claim. The pending issue … relates to whether Defendants can use supposed elements in the Ads to reduce their accounting …." Docket No. 628 at 7.	"The second issue—the impact of the Ads, if any, on Defendants' Accounting—is clearly not part of the First Claim, as even Defendants have admitted. *See* Docket No. 349 at 41-43; Counterclaims, ¶ 137(b) ('Any accounting of profits for exploitation of Superman would be reduced to account for … the [Ads].')." Mot. at 12:23.

Though not styled as such, plaintiffs' current motion amounts to one for reconsideration of the Court's October 13 order. But plaintiffs cannot and do not meet the requirements for reconsideration. *See* C.D. LOCAL RULE 7-18; *Samica Enters., LLC v. Mail Boxes Etc. USA, Inc.*, 2010 WL 807440, at *2 (C.D. Cal. Feb. 26, 2010); *Pickett v. Schwarzenegger*, 2010 WL 140386, at *3 (C.D. Cal. Jan. 11, 2010); *Figueroa v. Gates*, 2002 WL 31572968, at *3 (C.D. Cal. Nov. 15, 2002) (imposing sanctions for failure to properly style motion as one for reconsideration).

Dicta. In 2008, plaintiffs filed a motion for reconsideration of the Court's rulings listing the copyrightable elements in *Action Comics No. 1*, arguing that these statements were mere dicta and do not "restrict the Superman elements" they "recaptured." Docket No. 312 at 20-25. Plaintiffs identified the dicta question as an open issue in their December 2009 report, Docket No. 602 at 16:22-23, and that open issue has not been decided. Like the Ads issue, this dicta question fundamentally affects the scope of rights that plaintiffs recaptured and must be decided to adjudicate fully their First Claim.

Plaintiffs seek to explain away the open Ads and dicta issues by positing a false distinction between copyrighted "works" and the "contents" of those works—arguing their "First Claim asks only for declaratory relief as to which Superman ***works*** (*e.g.*, *Action Comics*, No. 1) were recaptured by the Termination, not their precise literary contents." Mot. at 11. This specious argument, which plaintiffs did not raise in their initial motion, is belied by very Termination notice that is the subject of plaintiffs' First Claim. *Id.* at 1. By its plain terms, the Termination seeks to recapture both comic books, like *Action Comics*, *and* "precise literary contents":

> This Notice of Termination applies to each and every work … that includes or embodies any *character, story element, or indicia reasonably associated with SUPERMAN or the SUPERMAN stories*, such as, without limitation, Superman, Clark Kent, Lois Lane, Perry White, Jimmy Olsen, Superboy, Supergirl, Lana Lang, Lex Luthor, Mr. MXYZTPLK…. Decl. of Daniel M. Petrocelli ("Petrocelli Decl.") Ex. A at 3, 3 n.1 (emphasis added).

Mixed-Trademark Use And S-in-Shield Logo Issues. In determining what works plaintiffs have recaptured, and to quantify the value associated with them, the issue of mixed use between trademark and copyright needs to be decided, as plaintiffs conceded in their December 2009 joint report. Docket No. 602 at 16:16-18. Equally relevant to plaintiffs' First Claim is whether plaintiffs can claim any right in the S-in-Shield Logo that adorns Superman's costume. This non-copyrightable element is a pure trademark to which plaintiffs are not entitled—a fact plaintiffs dispute. Docket No. 349 at 47-48.

Superboy. Also part of plaintiffs' First Claim are issues related to Superboy. The claim seeks a declaration that plaintiffs recaptured *all* of the works listed in the Termination. Docket No. 644 ¶¶ 53-55. Plaintiffs contend it has "clearly been decided" what works they recaptured, Mot. at 11, but they ignore the more than *1,325 Superboy works* listed in their Superman Termination on which the Court has *never* ruled. In the related and still-pending Superboy case, plaintiffs seek to adjudicate 1,607 works listed in a separate Superboy termination notice. However, 1,325 (or 82%) of those works are also listed in the Superman notice. *See* Appendix A; Petrocelli Decl. Exs. A-B. The status of those works has never been decided in either case. As plaintiffs acknowledged in their December 2009 report, one of the first orders of business in this case is for the Court to determine "(1) the extent of the original copyrightable material in Siegel's Superboy Materials, if any; and (2) whether the original material, if any, from the Superboy Materials was published in a work allegedly subject to recapture…." Docket No. 602 at 23:3-6.

Other Issues. There are additional grounds to challenge plaintiffs' First Claim, including issues related to the originality of certain elements in *Action Comics No. 1* and statute-of-limitations and settlement defenses based on new circumstances. Docket Nos. 631 at 10:3-6; 623 at 5:18-26. Had plaintiffs met and conferred with DC before filing this motion—which they declined to do, citing the parties' *August 2010* conference, Notice of Mot. at 1:24—DC could have identified

these other issues and infirmities in plaintiffs' position. Plaintiffs elected to proceed *without a conference*, in contravention of the rules. *See* C.D. LOCAL RULE 7-3 ("counsel contemplating the filing of any motion shall first contact opposing counsel to discuss [it] thoroughly").

Remedies. Plaintiffs' amended complaint continues to seek monetary relief with respect to the First Claim—plaintiffs' Prayer For Relief, which applies to "ALL CLAIMS," seeks "Plaintiffs' costs of suit" and "reasonable attorneys' fees." Docket No. 644 ¶¶ 80-82. Neither Judge Larson nor this Court has ever addressed these issues; they are disputed; and they cannot be concluded without deciding the remaining issues in the case, including the accounting sought by plaintiffs. A court should not grant a Rule 54(b) motion where such costs and fees issues remain undecided. *E.g.*, *Wolf v. Banco Nacional de Mexico, S.A.*, 721 F.2d 660 , 662 (9th Cir. 2005) (Rule 54(b) improper where judgment addressed liability but not damages or attorney's fees); *RD Legal Funding, LLC v. Erwin & Balingit, LLP*, 2010 WL 1416968, at *1 (S.D. Cal. 2010) ("summary judgment order is insufficient for a final judgment against the two Defendants because *Plaintiff requests additional relief in the form of interest, costs and attorneys' fees*, which was not addressed in the summary judgment motion") (emphasis added).

2. Plaintiffs' Appendix Of Rule 54 Cases Is Irrelevant And In Error.

While plaintiffs assert that Rule 54(b) certifications are "routinely granted," Mot. at 14, the Supreme Court and Ninth Circuit disagree: "Plainly, sound judicial administration does not require that Rule 54(b) requests be granted routinely," *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 10 (1980); and Rule 54(b) certification is "reserved for the unusual case" involving exceptional circumstances. *Cadillac Fairview/Calif., Inc. v. U.S.*, 41 F.3d 562, 567 (9th Cir. 1994).

Plaintiffs' chart of Ninth Circuit cases involving Rule 54(b) appeals misses the point. In *all* of these cases, one or more of the claims at issue had been fully adjudicated. Here, plaintiffs have not met that threshold requirement on their First

Claim. And as shown in Appendix B, in *not one* of the 98 cases plaintiffs cite did the district court enter judgment on a claim that had been only partially decided. Rather, these cases all involved circumstances in which:

1. A *party*, rather than a claim, was dismissed (44 cases);
2. An *entire claim* was resolved—*including liability and damages*—and judicial economy was best served by immediate appeal (4 cases);
3. An *entire claim* was resolved and was severable factually and legally from the remaining claims and issues (40 cases);
4. An immediate appeal could completely dispose of the *entire case* given the existence of a "controlling" question of law (5 cases);
5. The *entire case* had been disposed of by motion or otherwise (4 cases); or
6. The district court *denied* the Rule 54 motion (1 case).

The out-of-circuit cases cited by plaintiff are equally inapposite. In both *Rodrigue v. Rodrigue*, 218 F.3d 432, 434 (5th Cir. 2000), and *Gordon v. Youmans, Inc.*, 358 F.2d 261, 262 (2d Cir. 1965), the district court completely and finally decided the copyright ownership claim—unlike here, where underlying issues are unresolved.

B. Efficiency Concerns Weigh Heavily Against Rule 54(b) Judgment.

To grant a Rule 54(b) motion, a district court must make an "express determination" that "no just reason" exists to deny it, *Norton*, 325 F.3d at 1167, and find that the efficiencies to be gained *far outweigh* the prejudice inherent in permitting a piecemeal appeal, *e.g.*, *Hogan v. Consol. Rail Corp.*, 961 F.2d 1021, 1025 (2d Cir. 1992). The Court need not even reach this inquiry here, because the threshold finality requirement has not been satisfied. *See Schudel v. Gen. Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997). Moreover, as explained below, no efficiencies will be gained by granting plaintiffs' motion—only delay and prejudice will ensue.

1. All The Claims In The Complaint Are Directly Intertwined.

"A similarity of legal or factual issues" between the claim sought to be appealed and the claims remaining in the case "weight heavily against entry of

judgment under [Rule 54(b)]," *Cadillac Fairview*, 41 F.3d at 567, because in cases involving similar claims, multiple appeals "present similar factual and legal issues, and likely would result in a duplication of effort." *RD Legal*, 2010 WL 1416968, at *1. In this case, each of plaintiffs' claims overlap almost entirely—and is based on the scope and effect of plaintiffs' termination notice. *See* Docket No. 644 ¶ 54.b, Docket No. 602 at 3:4-9; (First Claim: seeking declaration that plaintiffs own "an undivided fifty percent (50%) of the Recaptured Copyrights"); Docket No. 644 ¶ 58.b, *id.* at 3:10-25 (Second Claim: 50% of all Superman profits and "accounting"); Docket No. 644 ¶ 63.d, Docket No. 602 at 3:26-4:1 (Third Claim: 50% of proceeds of Superman Crest and "accounting"); Docket No. 644 ¶ 70, Docket No. 602 at 4:2-4 (Fourth Claim: 50% of "licensing" proceeds and "accounting").

Before seeking to derail this case with an interlocutory appeal of indefinite duration, plaintiffs always referred to their First, Second, Third, and Fourth Claims as a bundle of "accounting claims." *E.g.*, Docket No. 602 at 15:22-24, 16:2-23, 23:2-12; *id.* at 11:23-12:3. Indeed, in the December 2009 status report, plaintiffs asserted that the Court should decide these "accounting claims" after resolving a number of open legal issues in this case and the Superboy case. *Id.* at 15:22-24, 16:2-23, 23:2-12. Judge Larson issued the partial summary judgment orders plaintiffs now seek to appeal on March 26, 2008, and August 12, 2009. *Not once* in 2008, 2009, or the first half of 2010 did plaintiffs ever once file a Rule 54(b) motion or even tell the Court that a Rule 54 appeal was warranted or appropriate. Just the opposite: When this case was reassigned in November 2009, plaintiffs filed a 23-page joint status report that detailed each claim for relief in this case and the Superboy case. Plaintiffs described how they had dismissed their claims for relief under the Lanham Act and how the Court had fully resolved and dismissed their claims against Time Warner. *Id.* 11:15-22, 12:19-20. *Nowhere* did plaintiffs ever say their First Claim had been "fully resolved" or that Rule 54(b) judgment was appropriate. To the contrary, plaintiffs bundled their First Claim with the all

the other remaining "accounting claims"[1] and argued the Court should "schedule the trial … for the accounting action" after resolving open legal issues concerning (i) "the scope of Plaintiffs' recaptured copyrights," (ii) procedures to govern the accounting trial, and (iii) Superboy-related issues. Docket No. 602 at 15:22-24, 16:2-23, 23:2-12.

2. Resources Are Being Much Better Spent Focusing On The Accounting.

While plaintiffs complain about the costs involved in trying the accounting case before the liability issue has been appealed, Mot. at 14-16, the same risk is inherent in every case involving damages, and this does not render the countless cases that proceed in this fashion "fatally flawed," *id.* at 16:6. Plaintiffs elected to file this case seeking expansive rights and remedies, including an accounting; they have vigorously litigated the case for six years—including an initial bench-trial, which they lost; and until recently plaintiffs *never* asserted the need to interrupt this case for an interlocutory appeal.

Furthermore, it is predominantly *DC* —not plaintiffs—which is undertaking the work and bearing the costs in preparing and providing the accounting demanded by plaintiffs. For example, DC has:

- Updated its voluminous productions of relevant financial records through December 31, 2010, and will be providing additional documents;
- Identified all Superman-related publications between April 16, 1999 and December 31, 2010 for which the accounting will be rendered;
- Identified all Superman-related media—including television shows, animated series, feature films, and video games—for the same period;
- Identified the merchandising on which it will account; and

[1] *E.g.*, *id.* at 11:23-12:3 ("[T]he Court bifurcated the trial, with separate trials on: (1) the alter ego issues [which the Court held a two-week trial on and ruled in DC's favor']… and (2) *the ultimate accounting claims*."); *id.* at 11:10 (Court denied "Plaintiffs' request for a jury trial on their 'alter ego' and *accounting claims*") (emphases added).

- Conducted an in-depth review of voluminous "Superman" works and associated accounting records necessary to render a fair accounting.

Petrocelli Decl. ¶ 6.

The Court's recent order compelling counsel to meet and attempt to agree on apportionment formulae regarding the upcoming accounting has been invaluable in crystallizing the apportionment issues and advancing the progress of the accounting. DC expects to complete and produce its accounting to plaintiffs by the end of May. Plaintiffs and their experts can review the accounting and identify any specific points of dispute. If the disputes cannot be worked out, the parties can take focused expert depositions and proceed to a short bench trial this summer or early fall—either before the Court or a special master.

3. A Rule 54(b) Appeal Will Not Promote Settlement.

DC disagrees that Rule 54(b) certification will promote settlement. The prospects of settlement will be significantly improved the sooner the remaining accounting and other issues in this case are decided. Only then will the value of plaintiffs' rights become clear. The Ninth Circuit recently confirmed in *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 911 (9th Cir. 2010), that apportionment of profits is necessary to match a copyright owner's recovery with its actual contributions to a property. Plaintiffs resist apportionment, because it will quantify the limited value of the rights they recaptured. They recognize the need to secure greater rights from the appellate court in order to meaningfully exploit any Superman rights. As revealed in a recent e-mail from plaintiffs' counsel to a rival movie studio disclosed in the related *Pacific Pictures* case:

> Please find attached copies of the works with respect to which Siegel's joint copyright interest has been held to have been successfully recaptured and for which Shuster's other half of the copyright will be recaptured on October 26, 2013: (1) the first Superman story published in Action Comics No. 1 and (2) the first two weeks of newspaper strips.
>
> As discussed, I also attached our motion for reconsideration of the Court's ruling regarding the many other strips authored by Siegel and

> Shuster. For the reasons stated therein *the recapture of such strips which contain the first appearance of numerous Superman elements has a good chance of success on appeal.*

Petrocelli Decl. Ex. D (emphasis added). Plainly, plaintiffs' current effort to halt these proceedings to pursue their chances on appeal is not aimed at promoting current settlement efforts, but is an effort to extract greater leverage against DC if and when they are successful in securing more rights. What will best promote a settlement sooner is for the parties to litigate the remaining phase of this case to final judgment. Neither side will be advantaged or prejudiced, and the resulting judgment will provide clarity as to the value—if any—of plaintiffs' claims.

4. A Rule 54(b) Appeal Will Not Streamline The Pacific Pictures *Case.*

Plaintiffs' assertion that a Rule 54 certification will have collateral-estoppel effect in the *Pacific Pictures* case, Mot. at 17, is incorrect. The *Pacific Pictures* case involves different claims, issues, and parties, *see, e.g.*, Case No. CV-10-03633, Docket No. 61 at 48-49—and under no theory of preclusion can the rulings here "apply [there] with equal force," *e.g.*, *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000) (collateral estoppel applies only where issues "identical"); *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1149 (9th Cir. 2010) (*res judicata* applies where "same claim" previously litigated against "same party"); *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993) (doctrine of law of the case only applies where an issue has been decided "in the identical case").

In *Pacific Pictures*, DC challenges the validity and scope of a copyright termination notice served by the heirs of Superman illustrator Joe Shuster, as well as improper conduct by the Shusters, Siegels, and Marc Toberoff and his entertainment companies in unlawfully trafficking in copyright interests. Case No. CV-10-03633. While plaintiffs assert that the two cases overlap, Mot. at 16-17, they concede—as they must—that only *one* of the six claims in *Pacific Pictures* tracks a claim here, and even then not completely. Case No. CV-10-03633, Docket No. 80 at 25 n.20. DC's second claim for relief in the *Pacific Pictures* case seeks a

declaration regarding the scope of the Shusters' termination notice, assuming it is valid. Case No. CV-10-03633, Docket No. 49 ¶¶ 135-64. DC advances a similar claim in this case regarding the scope of the Siegels' notice, but the Shuster and Siegel notices are different on their face, Case No. 10-03633, Docket No. 89 at 23-24, and the Siegels, Shusters, and Toberoff have all asserted: "The Shuster Termination has no legal bearing or effect upon the Siegel Terminations or upon Plaintiffs' claims in the Siegel Litigations…." Petrocelli Decl. Ex. C at 4. Indeed, as Judge Larson recognized, "It is by no means a foregone conclusion that the Shuster estate will be successful in terminating the grant to the Superman material published in *Action Comics No. 1*." Docket No. 554 at 23.

5. A Stay Of This Case Is Not Warranted.

After six hard-fought years, this case can finally be concluded in the next six months. The Court should deny plaintiffs' Rule 54(b) motion and allow the parties to complete the accounting that plaintiffs' lawsuit demands. Even were the Court to grant plaintiffs' motion, there would be no justification for staying the accounting pending the appeal. The Ninth Circuit could dismiss the case for lack of jurisdiction, as it dismissed plaintiffs' last three interlocutory appeals in the related *Pacific Pictures* case. *See* Case No. CV-10-03633, Docket No. 143 at 1. And even if it decided to take the case, the average time to resolve an appeal in the busy Ninth Circuit docket is *two years*. *See* CHRISTOPHER A. GOELZ & MEREDITH J. WATTS, FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE § 1.51 (Rutter 2010).

Two years from now—2013—is when plaintiffs claim that they and the Shusters will own 100% of the copyright interests in certain Superman works, and DC "will be required to obtain a fair new license from them to produce new Superman works." Mot. at 16. It is also soon after Warner Bros. is scheduled to release a new Superman motion picture in late 2012, as was recently publicly disclosed. Plaintiffs' tactical interest in securing delay to create leverage in negotiations with DC or third parties is *not* a proper ground for obtaining a stay—

and, indeed, warrants denial of the stay request. *E.g.*, *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936); *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007).

III. CONCLUSION

Plaintiffs' motion should be denied.

Dated: February 28, 2011

Respectfully Submitted,

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli
Daniel M. Petrocelli
Attorneys for Defendants

APPENDIX A

Overlap Between Plaintiffs' Superman and Superboy Notices of Copyright Termination

Page of Superboy Notice	Works in Superboy Notice also in Superman Notice	Total Works in Superboy Notice	Percentage Overlap
5	0	2	
6	7	7	
7	45	45	
8	46	46	
9	46	46	
10	46	46	
11	44	44	
12	38	38	
13	39	39	
14	45	45	
15	36	36	
16	46	46	
17	46	46	
18	45	45	
19	44	44	
20	44	44	
21	35	35	
22	26	26	
23	26	26	
24	27	27	
25	15	15	
26	15	15	
27	20	20	
28	41	41	
29	43	43	
30	44	44	
31	42	42	
32	24	25	
33	17	17	
34	23	23	
35	42	42	

Page of Superboy Notice	Works in Superboy Notice also in Superman Notice	Total Works in Superboy Notice	Percentage Overlap
36	20	41	
37	3	44	
38	29	42	
39	14	41	
40	0	46	
41	13	46	
42	21	42	
43	23	32	
44	18	25	
45	10	19	
46	13	24	
47	18	18	
48	36	36	
49	29	29	
50	21	25	
51	0	25	
52	0	12	
TOTAL	**1325**	**1607**	**82.45%**

APPENDIX B

Grounds for Distinguishing Cases Cited by Plaintiffs in Appendix I to Motion for Entry of Partial Judgment Under Fed. R. Civ. P. 54(b)

(1) Dismissal of a party, rather than a claim

1. *Noel v. Hall*, 568 F.3d 743 (9th Cir. 2009) ("When the district court dismisses claims against one of a number of parties, it has discretion to 'direct the entry of a final judgment as to [that party].'").

2. *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003) (plaintiff appealed decision as to one defendant, while the claims against the three other defendants were still pending).

3. *Destfino v. Reiswig*, 2011 U.S. App. LEXIS 1375 (9th Cir. Jan. 21, 2011) (dismissal of some defendants).

4. *Flores v. Emerich & Fike*, 385 Fed. Appx. 728 (9th Cir. 2010) (dismissal of one defendant).

5. *Eichler v. Sherbin*, 2010 U.S. App. Lexis 14480 (9th Cir. June 23, 2010) (dismissal of one defendant).

6. *Brown v. Dunbar*, 376 Fed. Appx. 786 (9th Cir. 2010) (where there were multiple plaintiffs and multiple defendants, and the only claim left is one equal protection claim against one individual defendant, Rule 54(b) granted).

7. *In re SNTL Corp.*, 571 F.3d 826 (9th Cir. 2009) (dismissal of one defendant).

8. *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009) (dismissal of all but one defendant).

9. *Darian v. Accent Builders, Inc.*, 342 Fed. Appx. 254 (9th Cir. 2009) (dismissal of one defendant and claims against dismissed defendant unique and not related to those brought against other defendants).

10. *McIlwain v. Or. Dept. of Revenue*, 334 Fed. Appx. 99 (9th Cir. 2009) (dismissal of two defendants).

11. *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986 (9th Cir. 2008) (dismissal of some plaintiffs in a class action).

12. *Ibrahim v. Dept. of Homeland Sec.*, 538 F.3d 1250 (9th Cir. 2008) (dismissal of one defendant regarding claims severable from plaintiff's claims against remaining defendants).

13. *Francis v. U.S.*, 376 Fed. Appx. 792 (9th Cir. 2010) (dismissal of some defendants).

14. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008) (dismissal of some plaintiffs).

15. *Williams v. Boeing Co.*, 517 F.3d 1120 (9th Cir. 2008) (dismissal of some plaintiffs in class action suit).

16. *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450 (9th Cir. 2007) (where all defendants but one dismissed, certification would not result in piecemeal appeals).

17. *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007) (dismissal of one category of defendants).

18. *Wood v. Lundgren*, 205 Fed. Appx. 599 (9th Cir. 2006) (dismissal of two defendants).

19. *Veliz v. Cintas Corp.*, 181 Fed. Appx. 621 (9th Cir. 2006) (dismissal of some plaintiffs).

20. *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2006) (determination of one plaintiff's copyright termination notice as invalid dismisses the claims relating to that plaintiff despite pending adjudication on the validity on another plaintiff's termination notice).

21. *Karboau v. Lawrence*, 135 Fed. Appx. 961 (9th Cir. 2005) (dismissal of one defendant).

22. *Hambleton Bros. Lumber Co. v. Balkin Enter., Inc.*, 397 F.3d 1217 (9th Cir. 2005) (dismissal of one defendant).

23. *Easter v. Am. W. Fin.*, 381 F.3d 948 (9th Cir. 2004) (dismissal of all plaintiffs but one).

24. *Ileto v. Glock Inc.*, 349 F.3d 1191 (9th Cir. 2003) (dismissal of one defendant).

25. *Bingham v. City of Manhattan Beach*, 341 F.3d 939 (9th Cir. 2003) (dismissal of one defendant).

26. *Lonberg v. Sanborn Theaters, Inc.*, 2001 U.S. App. LEXIS 21065 (9th Cir. Sept. 27, 2001) (dismissal of one defendant).

27. *Davis v. City of Las Vegas*, 478 F.3d 1048 (9th Cir. 2007) (dismissal of one defendant).

28. *Modahl v. County of Kern*, 61 Fed. Appx. 394 (9th Cir. 2003) (dismissal of one defendant).

29. *Boulder Fruit Express & Heger Organic Farm Sales v. Transp. Factoring, Inc.*, 251 F.3d 1268 (9th Cir. 2001) (dismissal of two defendants).

30. *McGee v. Craig*, 2000 U.S. App. LEXIS 21964 (9th Cir. Aug. 18, 2000) (dismissal of some defendants).

31. *Easter v. Am. W. Financial*, 381 F.3d 948 (9th Cir. 2004) (dismissal of one category of defendants).

32. *Goodell v. Eoff*, 73 Fed. Appx. 235 (9th Cir. 2003) (dismissal of some defendants).

33. *Forum Ins. Co. v. Comparet*, 62 Fed. Appx. 151 (9th Cir. 2003) (dismissal of some defendants).

34. *Estate of Perez v. Jacobo*, 57 Fed. Appx. 296 (9th Cir. 2003) (dismissal of two defendants).

35. *Franklin v. Fox*, 312 F.3d 423 (9th Cir. 2002) (dismissal of some defendants).

36. *In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124 (9th Cir. 2002) (dismissal of some plaintiffs in a class action suit).

37. *Miranda v. Clark County*, 279 F.3d 1102 (9th Cir. 2002) (dismissal of some defendants).

38. *Sierra Club v. Whitman*, 268 F.3d 898 (9th Cir. 2001) (dismissal of one defendant).

39. *Holley v. Crank*, 258 F.3d 1127 (9th Cir. 2001) (dismissal of one defendant).

40. *Laughon v. Int'l Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists & Allied Crafts of the U.S. and Can.*, 248 F.3d 931 (9th Cir. 2001) (dismissal of one defendant).

41. *Wright v. Dunbar*, 1. Fed. Appx. 656 (9th Cir. 2001) (dismissal of some defendants).

42. *In re Hashim*, 213 F.3d 1169 (9th Cir. 2000) (dismissal of some defendants).

43. *Gaulocher v. Ariz.*, 2000 U.S. App. LEXIS 9616 (9th Cir. May 4, 2000) (dismissal of one defendant).

44. *DeBoer v. Pennington*, 206 F.3d 857 (9th Cir. 2000) (dismissal of some defendants).

(2) Resolution of an entire claim, including damages, and circumstances in which judicial economy would be served by immediate appeal

45. *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072 (9th Cir. 2010) (Rule 54(b) entry appropriate where it would "end[] all litigation in the case, and it will not 'inevitably come back to this court under the same facts'").

46. *In re Imperial Credit Indus., Inc.*, 527 F.3d 959 (9th Cir. 2008) (entry of Rule 54 since remaining defenses could not be asserted until Chapter 11 debtor cured deficiency).

47. *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 290 Fed. Appx. 60 (9th Cir. 2008) (declaratory relief claim

regarding contract terms and for reliance damages shared no common issues of law or fact with remaining claims).

48. *Porter v. Jones*, 319 F.3d 483 (9th Cir. 2003) (dismissal of damages claims certified to consolidate with prior appeal on abstention order).

(3) Resolution of an entire claim factually and legally severable from the remaining claims

49. *Stanley v. Cullen*, 2011 U.S. App. LEXIS 1912 (9th Cir. Jan. 31, 2011) (resolution of separate trial phases relied on a largely independent set of operative facts).

50. *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946 (9th Cir. 2006) ("There was no risk of duplicative effort by the courts because any subsequent judgments in this case would not vacate its judgment on Dialysist West's counterclaim…[which was] not legally or factually related to AmerisourceBergen's Epogen claim, [and] no court need revisit this judgment.").

51. *SEC v. Capital Consultants LLC*, 453 F.3d 1166 (9th Cir. 2006) (appeal would finally resolve all the claims of some of the parties).

52. *Adidas Am., Inc. v. Payless Shoesource, Inc.*, 166 Fed. Appx. 268 (9th Cir. 2006) ("[W]hen 'the facts on all claims and issues entirely overlap, and successive appeals are essentially inevitable,' a Rule 54(b) request should not be granted. The present case is distinguishable…because…[it] revolves around a single legal issue, interpretation of the 1994 settlement agreement, while the claims that remain before the District Court involve the factually and legally distinct issue of trade dress infringement.").

53. *Webster v. Woodford*, 369 F.3d 1063 (9th Cir. 2004) (whether defendant's due process rights were denied by expansion of rule resulting in his death sentence distinct and severable from other convictions unaffected by the change in definition).

54. *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002) (resolution of two plaintiffs' individual action against the State for compensatory damages was distinct from their participation in the class action still pending).

55. *Sloan v. Oakland Police Dep't*, 376 Fed. Appx. 738 (9th Cir. 2010) (legal issues involved in dismissed claims unrelated to those in remaining claims).

56. *RA Med. Sys., Inc. v. PhotoMedex, Inc.*, 373 Fed. Appx. 784 (9th Cir. 2010) (overlapping issues between dismissed and remaining claims insignificant).

57. *Bradlow v. Castano Group*, 365 Fed. Appx. 883 (9th Cir. 2010) (entitlement to portion of one fee award distinct from claim regarding partial ownership of law firm).

58. *City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865 (9th Cir. 2009) (resolution of federal CERCLA claim distinct from unrelated remaining claims).

59. *Northrop Grumman Corp. v. Factory Mutual Ins. Co.*, 563 F.3d 777 (9th Cir. 2009) (contract interpretation issue readily severable, and no appellate court would have to decide the issue again in subsequent appeals).

60. *Ewing v. City of Stockton*, 588 F.3d 1218 (9th Cir. 2009) (dismissal of one category of defendants; resolution of federal constitutional issues as opposed to state claims that are legally and factually severable).

61. *U.S. v. Rich*, 317 Fed. Appx. 630 (9th Cir. 2008) (resolution of the terms of a partial settlement agreement distinct from the claims itself).

62. *U.S. v. Park*, 536 F.3d 1058 (9th Cir. 2008) (resolution of the interpretation of a specific word in an easement is distinct from other claims unaffected by the word).

63. *Nat'l Wildlife Fed'n v. City of Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008) (resolution of 4th Amendment claims distinct from state-law claims).

64. *Harris v. Gulf Ins. Co.*, 259 Fed. Appx. 952 (9th Cir. 2007) (issues certified separate, distinct, and independent from remaining claims).

65. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 481 F.3d 1224 (9th Cir. 2007) (claims relating to whether an environmental group's policy is flawed is distinct from others).

66. *Leonard v. City of Los Angeles*, 478 F.3d 1048 (9th Cir. 2006) (substantially different factual and legal issues related to certified claim as compared to remaining claim).

67. *DBSI/TRI IV Ltd. P'ship v. U.S.*, 465 F.3d 1031 (certification of quiet title judgment of one single property of a number of properties at issue).

68. *SEC v. Capital Consultants, LLC*, 397 F.3d 733 (9th Cir. 2005) (resolution of interpretation of settlement agreement distinct from other issues).

69. *S. Or. Barter Fair v. Jackson Cnty.*, 372 F.3d 1128 (9th Cir. 2004) (resolution of First Amendment claims distinct from others).

70. *Smelt v. Cnty. of Orange*, 447 F.3d 673 (9th Cir. 2006) (resolution of claims challenging constitutionality of federal statute distinct from claims challenging constitutionality of a state statute).

71. *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835 (9th Cir. 2003) (certification "completely disposed of Home Builders' challenge, leaving nothing more to be adjudicated…[and] le[ft] little chance of overlapping appeals.").

72. *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005) (resolution of claims regarding constitutionality of a state's emergency order as a whole distinct from whether specific state officer's action violated the First Amendment).

73. *Bay Inst. of San Francisco v. U.S.*, 87 Fed. Appx. 637 (9th Cir. 2004) (resolution of the interpretation of a statute and its procedures for calculating water cost are severable from other claims).

74. *City of St. Paul v. Evans*, 344 F.3d 1029 (9th Cir. 2003) (certification of all claims dismissed as time-barred, while unaffected claims and counterclaims remained).

75. *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004) (resolution of claims regarding current acts distinct from claims relating to past acts).

76. *McKesson HBOC, Inc. v. N.Y. State Common Retirement Fund, Inc.*, 339 F.3d 1087 (9th Cir. 2003) (resolution of defendant's counterclaim distinct from class action claims against the defendant).

77. *Goodell v. Eoff*, 73 Fed. Appx. 235 (9th Cir. 2003) (resolution of federal law claims, with only state claims remaining over which the court had no jurisdiction).

78. *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139 (9th Cir. 2002) (resolution of state law claims barred by statute of limitations, with only federal claims remaining).

79. *San Francisco Baykeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002) (resolution of claim regarding interpretation of a statute inapplicable to other claims).

80. *Dodge v. Johnson*, 41 Fed. Appx. 138 (9th Cir. 2002) (resolution of constitutional claims only).

81. *Hall v. Raytheon Missile Sys. Co.*, 51 Fed. Appx. 678 (9th Cir. 2002) (resolution of federal claims, as distinct from state claims).

82. *Everett Assoc., Inc. v. Transcon. Ins. Co.*, 35 Fed. Appx. 450 (9th Cir. 2002) (resolution of one claim based on interpretation of a contract inapplicable to other claims).

83. *Avid Identification Sys., Inc. v. Schering-Plough Corp.*, 33 Fed. Appx. 854 (9th Cir. 2002) (certification of all claims by plaintiff, leaving only defendant's counterclaims).

84. *Hall v. Raytheon Missile Sys. Co.*, 18 Fed. Appx. 669 (9th Cir. 2001) (state-law claims certified, while federal claims remained).

85. *In re First T.D. & Inv., Inc.*, 253 F.3d 520 (9th Cir. 2001) (resolution of one claim based on a specific interpretation of a provision of a statute inapplicable to other claims).

86. *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) (jurisdiction to review based on denial of qualified immunity defense).

87. *Hymore v. City of Sacramento*, 2000 U.S. App. LEXIS 8995 (9th Cir. May 4, 2000) (resolution of federal claims, leaving only state claims which were later dismissed).

88. *Adams v. Haw.*, 2000 U.S. App. LEXIS 3292 (9th Cir. Mar. 1, 2000) (resolution of federal claims, with only state-law claims remaining).

(4) Appeal could completely dispose of case or proceedings

89. *Brown v. Dunbar*, 376 Fed. Appx. 786 (9th Cir. 2010) (all claims by all plaintiffs against all defendants dismissed, except one claim against one defendant who also appeals the denial of qualified immunity, which if granted would dispose of entire action).

90. *In re Emery*, 317 F.3d 1064 (9th Cir. 2003) (appeal "involves the very existence of the rule pursuant to which the bankruptcy court would be required to make factual findings on remand" and could obviate the bankruptcy court's need to do any further fact-finding).

91. *Price v. Sery*, 513 F.3d 962 (9th Cir. 2008) (determination of controlling question of law supported entry of judgment because no unnecessary appellate review would result).

92. *Kelly v. Heron Ridge, Inc.*, 16 Fed. Appx. 695 (9th Cir. 2001) (entry of judgment over claims deciding controlling question of law and claims dismissed with prejudice).

93. *Gausvik v. Perez*, 392 F.3d 1006 (9th Cir. 2004) (certified finding of qualified immunity, which disposed of all claims save one dependent counterclaim;

Ninth Circuit admonished district court for certification, as "Rule 54(b) should be used sparingly").

(5) Action otherwise completely disposed of

94. *Quach v. Cross*, 252 Fed. Appx. 775 (9th Cir. 2007) (complaint dismissed for failure to state a claim).

95. *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148 (9th Cir. 2001) (all claims dismissed on summary judgment or voluntarily dismissed by plaintiff).

96. *Med. Lab. Mgmt. Consultants v. Am. Broad. Co., Inc.*, 306 F.3d 806 (9th Cir. 2002) (all claims dismissed on summary judgment or voluntarily dismissed by plaintiffs).

97. *Wright v. Riveland*, 219 F.3d 905 (9th Cir. 2000) (judicial resolution of all claims except for claim for disgorgement of funds, on which parties had come to separate agreement).

(6) Rule 54(b) motion denied

98. *Brookhaven Typesetting Serv., Inc. v. Adobe Sys., Inc.*, 332 Fed. Appx. 387 (9th Cir. 2009) ("Brookhaven also appeals the district court's … denial of Brookhaven's FRCP 54(b) motion. We affirm.").

CC1:844585

EXHIBIT CC

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

JOANNE SIEGEL, an individual; and LAURA SIEGEL LARSON, an individual, Plaintiffs, vs. WARNER BROS. ENTERTAINMENT INC., a corporation; DC COMICS, a general partnership; and DOES 1-10, Defendants.	Case No: CV 04-8400 ODW (RZx) Hon. Otis D. Wright II, U.S.D.J. **ORDER GRANTING MOTION FOR ENTRY OF A PARTIAL JUDGMENT UNDER FED. R. CIV. P. 54(B) AND FOR STAY OF REMAINING CLAIMS PENDING APPEAL** Complaint filed: October 8, 2004 Trial Date: None Set Date: March 21, 2011 Time: 1:30 p.m. Place: Courtroom 11
DC COMICS, Counterclaimant, vs. JOANNE SIEGEL, an individual; and LAURA SIEGEL LARSON, an individual, Counterclaim Defendants.	

ORDER

Federal Rule of Civil Procedure 54(b) allows a district court to certify as final and immediately appealable interlocutory orders that resolve certain outstanding claims in a case:

> "When more than one claim for relief is presented in an action … or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

Fed. R. Civ. P. 54(b). To be eligible for entry of judgment under Rule 54(b), the order must constitute "an ultimate disposition of an individual claim entered in the course of a multiple claims action," and there must be no just reason to delay appellate review of the order until the conclusion of the entire case. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7-8 (1980). The Ninth Circuit embraces a "pragmatic approach focusing on severability [of claims] and efficient judicial administration" in the construction of what constitutes a claim and whether there is no just reason to delay appellate review. *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987).

In accordance with the Court's decisions of March 26, 2008 (Docket No. 293), August 12, 2009 (Docket No. 560), and October 30, 2009 (Docket No. 595), the First Claim of Plaintiffs' Third Amended Complaint and the First, Second, Third and Fourth Counterclaims of Defendants' Second Amended Counterclaims have been fully resolved.

In determining whether there is any just reason for delay, the factors to be considered include "whether the nature of the claims already determined is such that no appellate court would have to decide the same issues more than once, even if subsequent appeals are heard," and "whether immediate appellate resolution will foster settlement of the remaining claims." *Whitney v. Wurtz*, 2007 U.S. Dist. LEXIS

60077, at *5 (N.D. Cal. Aug. 16, 2007). Entry of judgment on adjudicated claims under Rule 54(b) is especially appropriate where the claims determine the scope and contours of trial as to the remaining issues, that trial is likely to be protracted, and the Court will avoid wasting resources in a re-trial. *See Continental Airlines*, 819 F.2d at 1525 (approving Rule 54(b) entry of judgment where "the district court effectively narrowed the issues, shortened any subsequent trial by months, and efficiently separated the legal from the factual questions"). Here, any errors in the rulings and consequent determination of the severable First Claim and the First, Second, Third and Fourth Counterclaims would directly impact and necessarily reverse the trial court on the remaining accounting claims. Entry of a 54(b) judgment would streamline the issues, conserve judicial resources and promote settlement. As such, there is no just reason for delay entering judgment in this case.

Accordingly, for the reasons set forth herein and in Plaintiff's motion papers, IT IS HEREBY ORDERED that:

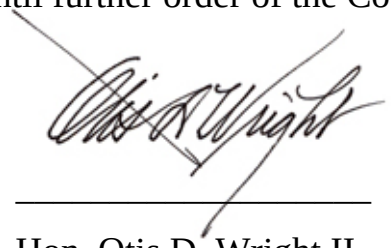
1. Plaintiffs' Motion For Entry of a Partial Judgment Under Fed. R. Civ. P. 54(b) and For Stay of Remaining Claims Pending Appeal is GRANTED.
2. Judgment in this action shall be entered on the First Claim of the Third Amended Complaint, and the First, Second, Third and Fourth Counterclaims of the Second Amended Counterclaims, and such Orders are hereby CERTIFIED FINAL PURSUANT TO FED. R. CIV. P. 54(b).
3. Further proceedings in this case are hereby stayed pending appeal.

4. Accordingly, the motion hearing and status conference scheduled for March 21, 2011 at 1:30 p.m. is VACATED.

5. Plaintiff is ordered to file a status report on or before **Wednesday, May 18, 2011,** and every 60 days thereafter, until further order of the Court.

IT IS SO ORDERED.

Dated: March 15, 2011



Hon. Otis D. Wright II

EXHIBIT CC - 1137

EXHIBIT DD

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

JOANNE SIEGEL, an individual; and LAURA SIEGEL LARSON, an individual,

Plaintiffs,

vs.

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

Defendants.

DC COMICS,

Counterclaimant,

vs.

JOANNE SIEGEL, an individual; and LAURA SIEGEL LARSON, an individual,

Counterclaim Defendants.

Case No: CV 04-8400 ODW (RZx)

Hon. Otis D. Wright II, U.S.D.J.

JUDGMENT PURSUANT TO FED. R. CIV. P. 54(B)

Complaint filed: October 8, 2004
Trial Date: None Set

Date: March 21, 2011
Time: 1:30 p.m.
Place: Courtroom 11

JUDGMENT

Based upon this Court's Orders dated March 26, 2008 (Docket No. 293), August 12, 2009 (Docket No. 560), and October 30, 2009 (Docket No. 595), and the Court's March 15, 2011 order granting Plaintiff's Motion For Entry of a Partial Judgment Under Fed. R. Civ. P. 54(b),

IT IS ORDERED AND ADJUDGED that pursuant to the Copyright Act, 17 U.S.C.§ 304(c), Plaintiffs validly terminated on April 16, 1999 all prior grants, assignments or transfers to any of the Defendants and any of their predecessors-in-interest, of the renewal copyrights in and to *Action Comics*, No. 1, as well as *Action Comics*, No. 4, *Superman*, No. 1 (pages 3-6), and the first two weeks of Superman newspaper strips, and that as of April 17, 1999, Plaintiff owned and continues to own fifty percent (50%) of the aforesaid recaptured copyrights.

IT IS FURTHER ORDERED AND ADJUDGED that counterclaimant DC Comics' First Counterclaim, which sought to invalidate the Termination, is DENIED for the reasons set forth in the Court's March 26, 2008 order. .

IT IS FURTHER ORDERED AND ADJUDGED that the Second Counterclaim is DENIED, as Plaintiff's claims for declaratory relief were brought within the relevant statute of limitations period.

IT IS FURTHER ORDERED AND ADJUDGED that the Third and Fourth Counterclaims are DENIED, as the parties did not enter into a settlement agreement.

IT IS ORDERED AND ADJUDGED that, finding no just reason for delay, the Court's Orders dated March 26, 2008 (Docket No. 293), August 12, 2009 (Docket No. 560), and October 30, 2009 (Docket No. 595) are CERTIFIED AS FINAL, and JUDGMENT IN THIS ACTION IS HEREBY ENTERED PURSUANT TO FED. R. CIV. P. 54(b) on the First Claim of the Third Amended Complaint, and the First, Second, Third and Fourth Counterclaims of the Second Amended Counterclaims.

Dated: March 15, 2011

Hon. Otis D. Wright II

EXHIBIT DD - 1139

EXHIBIT EE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-8400 ODW (RZx)	Date	May 5, 2011
Title	*Joanne Siegel, et al. v. Warner Bros. Entertainment, Inc., et al.*		

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):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order Vacating March 15, 2011 Judgment [660] and Striking Superfluous Allegations from DC Comics' First Amended Counterclaim

After certifying for appeal certain issues, the determination of which shall bear greatly on the upcoming trial in this matter, Defendant DC Comics pointed out that the counterclaims certified for appeal are not final. [661] But the allegations which allegedly preclude a finding of finality for purposes of appeal are improperly included in the counterclaims. Specifically, this case, which bears the number 04-8400, involves Superman, not Superboy. A separate action bearing the number 04-8776 concerns Superboy. The Court long ago declined to consolidate both cases into one action, but Defendants have nevertheless included some Superboy allegations in the Superman action. Such superfluous, redundant and improper allegations are hereby ordered **STRICKEN**, such that case number 04-8400 shall include no allegations whatsoever as to Superboy, and vice versa.

Plaintiffs shall renew their motion for certification and lodge a proposed judgment accordingly. Defendants' motion to amend judgment [661]is deemed **MOOT and the hearing scheduled for May 16, 2011 at 1:30 p.m. is VACATED**.

SO ORDERED

---- : 00

Initials of Preparer RGN

EXHIBIT EE - 1140

EXHIBIT FF

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

JOANNE SIEGEL, an individual; and LAURA SIEGEL LARSON, an individual,

Plaintiffs,

vs.

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

Defendants.

DC COMICS,

Counterclaimant,

vs.

JOANNE SIEGEL, an individual; and LAURA SIEGEL LARSON, an individual,

Counterclaim Defendants.

Case No: CV 04-8400 ODW (RZx)

Hon. Otis D. Wright II, U.S.D.J.

ORDER GRANTING RENEWED MOTION FOR ENTRY OF A PARTIAL JUDGMENT UNDER FED. R. CIV. P. 54(B) AND FOR STAY OF REMAINING CLAIMS PENDING APPEAL PURSUANT TO THE COURT'S MAY 5, 2011 ORDER

Complaint filed: October 8, 2004
Trial Date: None Set

ORDER

As established by the Court's decisions of March 26, 2008 (Docket No. 293), August 12, 2009 (Docket No. 560), October 30, 2009 (Docket No. 595), March 15, 2011 (Docket No. 659) and May 5, 2011 (Docket No. 664), the First Claim of Plaintiffs' Third Amended Complaint and the First, Second, Third and Fourth Counterclaims of Defendant DC Comics' Second Amended Counterclaims have been fully resolved. As set forth in the Court's March 15, 2011 order, there is no just reason for delay entering judgment in this case. Accordingly, for the reasons set forth in the above-referenced orders, as well as plaintiff's motion papers and all of the pleadings and records on file in this action, plaintiff's Renewed Motion for Entry of a Partial Judgment Under Fed. R. Civ. P. 54(b) is hereby GRANTED.

IT IS HEREBY ORDERED that:

1. Plaintiff's Renewed Motion for Entry of a Partial Judgment Under Fed. R. Civ. P. 54(b) and For Stay of Remaining Claims Pending Appeal Pursuant to the Court's May 5, 2011 order is GRANTED.
2. Judgment in this action shall be entered on the First Claim of the Third Amended Complaint, and the First, Second, Third and Fourth Counterclaims of the Second Amended Counterclaims (as stricken in part by the Court's May 5, 2011 order), and the Court's March 26, 2008 order (Docket No. 293), August 12, 2009 order (Docket No. 560), and October 30, 2009 order (Docket No. 595) are hereby CERTIFIED AS FINAL PURSUANT TO FED. R. CIV. P. 54(b).
3. Further proceedings in this case are hereby stayed pending appeal.
4. Instead of the status reports referred to in the Court's March 15, 2011 order, plaintiffs are ordered to file a status report on or before **Wednesday, June 8, 2011,** and every 60 days thereafter, until further order of the Court.

IT IS SO ORDERED. May 17, 2011 U.S. District Judge

EXHIBIT GG

[redacted]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

JOANNE SIEGEL, an individual; and LAURA SIEGEL LARSON, an individual,

Plaintiffs,

vs.

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

Defendants.

DC COMICS,

Counterclaimant,

vs.

JOANNE SIEGEL, an individual; and LAURA SIEGEL LARSON, an individual,

Counterclaim Defendants.

Case No: CV 04-8400 ODW (RZx)

Hon. Otis D. Wright II, U.S.D.J.

[PROPOSED] JUDGMENT PURSUANT TO FED. R. CIV. P. 54(b)

Complaint filed: October 8, 2004
Trial Date: None Set

[redacted]

~~[PROPOSED]~~ JUDGMENT

Based upon this Court's orders dated March 26, 2008 (Docket No. 293), August 12, 2009 (Docket No. 560), and October 30, 2009 (Docket No. 595), which resolved certain of the claims and counterclaims in this case; the Court's March 15, 2011 order which granted Plaintiff's Motion For Entry of a Partial Judgment Under Fed. R. Civ. P. 54(b) (Docket No. 659); the Court's May 5, 2011 order which denied Defendants' Motion to Amend Partial Final Judgment Under Fed. R. Civ. P. 59(e) (Docket No. 664), struck certain "superfluous, redundant and improper allegations" from DC's counterclaims, and directed Plaintiffs to renew their Rule 54(b) motion; and the Court's May 17, 2011 order granting Plaintiff's Renewed Motion for Entry of a Partial Judgment Under Fed. R. Civ. P. 54(b) and For Stay of Remaining Claims Pending Appeal Pursuant to the Court's May 5, 2011 order (Docket No. 667):

IT IS ORDERED AND ADJUDGED that pursuant to the Copyright Act, 17 U.S.C.§ 304(c), Plaintiffs validly terminated on April 16, 1999 all prior grants, assignments or transfers to any of the Defendants and any of their predecessors-in-interest, of the renewal copyrights in and to *Action Comics*, No. 1, as well as *Action Comics,* No. 4, *Superman,* No. 1 (pages 3-6), and the first two weeks of the Superman newspaper strips, and that as of April 17, 1999, Plaintiffs owned and continue to own fifty percent (50%) of the aforesaid recaptured copyrights.

IT IS FURTHER ORDERED AND ADJUDGED that counterclaimant DC Comics' First Counterclaim, which sought to invalidate the termination, is DENIED for the reasons set forth in the Court's March 26, 2008 order.

IT IS FURTHER ORDERED AND ADJUDGED that the Second Counterclaim is DENIED, as Plaintiffs' claims for declaratory relief were brought within the relevant statute of limitations period.

IT IS FURTHER ORDERED AND ADJUDGED that the Third and Fourth Counterclaims are DENIED, as the parties did not enter into a settlement agreement.

IT IS ORDERED AND ADJUDGED that, finding no just reason for delay, the

Court's orders dated March 26, 2008 (Docket No. 293), August 12, 2009 (Docket No. 560), and October 30, 2009 (Docket No. 595) are CERTIFIED AS FINAL, and JUDGMENT IN THIS ACTION IS HEREBY ENTERED PURSUANT TO FED. R. CIV. P. 54(b) on the First Claim of the Third Amended Complaint, and the First, Second, Third and Fourth Counterclaims of the Second Amended Counterclaims.

Dated: 5/17/'11

OTIS D. WRIGHT

Hon. Otis D. Wright II

EXHIBIT HH

Action Comics #4

Cover Date: September 1938
Approx. On Sale Date: August 2, 1938
Cover Price: $0.10
Page Count: 64
Editor: Vincent A. Sullivan
Cover Artist: Leo E. O'Mealia

Stories:
Superman : (Superman, Gridiron Hero)
Chuck Dawson : (No Title)
Pep Morgan : "The All-Star Althlete"
"The Menace of the Hills"
Marco Polo : (No Title)
Tex Thomson : (The Sealed City)
Scoop Scanlon : (Brady's Revenge)
Inspector Donald and Bobby : (No Title)
Zatara : "The Night Club Murder"

Series Navigation:

View Series Gallery