Appeal Nos. 11-55863, 11-56034

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAURA SIEGEL LARSON,
Plaintiff, Counterclaim-Defendant, Appellant, and Cross-Appellee,

v.

WARNER BROS. ENTERTAINMENT INC. AND DC COMICS,
Defendants, Counterclaimants, Appellees, and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE OTIS D. WRIGHT II, JUDGE
CASE NO. CV-04-8400 ODW (RZX)

MOTION TO SUPPLEMENT THE RECORD WITH THE MARKS MEMO

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Warner Bros. Entertainment Inc. and DC Comics (collectively, "DC") respectfully move to supplement the record with one document that this Court recently ordered defendants to produce. *In re Pacific Pictures Corp.*, 2012 WL 1640627 (9th Cir. May 10, 2012). The document directly relates to the first question DC presents in its cross-appeal; its consideration will not cause unfair surprise nor raise questions of authenticity; and, although the contents of the document were described in the record below in another document, the document at issue was unavailable to DC when it filed its opening brief in this appeal. Supplementation of the record is thus appropriate. *Mangini v. U.S.*, 314 F.3d 1158, 1160-61 (9th Cir. 2003); *Overstreet ex rel. NLRB v. United Bd. of Carpenters & Joiners of Am., Local 1506*, 409 F.3d 1199, 1204 n.7 (9th Cir. 2005). A copy of the Proposed Reply Excerpts of Record ("RER") is concurrently filed.

1. Larson cannot dispute the authenticity of the recently produced document. Nor can she dispute that the failure to include the document in the record below was not due to any fault or neglect on DC's part. The recently produced document at issue—the "Marks Memo"—comes from the collection of "Toberoff Timeline" documents that plaintiff Laura Siegel Larson and her co-defendants in the related *Pacific Pictures* case finally produced to DC on May 14, 2012. DC has been trying to obtain copies of these documents since July 2006. Declaration of Ashley Pearson ("Pearson Decl.") Ex. A. DC also argued to the

district court in 2009 that the Timeline documents, and especially the "Marks Memo" that DC requests this Court to consider here, were relevant to the settlement issue that DC presents on this appeal. *Id.* Ex. B at 50-55; DCB-5, 25.

2. Larson and her co-defendants asserted privilege over the Timeline documents, but the district court and this Court held that defendants waived any privilege that existed in them by "voluntarily" providing them to the government in 2010. *Pacific Pictures*, 2012 WL 1640627, at *5-6. Defendants moved for a stay, which would have kept DC from obtaining or using the Timeline documents in this appeal (and a related SLAPP appeal), Pearson Decl. Ex. C, but the courts denied defendants' motions, *id.* Exs. D, E. Defendants finally produced the Timeline documents five weeks ago, 10 days before filing their opposition to DC's cross appeal.

3. The Marks Memo is an August 9, 2002, memo written by the Siegels' former counsel, Kevin Marks, to Larson and her mother Joanne Siegel, and Don Bulson, counsel for Larson's half-brother Michael Siegel. RER-13-14. The memo directly supports DC's primary defense in this case—*i.e.*, that Larson's claims are barred by an October 2001 settlement agreement with DC, as DC argues in its first question presented. DCB-5, 25-37; DC Reply 2-15.

In his 2002 memo, Marks repeatedly affirms that the Siegels and DC made a "deal" in 2001. RER-13-14. He recounts that when Toberoff approached him with

an offer to buy the Siegels' Superman rights, he told "Toberoff that the Siegel Family had reached an agreement with D.C.," and that he "did not feel that it was appropriate to be making offers while [he] was in the process of documenting an existing deal." RER-13. Marks' letter also conveys a hard offer from Toberoff to the Siegels, but counsels against accepting it, saying: "I believe an agreement was reached last October with D.C. Comics, albeit subject to documentation. (If called to testify, I would have to testify as much.)" *Id.* Marks recommended the Siegels "continue to negotiate the documentation [of the October 2001 agreement] in good faith with D.C.," and warned the Siegels if they did not do so, DC would likely file suit against them and Toberoff to enforce its rights. RER-13-14.

4. Besides refuting Larson's arguments on appeal that no "agreement" was ever reached, LOR-13-17, these admissions by Larson's admitted agent (Marks), RER-9, run contrary to positions she took before the district court in obtaining summary judgment on DC's settlement defense, SER-561. Larson told the district court "no agreement was ever consummated," SER-549, because even though Marks "styled" his October 19, 2001, letter to DC as an " 'acceptance' of [DC's] 'offer,'" it was really intended as a "counter-offer," *id.* Marks' repeated admissions to Larson that "*an agreement* was reached last October with D.C.," RER-13, refutes this contention and makes clear that Marks—the author of the October 19 letter—knew his letter was an *acceptance*, and a deal was made.

The district court relied on Larson's representations in finding that there was "no unequivocal acceptance of an offer and, thus, no agreement" in October 2001, ER-200, and Larson now urges this Court to accept the same argument on appeal, LOR-16. Moreover, in her Third Brief on Cross-Appeal, Larson provides the Court with a litany of alleged "material differences" between Marks' October 19 letter and a later long-form agreement, as well as a letter that John Schulman of DC sent to Marks on October 26, 2001. LOR-17-24. Marks' memo undercuts the very premise of Larson's argument—if an "agreement was reached" on October 19, as Marks told Larson in 2002, then the terms of the October 19 letter are binding, and any differences in later communications are irrelevant. DCB-32-33.

5. The Marks Memo verifies evidence that was already in the record before the court below—evidence Larson challenged as inaccurate. For instance, the Toberoff Timeline itself (which is in the record and was before the district court in this case, in early 2009, SER-182-88) describes the events leading up to the Marks Memo and its contents:

> On August 8, 2002, MT [Marc Toberoff] tells Marks that he and Emanuel have a billionaire ready to offer $15 million up-front, plus what they promise to be meaningful participation from proceeds for exploitation of the Siegels' rights to SUPERMAN and some continued royalties on an ongoing basis in all media. Kevin Marks says to the Siegels, 'Don't do it." …
>
> *In their very first conversation, Kevin Marks tells MT "no go" --- that the Siegels have already reached an agreement with Time Warner and DC Comics.*

> *Marks conveys MT's offer to the Siegels, and Marks does say to the Siegels, it is a better offer than the one you have. However, Marks also tells the Siegels that he would testify in court against the Siegels if they accepted this offer because he believes there has already been an agreement reached [with DC].*

SER-183 (emphasis added). Based on the Timeline's disclosure in 2008, DC asked the district court in 2009 to re-open discovery, so that DC could gain access to the Marks Memo and its admissions concerning DC's settlement defense. Pearson Decl. Ex. B at 37-38, 50-55. Toberoff discounted the Timeline as a "conspiratorial rant," *id.* at 38-39, and the district court refused to reopen discovery, *id.* Ex. F. The recently produced Marks memo verifies the accuracy of this part of the Timeline—a document which the district court chose not to address.

6. This Court has inherent authority to grant a motion to supplement the record. *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003). The evidence is relevant to the most important issue on appeal, and there is no fault on DC's part in failing to submit the Marks Memo sooner. *Mangini*, 314 F.3d at 1160-61; *Colbert v. Potter*, 471 F.3d 158, 165-66 (D.C. Cir. 2006) (supplementing record where evidence "go[es] to the heart of the contested issue, [and] it would be inconsistent with this court's own equitable obligations … to pretend that [it does] not exist").

DC obtained a court order from the district court, in May 2011, compelling that the Timeline documents be produced—this was *before* Larson filed her notice of appeal on this interlocutory appeal. *Pacific Pictures*, 2012 WL 1640627, at *2;

ER-230-31. Larson impeded DC's efforts to obtain the Marks Memo and present it to the district court (and new district judge handling this matter) before this appeal was noticed, by pursuing their writ petition, which this Court ultimately denied in April 2011. *Pacific Pictures*, 2012 WL 1640627.

Appellate courts supplement the record when the omission of relevant evidence could result in an incomplete account of the facts. *Mangini*, 314 F.3d at 1160-61 (supplementing record with newly discovered letters refuting party's misstatements below); *Colbert*, 471 F.3d at 165-66 (supplementing record with front of canceled envelope, when only back had been submitted below).

Granting this motion to supplement presents no risk of unfairness or surprise. Larson and her counsel have possessed the Marks Memo for years, and DC, since 2009, has pressed its relevance. *Mangini*, 314 F.3d at 1160-61; *More Light Invs. v. Morgan Stanley DW Inc.*, 415 F. App'x 1, 2 (9th Cir. 2011). Nor can defendants question the authenticity of the memo—they produced it from their own files. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (judicial notice appropriate where "neither party disputes the authenticity" of evidence); *Valdivia v. Schwarzenegger*, 599 F.3d 984, 994 (9th Cir. 2010) (same).

7. The Court should grant DC's motion to supplement the record with the Marks Memo. To be clear, consideration of the Marks Memo is not necessary for the Court to hold that judgment should be entered in DC's favor or that, at a

minimum, the district court's summary judgment order must be reversed and the case remanded for a trial on DC's settlement and statute-of-limitations defenses. Supplementing the record with the Marks Memo should occur, however, to ensure a full and fair consideration of this case. *Mangini*, 314 F.3d at 1160-61; *Nat'l Senior Citizens Law Ctr. v. Soc. Sec. Admin.*, 849 F.2d 401, 403 & n.3 (9th Cir. 1988); *Mitleider v. Hall*, 391 F.3d 1039, 1041 n.1 (9th Cir. 2004).

Respectfully submitted,

Dated: June 19, 2012

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli
Daniel M. Petrocelli
Attorneys for Warner Bros. Entertainment and DC Comics

DECLARATION OF ASHLEY PEARSON

I, Ashley Pearson, declare and state as follows:

1. I am an attorney licensed to practice in the State of California and admitted to practice before the United States Court of Appeals for the Ninth Circuit. I am an associate at O'Melveny & Myers LLP, counsel of record for DC in the above-entitled appeal, and the related appeals in *DC Comics v. Pacific Pictures Corp.*, Appeal Nos. 11-56934, 11-71844. I make this declaration in support of DC's Motion To Supplement The Record With The Marks Memo.

2. Attached hereto as Exhibit A is a true and correct copy of excerpts from DC's Notice Of Motion And Joint Stipulation Re: Defendants' Motion To Compel Production Of Whistle-Blower Documents, filed in this case in the U.S. District Court for the Central District of California, Case No. CV 04-8400, on March 26, 2007.

3. Attached hereto as Exhibit B is a true and correct copy of excerpts from DC's Notice Of Motion And Joint Stipulation Re: Defendants' Motion To Reopen Discovery, To Compel Production Of Documents, And To Compel The Further Deposition Of Kevin Marks, filed in this case in the U.S. District Court for the Central District of California, Case No. CV 04-8400, on March 2, 2009.

4. Attached hereto as Exhibit C is a true and correct copy of Petitioners' Motion For Stay Pending Decision On Petition For Rehearing And For Rehearing

En Banc filed with this Court in *In re Pacific Pictures* ("*Pacific Pictures*"), Appeal No. 11-71844, on May 8, 2012.

5. Attached hereto as Exhibit D is a true and correct copy of an order issued by the U.S. District Court for the Central District of California in the related case, *DC Comics v. Pacific Pictures Corp.*, Case No. CV 10-03633 ODW (RZx), on May 7, 2012.

6. Attached hereto as Exhibit E is a true and correct copy of an order issued by this Court in *Pacific Pictures*, Appeal No. 11-71844, on May 10, 2012.

7. Attached hereto as Exhibit F is a true and correct copy of an excerpt from the Final Pre-Trial Conference Order, issued by the U.S. District Court for the Central District of California in this case, Case No. CV 04-8400, on March 13, 2009.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration is executed this 19th day of June, 2012, at Los Angeles, California.

/s/ Ashley Pearson
Ashley Pearson

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 27(d)

Pursuant to Federal Rules of Appellate Procedure 27(d) and 32(a), I certify that Appellee DC Comics' brief is proportionately spaced, has a typeface of 14 points or more, and does not exceed 20 pages.

Dated: June 19, 2012

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli
Daniel M. Petrocelli
Attorneys for DC and Warner Bros.

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2012, I caused to be electronically filed the Motion To Supplement The Record With The Marks Memo with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all interested parties in this case are registered CM/ECF users.

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on June 19, 2012, at Los Angeles, California.

/s/ Ashley Pearson
Ashley Pearson