Laura Larson v. Warner Bros Entertainment, Inc, et al Doc. 50 Att. 1

EXHIBIT A

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WEISSMANN WOLFF BERGMAN
COLEMAN GRODIN & EVALL LLP
Michael Bergman (SBN 37797)
Anjani Mandavia (SBN 94092)
9665 Wilshire Boulevard, Ninth Floor
Beverly Hills, California 90212
Telephone: 310-858-7888
Fax: 310-550-7191

FROSS ZELNICK LEHRMAN & ZISSU, P.C.
Roger L. Zissu (Admit ed *pro hac vice*)
866 United Nations Plaza
New York, New York 10017
Telephone: 212-813-5900
Fax: 212-813-5901

PERKINS LAW OFFICE, P.C.
Patrick T. Perkins (Admitted *pro hac vice*)
1711 Route 9D
Cold Spring, NY 10516
Telephone: 845-265-2820
Fax: 845-265-2819

At orneys for Defendants and Counterclaimant

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

JOANNE SIEGEL and LAURA SIEGEL LARSON,

Plaintiffs,

vs.

TIME WARNER INC., WARNER COMMUNICATIONS INC., WARNER BROS. ENTERTAINMENT INC., WARNER BROS. TELEVISION PRODUCTION INC., DC COMICS, and DOES 1-10,

Defendants.

AND RELATED COUNTERCLAIMS.

Case Nos. [Consolidated for Discovery]
CV 04-8400 SGL (RZx)
CV 04-8776 SGL (RZx)
Hon. Stephen G. Larson, U.S.D.J.
Hon. Ralph Zarefsky, U.S.M.J.

NOTICE OF MOTION AND JOINT STIPULATION RE: DEFENDANTS' MOTION TO COMPEL THIRD PARTY KEVIN MARKS AND PLAINTIFF LAURA SIEGEL LARSON TO ANSWER QUESTIONS AT DEPOSITION

DISCOVERY MATTER
LOCAL RULE 37

Time: 10:00 a.m.
Date: April 16, 2007
Courtroom 540
Mag. Judge Ralph Zarefsky
Discovery Cutoff: Nov. 17, 2006

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JOINT STIPULATION

I. DEFENDANTS' INTRODUCTORY STATEMENT

Defendants Warner Bros. Entertainment Inc., Warner Bros. Television Production Inc., Warner Communications Inc., Time Warner Inc., and defendant and counterclaimant DC Comics (collectively "Defendants") bring this motion to compel answers to certain questions posed to Plaintiffs' prior transactional attorney and to Plaintiff Laura Siegel Larson concerning such attorney's authority to act with respect to the parties' settlement in October 2001 of all of Plaintiffs' claims herein.

More specifically, Defendants seek to compel Kevin Marks, the former transactional attorney of Plaintiffs Joanne Siegel and Laura Siegel Larson ("Plaintiffs"), to respond to seven specific questions that Plaintiffs' counsel prevented Mr. Marks from answering at his deposition by improperly asserting the attorney-client privilege -- questions relating to his authority to act for Plaintiffs in connection with that settlement. Defendants also request that Ms. Siegel Larson herself be ordered to answer two questions on Mr. Marks' authority which Plaintiffs' counsel similarly prevented her from answering by improperly asserting the attorney-client privilege. These questions to such deponents were narrowly tailored to seek only *non-confidential information* – information that was *intended to be communicated* to a third party (namely, certain of the Defendants) in connection with a settlement agreement between Plaintiffs and Defendants and therefore did not qualify for protection under the attorney-client privilege in the first instance. Because the answers to those questions bear upon Plaintiffs' continued assertion regarding Mr. Marks' authority (or lack thereof) to enter into a settlement agreement on behalf of Plaintiffs, it is critical that Defendants be allowed to re-ask those discreet questions of both witnesses, as well as any reasonable follow-up questions on

issues relating to Mr. Marks' authority or regarding communications that Plaintiffs authorized Mr. Marks to make to Defendants.

As the Court is aware, defendant DC Comics ("DC") has interposed a counterclaim in these actions, alleging that Plaintiffs had previously fully and finally settled all of the claims which they are purporting to assert here. (*See* Bergman Decl., Ex. A, ¶¶ 47-56; Ex. B, ¶¶ 47-56.) This Counterclaim alleges that the terms of the parties' settlement were set forth in a letter from Mr. Marks acting as their attorney dated October 19, 2001. (*Id.*) Mr. Marks' and Plaintiffs' depositions were taken as a part of Defendants' efforts to establish DC's counterclaim, and to discover the bases for Plaintiffs' stated defenses to that counterclaim. The central seven questions to Mr. Marks and central two questions to Plaintiff Laura Siegel Larson at issue in this motion focused on one critical issue: Whether Plaintiffs had in fact authorized Mr. Marks to communicate to DC's attorneys his clients' acceptance of DC's settlement offer of October 16, 2001, as specifically represented in Mr. Marks' acceptance letter of October 19, 2001. Because Plaintiffs' current litigation counsel objected to these questions on the stated basis of the attorney-client privilege, Mr. Marks and Ms. Siegel Larson declined to answer the questions, and Defendants were forced to bring this motion.

The only issue presented to the Court in this motion is whether the attorney-client privilege protects communications between a client and an attorney *that were intended to be conveyed to a third party*. It is evident from the case law that the answer to that question is no – in both a general sense and in the specific context of communications regarding settlement authority. In other words, if a client does not intend a communication to her attorney to remain confidential in the first instance, then that communication cannot be protected by the attorney-client privilege. Under this case law, therefore, Plaintiffs' attorney-client privilege objections should be overruled and Mr. Marks and Ms. Siegel

Larson should be required to re-appear for deposition and ordered to respond to the unanswered questions regarding Mr. Marks' settlement authority, along with any reasonable follow-up questions on that issue.

II. PLAINTIFFS' INTRODUCTORY STATEMENT

Plaintiffs Joanne Siegel and Laura Siegel Larson ("Plaintiffs") are the widow and daughter, respectively, of Jerome Siegel ("Siegel"), the co-author of the world renowned comic book hero, "Superman," and the author of "Superboy." This case arises out of Plaintiffs' proper exercise of their right under section 304(c) of the 1976 United States Copyright Act, 17 U.S.C. § 304(c), to recapture Siegel's original copyrights in "Superman" and "Superboy" by serving statutory notices on the defendants herein ("Defendants") on April 3, 1997 and March 8, 2002, respectively terminating Siegel's prior grant(s) of "Superman" and "Superboy" to Defendants' predecessor(s) (the "Termination(s)").

Plaintiffs' Terminations complied with all the requirements of 17 U.S.C. § 304(c) and 37 C.F.R. § 201.10, the regulations promulgated thereunder by the Register of Copyrights. Accordingly, on April 16, 1999, the noticed "Superman" termination date, all rights Siegel conveyed in "Superman" to Defendants' predecessors duly reverted to Plaintiffs. On November 17, 2004, the noticed "Superboy" Termination date, all rights that Siegel had conveyed in "Superboy" to Defendants' predecessors duly reverted to Plaintiffs.

Shortly after Plaintiffs served their "Superman" Termination notices the general counsel of Defendant Warner Bros. Entertainment Inc. ("WB") and the President of Defendant DC Comics ("DC") both acknowledged the validity of the "Superman" Termination and the parties began negotiations for Defendants' licensing of the Plaintiffs' recaptured copyright interests. By October 19, 2001, Plaintiffs believed that the parties had agreed on certain deal points, subject, of course, to their proper articulation in an acceptable written agreement; however,

it soon became apparent from October 26, 2001 correspondence from Defendants, setting forth different terms and a different understanding, that this was *not* the case. Ultimately, negotiations broke down by early 2002 when Defendants unilaterally modified the terms in a very one-sided fashion and added aggressive new terms, both of which were completely unacceptable to Plaintiffs. Consequently, no agreement was made or executed by the parties.

Defendants neither claimed that a supposed settlement agreement had been entered into, nor attempted to perform or tender performance under any such purported agreement.

Plaintiffs commenced the within declaratory relief actions regarding the validity and effect of the "Superman" and "Superboy" Terminations on October 8, 2004 and October 22, 2004, respectively. In their answers and counterclaims Defendants asserted for the very first time that they had purchased Plaintiffs' recaptured copyright interests years earlier pursuant to a purported "settlement agreement," even though it was clear from the record and the parties' conduct that no such agreement had ever been consummated.

In pursuit of their purported settlement defense, Defendants now seek to retake the deposition of Plaintiffs' former transactional attorney Kevin Marks ("Marks"), and *for the second time* improperly move to retake the deposition of Plaintiff Laura Siegel Larson on the erroneous basis that both individuals must answer further questions "*regarding*" Marks' settlement authority to send an October 19, 2001 letter. Defendants' motion is marred by a complete failure to provide supporting case law and willful blindness towards the fact that the information purportedly sought by Defendants has already been provided to them.

The purported question of authority is plainly a *red-herring* used by Defendants in an ongoing attempt to invade the protected sanctum of the attorney-client relationship, and improperly reargue issues previously raised in

violation of the Central District's Local Rule 7-18. There is *no question* that Marks had authority as Plaintiffs' representative to conduct settlement negotiations with Defendants. This does not mean, however, that the content of Plaintiffs' privileged communications with Marks regarding such negotiations lose their protected status.

III. DEFENDANTS' CONTENTIONS

A. The Relevant Background

As this Court is aware from prior briefings in this matter, DC has asserted counterclaims against Plaintiffs seeking to enforce a 2001 settlement agreement that Defendants allege resolved all claims between the parties with respect to Plaintiffs' purported right to recapture their copyright interests in the Superman and/or Superboy property. (*See* Bergman Decl., Ex. A, ¶¶ 47-56; Ex. B, ¶¶ 47-56.) In response, Plaintiffs have asserted that no settlement was reached, and have interposed, *inter alia*, the affirmative defense that the settlement agreement was beyond the authority of Plaintiffs' attorneys at the time, namely Mr. Marks. (*See* Bergman Decl., Ex. C, ¶ 183 ("Plaintiffs' attorneys lacked authority and/or exceeded the scope of their authority with respect to the purported settlement agreement alleged by counterclaimant."); Ex. D, ¶ 177 (same).) Accordingly, part of Defendants' discovery efforts have focused on learning the facts behind the parties' apparent settlement, the reasons Plaintiffs walked away from the settlement that Mr. Marks acknowledged in his October 19, 2001 letter to DC's counsel, and the basis for Plaintiffs' contention that Mr. Marks did not have authority to enter into that settlement in the first instance.

Mr. Marks' deposition was taken by Defendants on October 7, 2006. During that deposition, Mr. Marks testified that his law firm, Gang, Tyre, Ramer & Brown ("Gang Tyre"), was hired by Plaintiffs in early 1999 to represent them in negotiating an agreement with DC regarding the Superman property. (Bergman Decl., Ex. E, Marks Dep. at 21:14 - 22:9.) Mr. Marks was the

Plaintiffs' principal representative at Gang Tyre in these negotiations. (*Id.*, Marks Dep. at 24:15 - 25:10.) The negotiations culminated in October, 2001, following extensive discussions between the parties over the course of the prior few years. Specifically, Mr. Marks testified that on October 16, 2001, he had a telephone conversation with DC's representative, John Schulman, at which time the parties resolved the outstanding issues between them. (*Id.*, Marks Dep. at 132:11 - 134:11.)

On October 19, 2001, Mr. Marks sent a letter to Mr. Schulman specifically stating that "The Siegel Family (through Joanne Siegel and Laura Siegel Larson, the majority owners of the terminated copyright interests) *has accepted D.C. Comics offer of October 16, 2001 in respect of the 'Superman' and 'Spectre' properties*." (Bergman Decl., Ex. E; emphasis added.) That letter described the material terms of the settlement agreement between the Siegels and DC, which terms had been finalized and resolved in the October 16, 2001 telephone conference between Mr. Marks and Mr. Schulman. (Bergman Decl., Ex. E, Marks Dep. at 132:11 - 134:11.)

The parties exchanged correspondence thereafter, and a draft long-form agreement was sent by DC's counsel to Mr. Marks in February, 2002. (Bergman Decl., Ex. G.) No long form agreement was ever finalized or executed, however, and Mr. Marks' and Gang Tyre's representation of Plaintiffs was terminated in September, 2002. (Bergman Decl., Ex. H.)

Plaintiff Laura Siegel Larson's deposition was taken by Defendants earlier on August 1, 2006, and Plaintiff Joanne Siegel's deposition took place on August 2. During those depositions, Defendants similarly sought to inquire into, among other things, the authority of Plaintiffs' former counsel, Mr. Marks, to send the October 19, 2001 settlement letter. Laura Siegel Larson testified that Plaintiffs saw Mr. Marks' October 19, 2001 settlement letter on or about or shortly after it was sent to Defendants but that instead of it saying the Siegels "accepted D.C.

Comics offer of October 16, 2001," Mr. Marks' letter was meant to mean or should have said Plaintiffs only "conditionally approved" the deal points stated therein. (Bergman Decl., Ex. I, Siegel Larson Dep. Tr. at 125:1 - 126:3.)

In connection to an earlier motion of Defendants seeking to compel Plaintiffs to produce documents as to which Plaintiffs asserted the attorney-client privilege concerning the parties' settlement negotiations in 2001, the Court decided that there had been no waiver of privilege as to Plaintiffs' communications with Mr. Marks by reason of Plaintiffs' denial of Defendants' request to admit that Mr. Marks was authorized to send the above-noted October 19, 2001 letter. (Bergman Decl., Ex. J.) When Defendants moved for reconsideration on the basis that Plaintiffs had waived any privilege with respect to these documents in pleading their affirmative defense that Mr. Marks' letter was beyond his authority (*See* Bergman Decl., Ex. C, ¶ 183; Ex. D, ¶ 177), the Court declined to reconsider its prior ruling, *inter alia*, in view of what it considered inadequate exploration of the effect on Defendants request for relief of the assertion in opposition by Plaintiffs' counsel that Plaintiffs intended to withdraw this affirmative defense. (Bergman Decl., Ex. K at 2). However, Plaintiffs have never withdrawn this defense.

Throughout both of the depositions of Plaintiffs, Plaintiffs' counsel instructed them not to answer many questions on the basis of the attorney-client privilege, including those at issue here concerning Ms. Marks' settlement authority.

Plaintiffs have taken the position in this litigation that no settlement was reached with DC in October, 2001, or at any time. Plaintiffs have also taken the position that the subsequent communications and dealings between the parties establish that no such agreement was extant. But while the parties have differing interpretations and arguments about the course of their dealings, and the impact of their subsequent actions on the formation or enforceability of an agreement,

the *sole* issue on which this motion is focused is whether Plaintiffs authorized Mr. Marks to send his October 19, 2001 communication to DC's representatives accepting DC's settlement offer.

B. The Deposition Questions at Issue

1. Questions Not Answered By Mr. Marks

Mr. Marks' deposition was taken by counsel for Defendants, Michael Bergman. Mr. Marks was represented at deposition by Marc Marmaro, and Plaintiffs were represented by Marc Toberoff. Although Mr. Marks answered a number of questions about Gang Tyre's and Mr. Marks' representation of Plaintiffs, including questions about the initiation and termination of the attorney-client relationship and the parties' settlement negotiations, he refused upon Mr. Toberoff's objection to answer questions regarding whether his clients, Joanne and Laura Siegel Larson, had authorized him to communicate their acceptance of DC's settlement offer – as expressly stated in his October 19, 2001 letter – and whether they imposed any limitations or conditions on his settlement authority that Mr. Marks should have conveyed to DC.

That line of inquiry comprised seven separate questions. As to each of those questions, Plaintiffs' counsel, Marc Toberoff, invoked the attorney-client privilege. Deferring to Mr. Toberoff's privilege objections, Mr. Marks' counsel, Mr. Marmaro, instructed him not to answer. Defendants contend that the objections were improper, and that Mr. Marks should have answered the questions as posed. Those seven questions, along with the corresponding colloquy between Plaintiffs' counsel, Defendants' counsel, and Mr. Marks' counsel, follow:

> [MR. BERGMAN]: The next sentence of the letter states, quote "the Siegel family (through Joanne Siegel and Laura Siegel Larson, the majority owners of the terminated copyright interests)

has accepted DC Comics' offer of October 16, 2001, in respect of the Superman and Spectre properties," close quote.

Prior to the time, Mr. Marks, that you sent this letter to Mr. Schulman, had Laura and [Joanne] authorized you to communicate to John Schulman the fact, as you state in your letter, that, quote, the Siegel family through Joanne Siegel and Laura Siegel Larson, the majority owners of the terminated copyright interests, has accepted DC Comics's offer of October 16, 2001?

MR. MARMARO: Because you framed the question in terms of calling for a communication between Mr. Marks and his clients, I'm just going to ask Mr. Toberoff if he has any objection.

MR. TOBEROFF: The way you phrased that, you're asking for -- directly asking for a communication from a client to Mr. Marks.

MR. BERGMAN: What I'm asking for, gentlemen, is what the cases say is clearly not privileged. I'm asking whether the Siegels told Mr. Marks to communicate a certain fact to Mr. Schulman. That is simply not privileged. It was intended to be communicated, and therefore it is not privileged, and I am going to -- I am very conscious of the attorney-client privilege, Mr. Toberoff. I've couched that question very carefully, and I urge you gentlemen to consider it, because I can give you a half dozen cases that say that communication was never privileged.

[Discussion of applicable case law.]

MR. TOBEROFF: This falls within the privilege, and I don't believe those cases -- and I believe if I got into those cases and a lineage of those cases, that would bear out the objection. If you

want to ask the question some other way, but that question I would assert the attorney-client privilege.

MR. MARMARO: Based on that position, we have no choice but to object and instruct, but I want to make sure it's real clear. Mr. Marks is not the holder of that privilege and has no power to waive it. The privilege has been asserted by the current counsel for the client, and I feel that he has no choice but to agree at this point to not answer that question on that basis.

(Bergman Decl. Ex. E, Marks Dep. Tr. at 135:17 - 139:1.)

Q: Between October 16, and October 19, did Joanne and Laura Siegel authorize you to communicate to John Schulman that, quote, the Siegel family through Joanne Siegel and Laura Siegel Larson, the majority owners of the terminated copyright interests, has accepted DC Comics's offer of October 16, 2001?

MR. MARMARO: Again, I'm going to have to ask Mr. Toberoff whether he wishes Mr. Marks not to answer that question.

MR. TOBEROFF: I hate to just repeat it. It's the same question. The same objection.

MR MARMARO: Based on that, I will also object and instruct him --

MR. BERGMAN: Okay.

MR. MARMARO: -- with the same statement that I made before --

MR. BERGMAN: I understand.

MR. MARMARO: -- which is we are not of the holder of a claimed privilege.

(Bergman Decl., Ex E, Marks Dep. Tr. at 140:21 - 141:14.)

Q: Between October 16 and October 19, Mr. Marks, did your clients instruct you to convey to Mr. Schulman any additional terms other than those set forth in your October 19 letter to Mr. Schulman upon which their acceptance of the October 16th offer was conditioned?

MR. TOBEROFF: Objection. Vague and ambiguous as to what is the October 16th offer, and attorney-client privileged communication as to the instructions from the client.

MR. MARMARO: And based on that objection, we also object and instruct.

(*Id.*, Marks Dep. Tr. at 141:17 - 142:2.)

Q: Between October 16 and 19 did Laura Siegel and Joanne Siegel instruct you to convey to Mr. Schulman any limitations other than those set forth in your October 19 letter to Mr. Schulman upon which their acceptance of the October 16 offer was conditioned?

MR. TOBEROFF: Same objections.

MR. MARMARO: For the same reasons I'll join in those objections and instruct.

(*Id.*, Marks Dep. Tr. at 142:5 - 142:12.)

Q: Between October 16 and October 19 did your clients instruct you to convey to Mr. Schulman any conditions subsequent, other than those set forth in your October 19 letter to Mr. Schulman, upon the occurrence of which acceptance of the October 16 offer would be negated?

MR. TOBEROFF: Same objection, and I will add vague and ambiguous and compound.

MR. MARMARO: It also calls for a legal conclusion, but based on the objections, which I understand include the attorney-client privilege being asserted by the holder -- counsel for the holder of the privilege, I'll object and instruct.

(Bergman Decl, Ex. E, Marks Dep. Tr. at 142:15 - 143:2.)

Q: Okay. Had you in fact been authorized to accept the October 16 offer?

MR. TOBEROFF: Objection --

MR. MARMARO: On the basis of privilege?

MR. TOBEROFF: Yes. And same objections as to the word "offer." Vague and ambiguous.

MR. MARMARO: And calls for a legal conclusion. And then based on Mr. Toberoff's privilege objection, I will also object and instruct on that ground.

(*Id.*, Marks Dep. Tr. at 146:6 - 146:14.)

Q: Prior to sending this letter, had you been authorized by your clients to communicate their acceptance of the October 16, 2001 offer?

MR. TOBEROFF: Same objection. Asked and answered. Same objection. Vague and ambiguous. Attorney-client privilege --

MR. MARMARO: Based --

MR. TOBEROFF: -- it calls for a legal conclusion.

MR. MARMARO: Based on that, we will also object, and I will instruct.

(*Id.*, Marks Dep. Tr. at 146:21 - 147:6.)

In response to Mr. Toberoff's initial attorney-client privilege objection to the line of questioning described above, Mr. Bergman provided counsel with citations to cases standing for the proposition that communications between an

attorney and client that are intended to be communicated to a third party are not protected by the attorney-client privilege. (Bergman Decl, Ex. E, Marks Dep. at 136:12 - 138:5.) Nonetheless, Mr. Toberoff stood by his privilege assertions, which Mr. Marks' attorney Mr. Marmaro followed, and Mr. Bergman concluded the deposition with his authority questions left unanswered.

2. Questions Not Answered by Plaintiff Laura Siegel Larson

Plaintiff Laura Siegel Larson's deposition was taken by counsel for Defendants, Roger L. Zissu. Plaintiffs were represented by Marc Toberoff. Although Ms. Siegel answered a number of questions about Gang Tyre's and Mr. Marks' representation of Plaintiffs, including questions about the initiation and termination of the attorney-client relationship and the parties' settlement negotiations, she refused upon Mr. Toberoff's objection to answer questions regarding whether she and her mother Joanne Siegel, had authorized Mr. Marks to communicate their acceptance of DC's settlement offer – as expressly stated in his October 19, 2001 letter – and whether they, in fact, imposed on him any limitations or conditions on his settlement authority that Mr. Marks did or should have conveyed to DC.

That line of inquiry included two separate questions at issue here concerning the acceptance of Defendants' offer confirmed in the October 19, 2001 letter. As to each of those questions, Plaintiffs' counsel, Marc Toberoff, invoked the attorney-client privilege and instructed the witness not to answer. Ms. Siegel followed these instructions. Defendants contend that the objections were improper, and that Ms. Siegel should have answered the questions as posed. Those two questions and Mr. Toberoff's instructions follow:

Q: Did you ever object to the – to Kevin Marks or tell DC Comics that you didn't approve the language in the letter?

A: I – that actually –

MR. TOBEROFF: You can't say whether you objected to Kevin Marks or not.

THE WITNESS: No. I was just going to say that's calling for me to discuss a private conversation that I had with my attorney.

(Bergman Decl., Ex. I, Siegel Larson Dep. Tr. at 128:3-11.)

Q: Did you ever instruct Mr. Marks to communicate to the lawyers for DC Comics that there should be a correction made in his letter?

MR. TOBEROFF: Objection. Attorney-client-privilege. Instruct you not to answer.

(*Id.*, Siegel Larson Dep. Tr. at 129:17-22.)

Notwithstanding the colloquy of Defendants' counsel with Plaintiffs' counsel at various points throughout the Plaintiffs' depositions in an attempt to have him withdraw such instructions not to respond, Mr. Toberoff stood by his privilege instructions, which the witness followed, and Mr. Zissu concluded the deposition with these authority questions left unanswered.

C. Compliance with Local Rule 37-1

Defendants initiated the joint stipulation process with respect to Mr. Marks' deposition testimony on October 13, 2006 by sending Plaintiffs' attorney a letter requesting a conference of counsel pursuant to Local Rule 37-1. (Bergman Decl., Ex. L.) Defendants earlier initiated the joint stipulation process with respect to Ms. Laura Siegel Larson's refusals to answer on August 31, 2006 by sending Plaintiffs' attorney a letter requesting a conference of counsel pursuant to Local Rule 37-1. (Weinberger Decl., Ex. A.) Counsel subsequently conducted conferences addressing the issues raised in such meet and confer letters, namely, Mr. Toberoff's improper assertions of attorney-client privilege objections to the questions listed above. (Bergman Decl., ¶ 2; Weinberger Decl., ¶ 2.) However, the parties were unable to resolve their disputes.

D. Argument

1. Plaintiffs' Privilege Objections Are Improper

For the reasons set forth herein, Defendants submit that the Court should overrule Plaintiffs' privilege objections to the seven disputed questions to Mr. Marks and to the two disputed questions to Ms. Siegel Larson and compel such deponents to reappear for deposition to answer those questions and any reasonably related follow-up questions on issues concerning his settlement authority or other communications Plaintiffs authorized Mr. Marks to make to Defendants.

Although an instruction not to answer on the basis of the alleged irrelevance of a question is prohibited by Rule 30(d)(1) of the Federal Rules of Civil Procedure, the standards for permissible discovery are broad. Federal Rule of Civil Procedure 26 "contemplates discovery into any matter that bears on or that reasonably could lead to other matter that could bear on any issue that is or may be raised in a case." *Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Sys., Inc.*, 2006 U.S. Dist. LEXIS 53187 at *8 (N.D. Cal. Aug. 1, 2006). There is no doubt that the deposition questions at issue call for information that falls within the broad scope of discovery provided for under Rule 26; indeed, the settlement issue is directly implicated by the pleadings of both parties. (*See* Bergman Decl., Exs. A-D.) The question presented to this Court, however, is whether the testimony requested in those seven questions to Mr. Marks and two questions to Plaintiff Laura Siegel Larson may be shielded from discovery by the attorney-client privilege.

Plaintiffs, as the party asserting the attorney-client privilege, have the burden of persuading the Court that it should apply. *Id.* at *9 ("In determining whether disclosure of privileged communications is required, the burden of persuasion rests on the party claiming the privilege."); *see also United States v. Martin*, 278 F.3d 988, 999-1000 (9th Cir. 2002) ("The burden is on the party

asserting the privilege to establish all the elements of the privilege."); *In re Napster, Inc. Copyright Litigation*, 2005 U.S. Dist. LEXIS 11497 at *9 (N.D. Cal. Apr. 12, 2005) ("because evidentiary privileges 'impede the full and fair discovery of truth,' the attorney-client privilege is 'strictly construed,' and the party claiming the privilege bears the burden of establishing its claim.").

To establish that the attorney-client privilege applies, a party must demonstrate, among other things, that she had a confidential communication with her attorney. *See Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503, 508 (S.D. Cal. 2003) ("The attorney-client privilege attaches to '(1) communications (2) made in confidence (3) by the client (4) in the course of seeking legal advice (5) from a lawyer in his capacity as such, and applies only (6) when invoked by the client and (7) is not waived.'") (citing *United States v. Abrahams*, 905 F.2d 1276, 1283 (9th Cir. 1990)). Under this standard, information that a client does not intend to remain confidential is not privileged in the first instance. *Grand Lake Drive In, Inc. v. Superior Court*, 179 Cal. App. 2d 122, 125 (Cal. Ct. App. 1960) ("When the client does not intend his communication to be confidential, it is not privileged."); *Griffith v. Davis*, 161 F.R.D. 687, 694 (C.D. Cal. 1995) ("[C]ourts have consistently refused to apply the privilege to information that the client intends or understands may be conveyed to others."); *GTE Directories Service, Corp. v. Pacific Bell Directory*, 135 F.R.D. 187, 191 (N.D. Cal. 1991) ("It is axiomatic that no privilege can attach to a communication that was not intended to be confidential.").

Statements a client makes to her attorney regarding the attorney's authority to settle, like those at issue in this motion, present a paradigmatic example of communications that were never intended to remain confidential. After all, an attorney cannot effectively negotiate or settle a matter on behalf of his clients without communicating his clients' wishes to the attorney on the other side of the negotiations. Accordingly, a number of courts have held that communications

between a client and an attorney regarding the attorney's settlement authority are not privileged. *See, e.g., Willard C. Beach Air Brush Co. v. General Motors Corp.*, 118 F. Supp. 242, 244 (D.N.J. 1953) (privilege does not extend to "the client's grant of authority to the attorney to settle, since this must be communicated to the other party to the settlement and is thus not confidential"); *Peters v. Wallach*, 321 N.E.2d 806, 809 (Mass. 1975) ("The client's grant of authority to settle must be communicated to the other party to the settlement and is thus not confidential."); *Walsh v. Barcelona Assoc., Inc.*, 476 N.E. 2d 1090, 1093 (Ohio App. 1984) ("By its very nature, a communication from a client to his attorney conveying authority to the attorney to act on his behalf as his agent in entering into an agreement with the opposing party, is a communication which is intended to be communicated to the opposing party. Because such a conversation is not intended to be confidential, it is not privileged.").

The case of *Diversified Development & Investment, Inc. v. Heil*, 889 P. 2d 1212 (N. Mex. 1995) applied these principles in a situation similar to the one presented to this Court. In *Diversified*, plaintiff had an option to purchase certain real estate owned by defendant Estate. Shortly before the expiration of the option period, plaintiff sought to negotiate a financing modification, but requested an extension to exercise the option under the existing terms in case the modification negotiations were not fruitful. During those negotiations, Hurley, the Estate's attorney, assured plaintiff that it could exercise the original purchase option if the Estate did not agree to the financing modifications, even though the option period had already expired by that time. When the talks broke down, the Estate took the position that the option had expired, and refused to accept plaintiff's tender.

In the subsequent litigation, plaintiff sought to discover "the instructions given to Hurley by the Estate and the nature and scope of his authority in regard to the purchase option deadline." *Diversified Development*, 889 P. 2d at 1218. That information included "memos written by Hurley detailing his conversations

with [the Estate] about the [] extension request" and "withheld portions of [the Estate representative's] diary detailing conversations with [the Estate's real estate agent] and Hurley." *Id.* at 1216. The court analyzed the issue and cited the rule that "Courts have held that the attorney-client privilege does not protect the instructions or authority given by the client to his attorney." *Id.* at 1218 (citations and internal quotations omitted). The rationale for that rule, the court explained, is that "the client's grant of authority to the attorney to settle is not protected by the attorney-client privilege since this must be communicated to the other party to the settlement." *Id.* (citations and internal quotations omitted). The court concluded that "the attorney-client privilege does not prohibit Hurley from disclosing what the Estate authorized him to agree upon with or communicate to Diversified Development." *Id.* The court also ruled that the trial court had erred by excluding Hurley's memorandum and the representative's telephone conversations with Hurley: "The court should have examined those documents and allowed Diversified Development to discover those portions detailing the Estate's instructions to Hurley and the scope of his authority in connection with the extension of the option deadline." *Id.*

The same rationale applies here. The questions at issue in this motion to Mr. Marks all called for him to reveal information regarding Mr. Marks' settlement authority *that was intended to be communicated to defendants*:

- "Prior to the time, Mr. Marks, that you sent this [October 19, 2001] letter to Mr. Schulman, ***had Laura and [Joanne] authorized you to communicate to John Schulman*** the fact, as you state in your letter that, quote, the Siegel family through Joanne Siegel and Laura Siegel Larson, the majority owners of the terminated copyright interests, has accepted DC Comics's offer of October 16, 2001?" (Bergman Decl., Ex. E, Marks Dep. at 135:23 - 136:4) (emphasis added);

- "Between October 16, and October 19, ***did Joanne and Laura Siegel authorize you to communicate to John Schulman*** any additional terms other than those set forth in your October 19 letter to Mr. Schulman upon which their acceptance of the October 16th offer was conditioned?" (*Id.*, Marks Dep. at 140:21 - 141:1) (emphasis added);
- "Between October 16 and October 19, Mr. Marks, ***did your clients instruct you to convey to Mr. Schulman*** any additional terms other than those set forth in your October 19 letter to Mr. Schulman upon which their acceptance of the October 16th offer was conditioned?" (*Id.*, Marks Dep. at 141:17 - 141:21) (emphasis added);
- "Between October 16 and 19 ***did Laura Siegel and Joanne Siegel instruct you to convey to Mr. Schulman*** any limitations other than those set forth in your October 19 letter to Mr. Schulman upon which their acceptance of the October 16 offer was conditioned?" (*Id.*, Marks Dep. at 142:5 - 142:9) (emphasis added);
- "Between October 16 and October 19 ***did your clients instruct you to convey to Mr. Schulman*** any conditions subsequent, other than those set forth in your October 19 letter to Mr. Schulman, upon the occurrence of which acceptance of the October 16 offer would be negated?" (*Id.*, Marks Dep. at 142:15 - 142:20) (emphasis added);
- "Okay. ***Had you in fact been authorized to accept the October 16 offer?***" (*Id.*, Marks Dep. at 146:6 - 146:7) (emphasis added);
- "Prior to sending the letter, ***had you been authorized by your clients to communicate their acceptance*** of the October 16, 2001 offer?" (*Id.*, Marks Dep. at 146:21 - 146:23) (emphasis added).

Similarly, the questions at issue in this motion to Ms. Laura Siegel Larson all call for her to reveal information regarding Mr. Marks' settlement authority *that was intended to be communicated to defendants*:

- "***Did you ever object*** to the – ***to Kevin Marks that you didn't approve the language in the letter?***" (Bergman Decl., Ex. I, Siegel Larson Dep. at 128:3-11) (emphasis added);
- "***Did you ever instruct Mr. Marks to communicate to the lawyers for DC Comics*** that there should be a correction made in his letter?" (*Id.*, Siegel Larson Dep. at 129:17-22) (emphasis added).

As the bolded language demonstrates, counsel for Defendants never asked Mr. Marks or Ms. Siegel Larson to reveal communications that were intended to remain confidential. In fact, Ms. Siegel Larson previously testified that Plaintiffs *had* instructed Mr. Marks to communicate certain conditions to defendants:

> Q: And [Mr. Marks] should have told DC Comics, according to what you're testifying, that these deal points were accepted on the conditions you've just testified to?
>
> A: Yes.

(*Id.*, Siegel Larson Dep. at 133:1 - 133:4.) Further, Plaintiffs have expressly put at issue the question of Mr. Marks' settlement authority, by interposing the affirmative defense that he had exceeded his authority in his dealings with Defendants. It is impossible to test that defense without learning what Mr. Marks *was* authorized to do and to communicate. Therefore, and under the holding of *Diversified Development* and the other authority cited herein, Mr. Toberoff's objections to these questions based upon the attorney-client privilege were improper, and Mr. Marks and Ms. Siegel Larson should have been allowed to answer the questions as posed.

2. Even if Plaintiffs Properly Asserted the Privilege With Respect to Mr. Marks' Authority, The Privilege Has Been Waived by Virtue of Plaintiffs' Having Affirmatively Placed the Matter in Issue by Pleading their Authority Defense.

Even if the Court determines that Plaintiffs were to have properly asserted attorney-client privilege instructions to the seven questions posed to Mr. Marks and the two questions to Ms. Siegel Larson at issue on this motion, both witnesses should nonetheless be made to reappear for deposition to answer those questions on the ground that the privilege, if any exists, has been waived.

In their replies to Defendant DC's amended counterclaims Plaintiffs raise following affirmative defense: "Plaintiffs' attorneys lacked authority and/or exceeded the scope of their authority with respect to the purported settlement agreement alleged by counterclaimant." (Bergman Decl., Ex. C, ¶ 183; Ex. D, ¶ 177.) As this Court has already held, "[t]he privilege may be impliedly waived where a party to a lawsuit places into issue a matter that it is normally privileged, if the gravamen of the lawsuit is so inconsistent with the continued assertion of the privilege so as to compel the conclusion that the privilege has in fact been waived.." (Bergman Decl., Ex. J at 2 (citing *Wilson v. Superior Court*, 63 Cal. App.3d 825, 134 Cal. Rptr. 130 (1976).).[1] Plaintiffs have expressly and unequivocally pleaded their prior counsel's lack of authority in response to DC Comics' counterclaims, and thus "affirmatively plac[ed] the matter in issue" (*id.* at 3). That is, by their pleading, Plaintiffs have waived the privilege. *See Wilson v. Superior Court*, 63 Cal. App.3d 815, 134 Cal. Rptr. 130 (1976).

* * *

Accordingly, whether by virtue of the fact of their improper privilege instructions or, in the alternative, a waiver of privilege, Mr. Marks and Ms. Siegel Larson should be ordered to reappear for deposition and answer the questions identified in this motion, as well as all reasonable follow up questions relating to

[1] On the prior motion cited here, the parties mistakenly contended that Plaintiffs had not in fact pled the authority defense. When Defendants moved for reconsideration of the Court's order in light of this inadvertent error, the Court denied the motion, invited the parties to meet and confer anew and, if necessary, seek relief from the Court after that time. (Bergman Decl., Ex. K at 2.) Defendants are doing so here.

Mr. Marks' settlement authority and other communications that Plaintiffs authorized Mr. Marks to make to Defendants.

IV. PLAINTIFFS' CONTENTIONS

A. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Joanne Siegel and Laura Siegel Larson ("Plaintiffs") termination notices regarding "Superman" and "Superboy" complied with all the requirements of 17 U.S.C. § 304(c) and 37 C.F.R. § 201.10, the regulations promulgated by the Register of Copyrights. Shortly after Plaintiffs served their "Superman" termination notices the General Counsel of Defendant Warner Bros. Entertainment Inc. ("WB") and the President of its sister company, Defendant DC Comics ("DC"), both acknowledged the validity of the "Superman" termination and the parties began negotiations for Defendants' licensing of Plaintiffs' recaptured copyright interests. (*See* Plaintiffs' First Amended Supplemental Complaint in Case No. 04-8400 ("FASC"), ¶¶ 46-48, Declaration of Marc Toberoff ("Toberoff Decl."), Ex. B submitted herewith). These negotiations were led by WB's General Counsel, John Schulman ("Schulman"), on behalf of the Defendants, and by attorney Kevin Marks ("Marks"), on behalf of Plaintiffs.

As set forth in an October 19, 2001 letter from Marks to Schulman (the "October 19, 2001 Letter") it appeared that the parties had approved certain basic deal points subject to their articulation in an acceptable written agreement. (Declaration of Michael Bergman ("Bergman Decl.") submitted herewith, Ex. F). However, a reply letter from Schulman to Marks dated October 26, 2001 (the "October 26, 2001 Letter"), conveniently omitted in Defendants' portion of this joint stipulation, evidences that no such accord had in fact been reached and that the parties' understanding differed in several key respects. (Toberoff Decl., Ex. A)("I enclose herewith for you and Bruce a more fulsome outline of what we believe the deal we've agreed to is"). These material differences were greatly

Respectfully submitted,

DATED: March 26, 2007

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

PERKINS LAW OFFICE, P.C.

-and-

WEISSMANN WOLFF BERGMAN COLEMAN GRODIN & EVALL LLP

By: _____
Michael Bergman

Attorneys for Defendants and Counterclaimant

DATED: March 23, 2007

LAW OFFICES OF MARC TOBEROFF, PLC

By: _____
Marc Toberoff

Attorneys for Plaintiffs/Counterclaim-Defendants

EXHIBIT B

WEISSMANN WOLFF BERGMAN
COLEMAN GRODIN & EVALL LLP
Michael Bergman (SBN 37797)
Anjani Mandavia (SBN 94092)
Adam Hagen (SBN 218021)
9665 Wilshire Boulevard, Ninth Floor
Beverly Hills, California 90212
Telephone: (310) 858-7888
Fax: (310) 550-7191

FROSS ZELNICK LEHRMAN & ZISSU, P.C.
Roger L. Zissu (Admitted *pro hac vice*)
James D. Weinberger (Admitted *pro hac vice*)
866 United Nations Plaza
New York, New York 10017
Telephone: (212) 813-5900
Fax: (212) 813-5901

PERKINS LAW OFFICE, P.C.
Patrick T. Perkins (Admitted *pro hac vice*)
1711 Route 9D
Cold Spring, New York 10516
Telephone: (845) 265-2820
Fax: (845) 265-2819

Attorneys for Defendants and Counterclaimant

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOANNE SIEGEL and LAURA SIEGEL LARSON,
Plaintiffs,
vs.
WARNER BROS. ENTERTAINMENT INC.; TIME WARNER INC.; DC COMICS; and DOES 1-10,
Defendants.

JOANNE SIEGEL and LAURA SIEGEL LARSON,
Plaintiffs,
vs.
TIME WARNER INC.; WARNER COMMUNICATIONS INC.; WARNER BROS. ENTERTAINMENT INC.; WARNER BROS. TELEVISION PRODUCTION INC.; DC COMICS; and DOES 1-10,
Defendants.

AND RELATED COUNTERCLAIMS

Case Nos. [Consolidated for Discovery]:
CV 04-8400 SGL (RZx)
CV 04-8776 SGL (RZx)
Hon. Steven G. Larson, U.S.D.J.
Hon. Ralph Zarefsky, U.S.M.J.

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

DISCOVERY MATTER
LOCAL RULE 37

Time: 10:00 a.m.
Date: April 20, 2009
Courtroom: 1
Hon. Stephen G. Larson
Discovery Cutoff: Nov. 17, 2006

JOINT STIPULATION

I. DEFENDANTS' INTRODUCTORY STATEMENT

As the Court is aware, in late June 2006, three separate packages of documents (the "Escrow Documents") were anonymously mailed to executives of Defendant Warner Bros. As this Court observed in its Order of September 26, 2008 (the "September 26 Order"), the Escrow Documents "contain embarrassing and potentially questionable conduct by plaintiffs' counsel in this case." (September 26 Order at 1.) Since their delivery in June 2006, Defendants have played strictly by the rules in an attempt to obtain the Escrow Documents. All the while, Plaintiffs did everything in their power to block production of the embarrassing Escrow Documents. Finally, after more than a year and a half of motion practice, the Court confirmed as "law of the case," the Magistrate Judge's ruling that, due to Plaintiffs' counsel's failure to list certain of the Escrow Documents on a privilege log, any privilege in certain of the Escrow Documents had been waived.

Unfortunately, Plaintiffs' obstructionist tactics were temporarily successful as Defendants were prevented from seeing any of the Escrow Documents until December 12, 2008 – well after the close of discovery and well after the Court had ruled on motions for summary judgment.

When Defendants finally received the Escrow Documents, they saw that one such document, the so-called "Marc Toberoff Timeline" (the "Toberoff Timeline"), contained the revelation that in August 2002 Plaintiffs' former counsel, Kevin Marks, had advised his clients that he believed that an enforceable settlement agreement with DC Comics had been reached. Even more significant was Kevin Marks' statement that if Plaintiffs did not abide by the settlement agreement, he would testify against them at a trial to enforce the agreement. This revelation of evidence came too late – *after* the October 7, 2006 deposition of Kevin Marks during which Mr. Marks testified in a manner inconsistent with his prior written

statement, and *after* this Court's dismissal of Defendants' settlement defense on March 26, 2008, to allow Defendants to develop a full and fair record on the settlement issue. Because the Escrow Documents were not produced until after the Court had ruled, Defendants were deprived of the ability to develop the facts and to put them before the Court on summary judgment. The Court ruled without the benefit of such developed evidence.

By this motion, Defendants seek: (i) production of correspondence dated August 9, 2002, the substance of which was revealed in the Toberoff Timeline, containing the now disclosed statement of Kevin Marks that an enforceable settlement had been reached; and (ii) the right to further depose Plaintiffs' former counsel, Kevin Marks in view of the new evidence that has come to light and its inconsistency with his deposition testimony.

II. PLAINTIFFS' INTRODUCTORY STATEMENT

Defendants' baseless motion is but their latest frivolous attempt to leverage the theft of privileged documents from the offices of Plaintiffs' counsel, and to bias the trier of fact against Plaintiffs and their counsel through a flurry of false, unsupported accusations. Defendants erroneously claim that an unproven statement in a privileged communication by Plaintiffs' former counsel to his clients is enough to overturn the Court's March 26, 2008 summary judgment order, holding that no enforceable agreement was reached between the parties regarding Plaintiffs' recaptured Superman copyrights. *See Siegel v. Warner Bros. Entertainment Inc.* ("*Siegel II*"), 542 F. Supp. 2d 1098, 1136-1138 (C.D. Cal. 2008).

The facts underlying this seemingly endless matter are simple: Plaintiffs' legal files were *stolen* from the offices of Plaintiffs' counsel (the "Stolen Documents") and delivered to Defendant Warner Bros. Entertainment Inc. ("Warner Bros.") A majority of the documents were clearly privileged attorney-client communications. Enclosed with the Stolen Documents was an anonymous, unsupported, defamatory cover letter (the "Defamatory Letter"). This conspiratorial

rant was written by a disgruntled attorney, employed briefly at the firm of Plaintiffs' counsel, who deliberately ignored his legal and ethical duties to Plaintiffs by stealing their privileged legal files and handing them over to Warner Bros. in the midst of this litigation.

We know now that Defendants misrepresented their handling of the Stolen Documents to Magistrate Zarefsky and this Court to obtain approval of their purported procedures and to sanitize their unseemly use of the stolen legal files. Warner Bros.' in-house counsel Wayne Smith claimed to have only briefly "thumbed through" the Stolen Documents to see if they were privileged. Instead of notifying Plaintiffs' counsel immediately and returning clearly privileged documents, Warner Bros. purportedly arranged for a law firm to act as a "neutral" "escrow holder." It was later revealed, however, that the firm, retained and paid by Defendants, was neither "neutral" nor an "escrow holder." Moreover, it is clear from Smith's repeated ability to pinpoint and describe specific documents and to correlate them to specific entries on Plaintiffs' privilege logs (received long after Defendants purportedly turned over all Stolen Documents to a so-called "neutral") that Warner Bros. stepped way over the line in leveraging this theft and exploiting clearly privileged information in this litigation.

On April 30, 2007, Magistrate Zarefsky ordered a simple ministerial procedure to deal with the documents: the stolen documents which were listed on privilege logs should be returned to Plaintiffs, while documents not listed on privilege logs should be produced to Defendants. This led to two disputes. The first dispute concerned 9 documents (4 of which are merely fax cover or confirmation sheets) of the 839 pages of the Stolen Documents that fell between the "cracks" of the April 30, 2007 order, but were clearly privileged. These documents included the Defamatory Letter and post-litigation attorney-client communications. The second dispute concerned Defendants' transparent manipulation of their "escrow" protocol. Instead of letting their "escrow" execute the simple disbursal ordered by Magistrate

Zarefsky on April 30, 2007 and again by this Court on September 26, 2008, with respect to the 130 documents that remained undisputed, Defendants instructed their "escrow" to retain all the documents and repeatedly attempted to have him "peek" behind the logs to challenge Plaintiffs' assertion of privilege.

This Court again resolved the matter in its December 4, 2008 Order. The 9 documents remaining in question, including the Defamatory Letter, were ordered produced, and all other documents – those listed on privilege logs or already produced – were finally returned to Plaintiffs.

Now, on the groundless basis of the Defamatory Letter, Defendants once again attempt to re-open this matter and rip away the already upheld attorney-client privilege protecting an August 9, 2002 letter from attorney Kevin Marks ("Marks") to his clients, Laura and Joanne Siegel (the "August 9 Letter") that was among the Stolen Documents.

The privileged August 9 Letter ***was*** properly listed and claimed on a privilege log. Based on no less than four Court orders, the inquiry should end there. Ignoring these fatal facts, Defendants attempt to violate the attorney-client privilege on the sole basis that the anonymous, inadmissible Defamatory Letter purportedly describes the privileged August 9 Letter, and that this description allegedly contradicts Marks' sworn deposition testimony regarding the negotiation of a settlement agreement.

As an initial matter, the Defamatory Letter neither mentions the August 9 Letter, nor any writing, in describing what Marks purportedly believed. Defendants' entire motion is falsely premised on the unproven contents of the privileged August 9 Letter. Moreover, ***even if*** Marks subjectively believed (he did not) that a binding agreement had been reached, such a belief would be extraneous because the formation of a contract requires an "objective manifestation" of a "meeting of the minds" on all material terms of agreement. The Court correctly held this was clearly absent in the well-documented exchange between Plaintiffs and DC of offers

and counter-offers containing materially different terms. *See Siegel II*, 542 F. Supp. 2d at 1136-1139.

Secondly, Defendants mischaracterize both Marks' deposition testimony and the Defamatory Letter to fabricate an inconsistency that, in reality, does not exist. Even if the ranting Defamatory Letter were taken at face value, it simply states: "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." *See* Declaration of Patrick Perkins in Support of Defendants' Motion to Compel ("Perkins Decl."), Ex. 1 at 1. Defendants repeatedly mischaracterize the Defamatory Letter as stating an "*enforceable* agreement" had been reached, when it plainly does not say this. This critical distinction is amply illustrated by Marks' testimony, cited by Defendants (hence Defendants' deceptive insertion of "enforceable"):

> "A: Well, if the question is did I think at this point there was a final, binding, enforceable agreement, the answer would be no, ***but I did believe that we had come to an agreement back on October 19th, 2001***.... So while I thought we had an agreement on these terms, John evidently didn't, and where you don't have a meeting of the minds, you don't have an agreement."

See Perkins Decl., Ex. 6 at 154:12-155:2 (emphasis added). Marks' testimony is perfectly consistent with the Defamatory Letter's statement that Marks "believes there has already been an agreement reached."

Defendants' motion is nothing more than a veiled motion for reconsideration of the Court's summary judgment ruling and is built on a false pretext. Defendants' continuing efforts to exploit Stolen Documents to access Plaintiffs' privileged attorney-client communications taints this case. Moreover, the baseless nature of Defendants' motion suggests that Defendants' real objective is to once again place the Defamatory Letter before the Court to prejudice the trier of fact shortly before trial. Plaintiffs respectfully request that this Court reconsider its prior September 26, 2008 ruling that the anonymous, inadmissible and wholly unsupported Defamatory Letter "contained embarrassing and potentially questionable conduct by plaintiffs[']

counsel in this case." Plaintiffs further request that Defendants be precluded from using the Defamatory Letter in this litigation or elsewhere. This Court should close this disgraceful chapter of this litigation once and for all.

III. DEFENDANTS' CONTENTIONS

A. FACTUAL AND PROCEDURAL BACKGROUND

1. DC Comics' Settlement Defense In The Actions

In response to Plaintiffs' complaints in the two related cases (the "Actions"), Defendant DC Comics ("DC") filed counterclaims seeking enforcement of a prior settlement agreement between the parties. DC's settlement claim was based on a letter sent by Plaintiffs' prior counsel, Kevin Marks ("Marks"), on October 19, 2001, which unequivocally states that the Siegel Family has "accepted D.C. Comics' offer of October 16, 2001" and which outlines all of the material terms of the parties' agreement. (*See, e.g.*, Exhibit 2 to the Declaration of Patrick T. Perkins submitted herewith ("Perkins Decl."), ¶¶ 47-56.)

In reply to DC's counterclaims, Plaintiffs denied that the parties reached any valid settlement agreement. In response to Defendants' settlement defense, Plaintiffs initially asserted as an affirmative defense that Marks did not have authority, or exceeded the scope of his authority. (Perkins Decl. ¶ 5; Perkins Ex. 3 at ¶ 183.)[1] Additionally, Plaintiffs argued that the subsequent conduct of Defendants after October 19, 2001, including but not limited to (i) an October 26, 2001 letter to Marks containing a "more fulsome" outline of the parties' agreement; and (ii) a long-form agreement drafted by Defendants and submitted to Plaintiffs on February 1, 2002, added to and materially changed the terms of the settlement that

[1] Defendants moved to compel production of documents and testimony regarding Plaintiffs' counsel's lack of authority to send the October 19, 2001 letter on the basis that the authority defense served as a waiver of privilege. On May 2, 2007, Magistrate Judge Zarefsky granted Defendants' motion but allowed Plaintiffs to withdraw the defense and, in effect, retract their waiver of privilege by striking the affirmative defense in lieu of compelling Plaintiffs to produce the documents and provide further testimony. (Perkins Decl. ¶ 7.)

they had accepted and thus justified their decision not to consummate their agreement with Defendants. (Perkins Decl. ¶ 5; Perkins Ex. 3 at ¶ 53.)

2. Warner Bros.' Receipt Of The Escrow Documents

On or around June 28, 2006, three sets of the Escrow Documents arrived at the offices of Warner Bros. from an anonymous source, addressed to separate Warner Bros. executives. The executives to whom the Escrow Documents were sent were instructed by Warner Bros.' then General Counsel to deliver them to his office without reviewing the Documents. (Declaration of Wayne M. Smith submitted March 26, 2007 (the "March 2007 Smith Decl. ¶ __") ¶ 2 (attached for the Court's convenience as Perkins Exhibit 4).)

The Escrow Documents were provided to in-house litigation counsel Wayne Smith ("Smith") who, after reviewing the unsigned cover letter that accompanied them and after thumbing through the Documents, determined that some of them may have been privileged. (March 2007 Smith Decl. ¶ 4.)

Smith researched the issue of what obligations, if any, governed Defendants' handling of the Escrow Documents that Warner Bros. had received. Based on his review of the relevant California authorities, Defendants: (i) reviewed each document but ceased the review once it became apparent that the document was privileged or may have been privileged; (ii) contacted opposing counsel and advised him that the documents have been received; and (iii) refrained from using any information in the documents until there was either an agreement with opposing counsel, or the Court had determined each document's disposition. (March 2007 Smith Decl. ¶ 6.) Magistrate Judge Zarefsky found the procedure exercised by Mr. Smith to be appropriate and "professional." (Perkins Ex. 5 at 19:3-7.)

During his review, Defendants' in-house counsel identified an August 9, 2002 written communication from Marks to his clients (the "August 9, 2002 Communication"), as one that related to plaintiffs' contention that Marks lacked authority to bind plaintiffs to any settlement, and he concluded that the privilege

attaching to the document had likely been waived. (February 19, 2009 Declaration of Wayne M. Smith ("February 2009 Smith Decl. ¶__") ¶ 5.

On June 30, 2006, Defendants provided ***all*** of the Escrow Documents to an escrow agent, not just those that were clearly or potentially privileged, and retained no copies. (March 2007 Smith Decl. ¶ 13.) On July 18, 2006, the escrow agent supplied a full copy set of the Escrow Documents to Plaintiffs' counsel. (Perkins Decl. ¶ 10.) Meanwhile, neither copies nor the contents of the Escrow Documents were provided to or shared with any of the outside counsel representing the Defendants in this action, nor were any such documents used in the litigations unless they were separately produced by Plaintiffs or by recipients of third-party subpoenas. (March 2007 Smith Decl. ¶ 13.)

3. Defendants' Attempts To Obtain The Escrow Documents.

In July 2006, Defendants made multiple attempts to work out with Plaintiffs voluntary production of the non-privileged Escrow Documents. When those efforts failed, on August 7, 2006, Defendants served a document request on Plaintiffs, as well as a subpoena *duces tecum* on Plaintiffs' counsel, Marc Toberoff, seeking a copy of the Escrow Documents. (Perkins Decl. ¶ 11; September 26 Order at 2.) In response, on August 23, 2006, Plaintiffs and Mr. Toberoff served a general objection and refused to produce the Escrow Documents. (Perkins Decl. ¶ 12; September 26 Order at 2.)

The objections served by Plaintiffs and Mr. Toberoff relied principally on privilege objections and stated that a log identifying any item withheld on the basis of privilege would be provided. However, Plaintiffs and their counsel ultimately made the tactical decision not to provide the promised privilege logs in response to Defendants' request and subpoena. (Perkins Decl. ¶ 12.)

Plaintiffs' failure to serve privilege logs addressing the Escrow Documents was significant because Magistrate Judge Zarefsky had previously ordered Plaintiffs

to "produce all privilege logs, including any revisions, by September 29, 2006," well over a month *after* Plaintiffs and Mr. Toberoff responded to the subpoenas. As a consequence, some of the Escrow Documents, which Mr. Toberoff later claimed were privileged, were not identified in any privilege log. (*See* September 26 Order at 2; Smith March 2007 Decl. ¶ 12.)

As a result of Plaintiffs' refusal to produce the Escrow Documents, and their failure to list at least some of them on their privilege log, Defendants made a motion to compel. On April 30, 2007, Magistrate Judge Zarefsky conducted a hearing on the motion. (Perkins Decl. ¶ 13.) At the conclusion of the hearing, Magistrate Judge Zarefsky summarized his order, stating, "[p]rivileged documents get returned. The privileged documents that were listed on the privilege log get returned. The others get sent to defense counsel." (Perkins Ex. 5 at 30:22-24.)

Notwithstanding Plaintiffs' counsel's representations at the April 2007 hearing that all Escrow Documents that had not been produced were listed on a privilege log, Plaintiffs had not in fact listed all allegedly privileged documents on their privilege log. The declaration subsequently served by Plaintiffs' counsel in response to Magistrate Judge Zarefsky's order conceded this, but Plaintiffs did not produce the unlisted documents as the Magistrate Judge had ordered. Instead, Plaintiffs asserted that the unlisted documents were privileged and refused to produce them. (September 26 Order at 4.) As a result, Defendants were required to go back to Court, moving on September 17, 2007 to compel compliance with Magistrate Judge Zarefsky's order. (Perkins Decl. ¶ 14.)

Because Defendants' September 17, 2007, motion to compel compliance was not ruled upon, Defendants filed a renewed motion on April 9, 2008, this time with the District Court. Plaintiffs' principal focus in opposing the renewed motion centered on withholding the Toberoff Timeline. Neither Plaintiffs nor Mr. Toberoff had ever listed the Toberoff Timeline on any privilege logs. (*Id.*)

On September 26, 2008, the District Court ruled on Defendants' motion to enforce Plaintiffs' compliance with Magistrate Judge Zarefsky's order, a motion that Defendants had filed more than a year before, on September 17, 2007. In the September 26 Order, the District Court confirmed that the Magistrate Judge's prior ruling that for any potentially privileged documents not listed on Plaintiffs' privilege logs, privilege as to those documents was deemed waived and was now the "law of the case" due, in part, to Plaintiffs' failure to timely appeal the Magistrate Judge's ruling. (September 26 Order at 4-5.) The District Court reiterated the Magistrate Judge's finding that the waiver of privilege occurred not by the anonymous delivery of the Escrow Documents to Warner Bros., but instead by virtue of Plaintiffs' failure to include certain of the Escrow Documents, including the Toberoff Timeline, on a privilege log. (*Id.*)

4. The Toberoff Timeline

On December 12, 2008, more than a year and a half after first moving to compel production, Defendants finally received the subset of the Escrow Documents that had not been produced previously and that were not listed on a privilege log. Of the Escrow Documents finally produced to Defendants, the most explosive is the Toberoff Timeline.

The Toberoff Timeline, which was written by a former lawyer in Plaintiffs' counsel's firm (Perkins Ex. 5 at 9:25-10:8), chronicles the history of Plaintiffs' counsel's involvement in asserting control over the termination rights in Superman. (Perkins Ex. 1.) According to the Toberoff Timeline, which purports to draw its information from other documents included among the Escrow Documents delivered to Warner Bros. in 2006, Plaintiffs' counsel set in motion a plan to gain control over certain copyrights related to Superman, such that the result is that "**Marc Toberoff *personally* [owns] 47.5% of the entire Superman interest.**" (Perkins Ex. 1 at 6; bold and italics in original.) The Toberoff Timeline further states that, in August 2002, Mr. Toberoff "approaches the Siegels [through their

then counsel Kevin Mark ("Marks")], *not as an attorney but as a film producer*, stating that he is 'allied' with [agent Ari] Emanuel..." and that Toberoff and Emanuel "have a billionaire ready to offer $15 million dollars 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."[2] (*Id.* at 2; emphasis in original.)

The Toberoff Timeline further states that, in response to Mr. Toberoff's offer, Plaintiffs' then-counsel Marks contemporaneously communicated such offer to Plaintiffs but advised against accepting it, warning them that "he would testify in court against the Siegels if they accepted the offer because he believes there has already been an agreement reached." (*Id.*) Defendants have concluded, based upon the Toberoff Timeline, the recollection of Warner Bros. counsel Wayne Smith who saw the underlying documents, and Plaintiffs' privilege logs, that this statement was communicated by Marks to Plaintiffs in the August 9, 2002 Communication, which Defendants still have not obtained in discovery.[3] (February 2009 Smith Decl. ¶ 5.)

Although Magistrate Judge Zarefsky's order of April 30, 2007 required that the Toberoff Timeline be produced in May 2007, Plaintiffs kept Defendants from obtaining access to it until discovery was over and, significantly, until after the motions for summary judgment had been briefed and ruled upon. Defendants respectfully but firmly believe that the statements attributed to Marks, which appear in the August 9, 2002 Communication from Marks to the Siegels, is information that Defendants were entitled to probe and develop during discovery. Defendants submit that such discovery and its resulting evidence would have had a material impact on the Court's view of Defendants' settlement defense.

[2] The Toberoff Timeline further alleges that Toberoff later admitted "to Laura Siegel that there never was a billionaire willing to invest $15 million when he first approached them." (Perkins Ex. 1 at 6.)

[3] Significantly, in their response to Defendants' invitation to meet and confer on this motion, Plaintiffs do not deny that the August 9, 2002 writing from Marks contains, in substance, the statement set forth in the Toberoff Timeline. (Perkins Ex. 8.)

Plaintiffs' failure to produce the August 9, 2002 Communication during the discovery period allowed the Court to rely on Marks' uncontroverted testimony at his deposition:

> Q. [BERGMAN] Did you as of February 6, 2002 believe that you had closed a deal with DC for the Superman interest?
>
> * * * *
>
> [Objections Deleted]
>
> A. [MARKS] Well, ***if the question is did I think at this point there was a final, binding, enforceable agreement, the answer would be no***, but I did believe that we had come to an agreement back on October 19th, 2001, that was reflected exactly in the terms that I have set out. At the end of that letter I wrote to John in substance and effect, "John, if I've gotten anything wrong, if I've misstated any of these terms, please let me know." When John writes back on October 26, which I see later, in effect his letter is yeah, you've got terms wrong. My outline of the deal terms is different than your outline of the deal terms. So while I have thought we had an agreement on these terms, John evidently didn't, and where you don't have a meeting of the minds, you don't have an agreement.

(Perkins Ex. 6 at 153:21-155:2; emphasis added.) The foregoing answer laid the foundation and was the jumping off point for Marks' immediately following testimony regarding the supposed many "differences" between Marks' October 19, 2001 acceptance letter, and Schulman's October 26, 2001 response. (*Id.* at 155:4-164:11.) This follow-on testimony consumed eight pages of deposition transcript and was extensively relied on by Plaintiffs as allegedly objective evidence of the absence of a settlement agreement in seeking summary judgment. (Pltfs' Motion for Summary Judgment (Dkt # 161), at 48-57.) Indeed, in moving for summary judgment, Mr. Toberoff characterized Marks' recitation of differences as "material" and claimed that these differences were evidence that "there never was a 'meeting of the minds'" – precisely the words that Marks invoked in answering the question

above. (*Id.* at 48, 58.) Defendants submit that had they been able to confront Mr. Marks at deposition with his statement in the August 9, 2002 Communication, they would have impeached Mr. Marks, and he might have changed his testimony. Moreover, the difference between Marks' testimony at deposition and his statement in the August 9, 2002 Communication would have created a fact issue on Summary Judgment.

The Court ultimately accepted Plaintiffs' "material differences" characterization – underpinned by Marks' unrebutted testimony – and found that there were "numerous material differences between the terms relayed in the October 19 and 26, 2001, letters." (March 26, 2008 Order at p. 61:6-7.) Adopting the formulations of both Marks and Plaintiff's counsel, the Court also found that "the documents [including the October 19 and 26, 2001 letters] referenced above . . . aptly demonstrate that there was no 'meeting of the minds' on all material terms." (*Id.* at 60:23-25.) But the Court's conclusion that these differences were on "material terms" was made without the benefit of Marks' subsequent advice to his clients in August 2002 that he believed there was an enforceable agreement and that he was prepared to testify to that fact under oath if they tried to breach that agreement.

Thus, without the benefit of Plaintiffs' former counsel's statement that he believed that an agreement was in place that was sufficiently enforceable for him to testify against his own clients, the Court on summary judgment dismissed Defendant DC Comics' settlement defense. (March 26, 2008 Order at 57-62.) Not only did the Court rely upon the supposed "material" differences in the parties' correspondence – which are completely undermined by Marks' August 2002 communication – but also on the parties' "*conduct in reaction thereto.*" (*Id.* at 61, emphasis added.) This "conduct in reaction thereto" necessarily included Marks' now-disclosed communications to his clients that an enforceable agreement had in fact been reached, something that the Court never had the opportunity to consider.

5. The Parties' Meet And Confer Efforts

Pursuant to L.R. 37-1, on January 14, 2009, Defendants' counsel sent Plaintiffs' counsel a letter setting forth Defendants' position on the issues presented in this motion, outlining the relief sought in an attempt to avoid the need for Court intervention, and inviting Plaintiffs' counsel to confer on the issue. (Perkins Decl. ¶ 16; Ex. 7.) By letter dated January 22, 2009, Plaintiffs' counsel rejected Defendants' position on the issues raised in this motion, but did not provide any dates on which to confer with Defendants' counsel. (*Id.* ¶ 17; Ex. 8.). By e-mail dated January 23, 2009, Defendants' counsel confirmed receipt of Plaintiffs' counsel's letter of January 22, 2009, and confirmed that Plaintiffs considered the "meet and confer" obligation to have been satisfied. (*Id.* ¶ 18; Ex. 9.) Plaintiffs' counsel did not respond. Thus, the parties have not been able to resolve the dispute.

B. LEGAL ARGUMENT

1. The Newly Discovered Evidence In The "Toberoff Time Line" And The Not-Yet-Discovered Evidence In The August 9, 2002 Communication Contain Discoverable Information Which May Ultimately Support Reconsideration By The Court Of Defendants' Settlement Defense.

Because of the conduct of Plaintiffs and their counsel in this matter, the Court has dismissed on summary judgment a key defense – that the parties had previously reached a settlement of this dispute – on the basis of an incomplete and misleading record. The Court in its ruling relied in part on certain evidence – Marks' deposition testimony – that we now know to be a distorted fragment of the truth because Plaintiffs and their counsel tried, and almost succeeded, in hiding contrary evidence. The full picture in fact shows that Plaintiffs' counsel, when all was said and done, months after the exchange of letters and the long form agreement that Plaintiffs contended on summary judgment demonstrated that there was no meeting of the

minds, wrote a letter to his client saying that a settlement had in fact been reached and that he would so testify in court if necessary.

Because of the tactics of Plaintiffs and their counsel, the Court at the time of its ruling had before it an incomplete record that still is not complete. Fundamental fairness dictates that Defendants be allowed to discover all of the relevant non-privileged evidence on this issue and to consider whether to ask the Court to revise its ruling on the settlement issue. The decision on whether to move to reconsider, on any motion to reconsider, or on appeal if any, ought to be made on the basis of a complete record and not on the basis of potentially misleading fragments. Disclosure of the contents of the August 9, 2002 Communication and further discovery on this issue ought to be had.

2. <u>The Evidence That Defendants Now Seek Is Impeachment Evidence That Goes Directly to the Heart of Marks' Credibility on the Settlement Issue.</u>

Marks testified in 2006 that no settlement had occurred in 2001, in part due to certain actions by Defendants in late 2001 and early 2002. It would have been critical for Defendants' counsel to have confronted Marks at his deposition with a letter written by Marks to his clients in *August 2002* and providing his then-contemporaneous views and conclusions concerning the events in question, namely, that there had been a settlement and that were he sworn to tell the truth, he would be forced to say so. Marks was not confronted by that letter – and indeed the Court and counsel do not even today know for sure exactly what that letter contains – because of Plaintiffs' multi-year effort to hide the ball.

The question on the settlement defense is whether the parties had a meeting of the minds on the material terms of a settlement back in 2001. No piece of evidence on this question is more critical than what Marks believed back in 2001 at the time that these events occurred – a subject that Plaintiffs' counsel allowed Marks to testify on at his deposition, in the absence of the August 9, 2002 Communication

that provides the *best* evidence on this key issue. To allow the Defendants and the Court to litigate these issues on the basis of Marks' characterization of the events in 2006, years after they occurred, when there is written evidence of what Marks contemporaneously believed back in 2002 in the form of a presumably candid assessment by a lawyer to his client, is to risk a substantial miscarriage of justice. In Defendants' view, the Court ought to avoid that risk and allow a complete and searching investigation of the facts.

Defendants are entitled to a full account before they are forced to decide whether to ask the Court to reconsider. The Court is entitled to a full account if it is asked to reconsider. And, no matter what, the parties are entitled to a complete record in this case in the event that further proceedings ensue. Discovery of the August 9, 2002 Communication and a resumed deposition of Marks depending on what the August 9, 2002 Communication reveals are the first steps in the process of undoing the damage to this case that Plaintiffs' conduct has caused.

3. Plaintiffs Have Improperly Obscured The Truth Through Selective Use And Waiver Of The Privilege.

Any voluntary disclosure inconsistent with the confidential nature of the work product privilege waives the privilege. *Atari Corp. v. Sega of Am.*, 161 F.R.D. 417, 420 (N.D. Cal. 1994). "Disclosure to an actual or potential adversary waives work product protection as to the material disclosed." *In re McKesson HBOC, Inc. Secs. Litig.*, 2005 U.S. Dist. LEXIS 7098, 32-33 (N.D. Cal. Mar. 31, 2005). Moreover, a waiver of the privilege may occur even if there is an agreement among parties that disclosure does not constitute waiver. *Id.* Equally important in the rules governing the waiver of privileges is the prevention of "prejudice to a party and distortion of the judicial process by a privilege holder's selective disclosure of privileged information . . . ." *Jacobs*, 117 F.3d at 89. *See also Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001) (the attorney-client privilege and work product immunity may not be used

both as a sword and a shield); *Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503, 512 (S.D. Cal. 2003).

At the deposition of Kevin Marks, Plaintiffs sought to selectively waive the work-product doctrine. Specifically, Defendants' counsel asked Mr. Marks the following question:

> Q. [BERGMAN] Did you as of February 6, 2002 believe that you had closed a deal with DC for the Superman interest?

(Perkins Ex. 6 at 153:21-22.)

At this point in the deposition, Mr. Marks' counsel and Mr. Toberoff interposed the following objections:

> [MR. MARMARO] The question is vague and ambiguous, calls for a legal conclusion, and again, I am going to defer to Mr. Toberoff whether he has any objection to – subject to those objections, having Mr. Marks answer the question.
>
> [MR. TOBEROFF] I object on *work product privilege*, but I think I am not asserting that on behalf of the clients. I am not asserting that on behalf of the Siegels
>
> [MR MARMARO] Mr. Marks would be prepared to answer the question if the Siegels have no objection to it.
>
> [MR TOBEROFF] As to your personal belief, no objection.

(*Id.* at 153:23-154:11; emphasis added.) With the express permission of Plaintiffs' counsel to testify as to his state of mind as to whether he believed there was an agreement, Mr. Marks went on to testify as follows:

> A. [MARKS] Well, if the question is did I think at this point there was a final, binding, enforceable agreement, the answer would be no, but I did believe that we had come to an agreement back on October 19th, 2001, that was reflected exactly in the terms that I have set out. At the end of that letter I wrote to John in substance and

> effect, "John, if I've gotten anything wrong, if I've misstated any of these terms, please let me know." When John writes back on October 26, which I see later, in effect his letter is yeah, you've got terms wrong. My outline of the deal terms is different than your outline of the deal terms. So while I have thought we had an agreement on these terms, John evidently didn't, and where you don't have a meeting of the minds, you don't have an agreement.

(*Id.* at 154:12-155:2) Of course, what Defendants did not know at the time of Mr. Marks' deposition was that, in a letter in August 2002, Mr. Marks had actually reached a different conclusion than that expressed at deposition. According to the Toberoff Timeline, Mr. Marks had told his clients that he believed that Plaintiffs had entered into a binding agreement and that if they took Mr. Toberoff's offer, Mr. Marks would testify against the Plaintiffs. (Perkins Ex. 1 at 2.) Ironically, Mr. Marks ended up testifying exactly the opposite.

Plaintiffs' tactic at the Marks deposition is the very kind of "sword and shield" behavior that the law governing waiver of privilege was designed to prevent.[4] Mr. Marks was asked for his legal judgments formed as of February 6, 2002, shortly after he received Defendants' draft long form agreement. (Perkins Ex. 6 at 153:21-22.) In other words, Mr. Marks was asked to disclose his mental impressions formed in February 2002. Such impressions were unquestionably formed in anticipation of litigation because as Mr. Marks testified at deposition "litigation was always looming" when it came to the negotiations regarding the Superman termination interest. (Perkins Ex. 6 at 45:21-22.) Plaintiffs' counsel acknowledged that this question called for testimony concerning the attorney work product, but then stated that he was not asserting that objection on behalf of the

[4] Plaintiffs' counsel and/or Mr. Marks' counsel objected on privilege grounds and instructed Mr. Marks not to answer on more than 15 separate occasions during the course of the deposition. (Perkins Decl. ¶ 15.)

Siegels. (Perkins Ex. 6 at 154:3-6.)[5] Plaintiffs' counsel knew what Mr. Marks' answer would be and therefore was anxious to have him answer the question.

Plaintiffs' counsel's selective waiver of the work-product privilege, and Mr. Marks' ensuing favorable testimony for Plaintiffs, is troubling in light of the apparent inconsistency between Mr. Marks' deposition testimony and the August 9, 2002 Communication in which Mr. Marks apparently told his clients – in writing – that he believed an agreement *had* been reached, and felt sufficiently strongly about this to threaten to testify under oath against Plaintiffs should they renege on the agreement and instead accept Mr. Toberoff's offer. (Perkins Ex. 1 at 2.) Meanwhile, when Defendants heard Mr. Marks' work product testimony, they were unaware of the contents of the Toberoff Timeline or the contents of the August 9, 2002 Communication. As a result, they were not able to inquire as to the inconsistency in Mr. Marks' view, nor could they even move to compel production of the August 9, 2002 Communication on the basis of Mr. Marks' waiver.

In light of what was an obvious waiver of Mr. Marks' work product – his voluntary disclosure of his mental impressions as to whether he believed there was an agreement between the parties in 2002 – as well as the inconsistency between Mr. Marks' deposition testimony on the one hand, and content of the August 9, 2002 Communication on the other, the law that governs waiver and that is designed to protect against prejudice to parties and to prevent the distortion of justice requires that Defendants' motion be granted, that the August 9, 2002 Communication be produced, and that Mr. Marks be deposed on the subject matter thereof.

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[5] Of course, this begs the question, on whose behalf *other than the Siegels* he could have been asserting a work product privilege? Of course, the answer is that it could only be the Plaintiffs' privilege.

4. It Is The "Law Of The Case" That Any Attorney-Client Privilege Applicable To The Toberoff Timeline Has Been Waived, Which In Turn Serves To Waive Any Privilege In Kevin Marks' August 2002 Communication With Plaintiffs Concerning Marks' Opinion That The Parties Had Reached A Settlement.

In its September 26 Order, the District Court held:

> Pursuant to Magistrate Judge Zarefsky's order, any claim of privilege not previously asserted before that Order was deemed "waived." Although plaintiffs suggest that such a reading of Magistrate Judge's order as not a fair one and lacks common sense, the language of his order is clear and unambiguous: Any escrow document not matching up to the privilege log or the declaration's list of previously-produced documents was to be produced to defendants; any assertion of privilege to such documents to be produced was deemed "waived." That plaintiffs' counsel may have a basis to assert such privilege or otherwise challenge the propriety of producing such material on relevance grounds, etc., is inapposite. If plaintiffs wished to press such new claims of privilege or any other basis for challenging production of the same, Magistrate Zarefsky's Order deemed them waived. What plaintiffs' counsel should have done at that point to preserve such assertions was to appeal Magistrate Judge Zarefsky's Order to this Court, in particular that section of his Order deeming any previously un-asserted grounds of privilege to be "waived." Plaintiffs did not do so, and the time to appeal Magistrate Judge Zarefsky's Order to this Court has long since expired. See Local Rule 72-2.1.

Magistrate Judge Zarefsky's Order is now the law of the case in this matter. (September 26 Order at 4-5.)

"[A]ttorney-client communications made 'in the presence of, or shared with, third-parties destroys the confidentiality of the communications and the privilege protection that is dependent upon that confidentiality.' 1 Paul R. Rice, Attorney-Client Privilege in the United States § 4:35, at 195 (1999 ed.)." *Nidec Corp. v.*

Victor Co., 249 F.R.D. 575, 578 (N.D. Cal. 2007). Once disclosure of previously privileged information occurs "it extinguishes the element of confidentiality that one must show in order to claim the privilege." *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). Similarly, "'disclosure of the substance of a privileged communication is as effective a waiver as a direct quotation since it reveals the "substance" of the statement.'" *U.S. v. Jacobs*, 117 F.3d 82, 91 (2d Cir. 1991) *quoting In re Kidder Peabody Sec. Litig.,* 168 F.R.D. 459, 470 (S.D.N.Y. 1996).

According to the Toberoff Timeline, in response to an offer from Mr. Toberoff to Plaintiffs for their Superman rights, Plaintiffs' then-counsel, Kevin Marks, "tells the [Plaintiffs] that he would testify in court against the [Plaintiffs] if they accepted [Toberoff's] offer *because he believes there has already been an agreement reached*." (Perkins Ex. 1, at 2, emphasis added.) Defendants have concluded, based upon the Toberoff Timeline, the recollection of Warner Bros. counsel Wayne Smith who saw the underlying documents, and Plaintiffs' privilege logs, that this statement was communicated by Marks to Plaintiffs and others in the August 9, 2002 Communication. (February 2009 Smith Decl. ¶ 5.)[6] Effectively, the "gist" of the August 9, 2002 Communication has already been disclosed and the production of that document will "add literal meaning to that disclosure." *Jacobs*, 117 F.3d at 90. Namely, the August 9. 2002 Communication will provide the full context of Mr. Marks' contemporaneous view of a binding agreement and will allow Defendants – and the Court – to view Mr. Marks' position in his own words.

As a result of the disclosure of the contents of the August 9, 2002 Communication through the production of the Toberoff Timeline pursuant to a finding of privilege waiver which is the law of this case, the privilege in the August

[6] Significantly, in their response to Defendants' invitation to meet and confer on this motion, Plaintiffs do not deny that the August 9, 2002 writing from Marks contains, in substance, the statement set forth in the Toberoff Timeline. (Perkins Ex. 8.)

9, 2002 Communication has been waived. Thus, Defendants are entitled to the August 9, 2002 Communication (which was called for under Defendants' Document Requests (Perkins Decl. ¶ 11), as well as to depose Mr. Marks further concerning the Document's contents.

5. Defendants Have Been Diligent In Seeking Discovery Of The Escrow Documents And Thus Have "Good Cause" To Reopen Discovery.

"Rule 16(b) provides that a district court's scheduling order may be modified upon a showing of 'good cause,' an inquiry which focuses on the reasonable diligence of the moving party." *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1174 (9th Cir. 2007) *citing Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). *See also N. Y. Life Ins. Co. v. Morales*, 2008 U.S. Dist. LEXIS 51304 (S.D. Cal. July 1, 2008) (whether defendant has demonstrated good cause for reopening discovery turns on when defendant learned of new deponents whether he pursued discovery in a reasonably diligent manner).

Here, Defendants have been diligent in attempting to obtain first, the Escrow Documents, and now the August 9, 2002 Communication. Defendants began their effort to receive at least some of the Escrow Documents by voluntary exchange in July 2006. When those efforts failed, Defendants served formal document requests on Plaintiffs as well as a subpoena *duces tecum* on Plaintiffs' counsel on August 7, 2006. (Perkins Decl. ¶ 11.)

After Plaintiffs refused to produce any of the Escrow Documents, and well before the close of discovery, on March 26, 2007, Defendants moved to compel production of some of the Escrow Documents. On April 30, 2007, Magistrate Judge Zarefsky issued an order on the record that should have resulted in Defendants receiving in May 2007 the documents that were finally produced on December 12, 2008. (Perkins Ex. 5 at 30:22-24.) Instead, Plaintiffs simply refused to comply with Magistrate Zarefsky's order, requiring Defendants to again move before the

Magistrate Judge on September 12, 2007 prior to the close of discovery. (Perkins Decl. ¶ 14.) Through no fault of Defendants, this motion was not ruled upon until more than a year later, on September 26, 2008 and, because of an outstanding issue, the Escrow Documents were not produced to Defendants until December 12, 2008. (*Id.*)

Approximately one month after having received the Escrow Documents (which month included the Christmas and New Year's holidays), Defendants commenced the process of filing the instant motion. (*Id.* ¶ 16.)

In light of the foregoing, Defendants have demonstrated diligence in timely seeking the evidence they seek by this Motion, thus demonstrating the "good cause" necessary under Fed. R. Civ. P. 16(b).

6. The Evidence Sought By Defendants In This Motion Is Discoverable Notwithstanding The Court's Ruling On Summary Judgment.

The standard for what is discoverable is very broad under Rule 26 of the Federal Rules of Civil Procedure:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1).[7] There can be no dispute that documents and testimony concerning Plaintiffs' main negotiator and attorney's contemporaneous view as to

[7] The Court reiterated this point at a recent hearing in ordering Defendants to supplement their document production, stating "I'm sure that all counsel in this room understand the distinction between the standard of relevancy in the discovery phase versus the standard of relevancy at the trial itself. (Jan. 14, 2009 Trans. at 21:6-9.)

whether the parties had an enforceable agreement is probative evidence itself and would lead to the discovery of admissible evidence regarding Defendants' settlement defense.

Indeed, in ruling on the settlement defense without the benefit of a letter from Plaintiffs' counsel expressing his contemporaneous opinion that the parties had reached an agreement as of August 9, 2002, the Court found that no such agreement existed. In so ruling, the Court relied on differences in the parties' correspondence and on "conduct in reaction thereto." (March 16, 2008 Order at 61.) The impact of the differences in correspondence, if there were differences, is undermined by the direct evidence now available concerning the state of mind of the negotiator on the Siegels' side. It demonstrates that he believed he had a settlement notwithstanding any differences in the correspondence, something the Court did not know before. Moreover, Mr. Marks' decision to confront his clients and to insist that he would testify to the existence of a settlement is "conduct in reaction thereto," conduct about which the Court was unaware when it ruled on Summary Judgment.

Defendants respectfully argue that a contemporaneous letter from Plaintiffs' then counsel expressing a belief that the parties had an agreement is powerful evidence of the very sort of "conduct in reaction" upon which the Court indicated it relied in dismissing Defendants' settlement defense, or at the very least places that "conduct in reaction" under a significantly different light. Such evidence, if developed and presented on summary judgment, should have created a fact issue for trial.

7. The Interests Of Justice And The Integrity Of The Judicial Process Strongly Favor The Relief Sought By Defendants.

Defendants do not, at this time or by this motion, seek reconsideration of the District Court's dismissal of the settlement defense. Rather, Defendants seek only narrow relief – production of the August 9, 2002 Communication and the opportunity to depose Marks thereon. Whether Defendants decide to move for

reconsideration will depend, in part, upon the development of the evidence. However, regardless of whether Defendants seek reconsideration, fundamental fairness requires that they must be permitted to develop this newly discovered evidence so that they may have the option to seek reconsideration or simply to have the evidence in the record on appeal at the conclusion of the case.

The Toberoff Timeline describes a pattern of deception by Plaintiffs' counsel that has seriously tainted the process to Defendants' detriment. Most germane to this motion, Plaintiffs' improper delay in complying with Magistrate Judge Zarefsky's Order of April 30, 2007, combined with delay in final decisions being rendered on Defendants' motion to compel, conspired to keep powerful evidence of a settlement between the parties from Defendants until after the close of discovery and after the Court ruled on summary judgment. In addition, by selectively waiving the work product privilege and allowing Marks to testify in a way that appears to be directly contradicted by a letter he wrote to his clients in 2002, Plaintiffs' conduct has unfairly affected the merits of the case and has undermined the fundamental fairness of the judicial process. As a result, Defendants respectfully submit that the Court's duty to maintain the integrity of the judicial process and fundamental fairness further favor the granting of the narrow relief sought by Defendants herein.

IV. PLAINTIFFS' CONTENTIONS

A. FACTUAL AND PROCEDURAL BACKGROUND

1. The Court Properly Held on Summary Judgment That No Settlement Agreement Was Consummated By the Parties

On April 30, 2007, Plaintiffs moved for partial summary judgment that no settlement agreement was reached between Plaintiffs and Defendants regarding Plaintiffs' Superman termination, as Defendants had alleged. *See* Defs. First Amended Answer, dated November 1, 2005, at ¶¶ 112-113; Defs. First Amended Counterclaims, dated October 17, 2005, ¶¶ 47-56, 97-105. Plaintiffs demonstrated that the parties' objective manifestations of intent *clearly* indicated no "meeting of

"neutral" "escrow" procedure to handle the documents. It is obvious from the record facts that this is not true. Defendants have crossed the line by reviewing and leveraging Plaintiffs' privileged information. Accordingly, sufficient grounds exist for this Court to reconsider its ruling and release of the Defamatory Letter to Defendants.

V. DEFENDANTS' CONCLUSION

For the reasons set forth herein, Defendants respectfully request that their motion be granted.

VI. PLAINTIFFS' CONCLUSION

For the reasons stated above, (i) Defendants' motion should be denied in its entirety, (ii) the Court is respectfully requested to reconsider its September 26, 2008 order insofar as it states that the anonymous, inadmissible and wholly unsupported Defamatory Letter "***contained*** embarrassing and potentially questionable conduct by plaintiffs[']counsel in this case," instead of "alleged" such conduct, and (iii) to reconsider the release of the Defamatory Letter in light of new evidence regarding Defendants' misrepresentations to Magistrate Judge Zarefsky and improper exploitation of the Stolen Documents, and/or (iv) preclude the further use of the Defamatory Letter by Defendants in this litigation or otherwise.

DATED: March 2, 2009

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

PERKINS LAW OFFICE, P.C.

-and-

WEISSMANN WOLFF BERGMAN COLEMAN GRODIN & EVALL LLP

By: _____
Michael Bergman

Attorneys for Defendants and Counterclaimant

EXHIBIT B

DATED: March 2, 2009

TOBEROFF & ASSOCIATES, P.C.

By _____
Marc Toberoff

Attorneys for Plaintiffs/Counterclaim-Defendants

EXHIBIT C

CASE NO. 11-71844

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE PACIFIC PICTURES CORPORATION, IP WORLDWIDE, LLC, IPW, LLC, MARC TOBEROFF, MARK WARREN PEARY, JEAN ADELE PEAVY, AND LAURA SIEGEL LARSON

Defendants-Petitioners,

(caption continued on next page)

PETITIONERS' MOTION FOR STAY PENDING DECISION ON PETITION FOR REHEARING AND FOR REHEARING EN BANC

REQUEST FOR EMERGENCY RESOLUTION UNDER CIRCUIT RULE 27-3(A) BY NO LATER THAN MAY 11, 2012

On Petition for Writ of Mandamus to the United States District Court for the Central District of California, Case No. CV-10-3633, Hon. Otis D. Wright II

TOBEROFF & ASSOCIATES, P.C.
Marc Toberoff (188547)
Keith G. Adams (240497)
22337 Pacific Coast Highway #348
Malibu, California 90265
Telephone: (310) 246-3333
Facsimile: (310) 246-3101

Attorneys for Defendants-Petitioners Mark Warren Peary, as personal representative of the Estate of Joseph Shuster, Jean Adele Peavy, and Laura Siegel Larson, individually and as personal representative of the Estate of Joanne Siegel

KENDALL BRILL & KLIEGER LLP
Richard B. Kendall (90072)
Laura W. Brill (195889)
10100 Santa Monica Blvd., Suite 1725
Los Angeles, California 90067
Telephone: 310.556.2700
Facsimile: 310.556.2705

Attorneys for Defendants-Petitioners Pacific Pictures Corporation, IP Worldwide, LLC, IPW, LLC, and Marc Toberoff

v.

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA

Respondent,

DC COMICS,

Plaintiff-Real Party in Interest.

CIRCUIT RULE 27-3 CERTIFICATE OF COUNSEL

(i) The Telephone Numbers and Office Addresses of the Attorneys for the Parties:

TOBEROFF & ASSOCIATES, P.C.
Marc Toberoff (188547)
mtoberoff@ipwla.com
Keith G. Adams (240497)
kgadams@ipwla.com
22337 Pacific Coast Highway #348
Malibu, California 90265
Telephone: (310) 246-3333
Facsimile: (310) 246-3101
Attorneys for Defendants-Petitioners Mark Warren Peary, as personal representative of the Estate of Joseph Shuster, Jean Adele Peavy, and Laura Siegel Larson, individually and as personal representative of the Estate of Joanne Siegel

KENDALL BRILL & KLIEGER LLP
Richard B. Kendall (90072)
rkendall@kbkfirm.com
Laura W. Brill (195889)
lbrill@kbkfirm.com
Nicholas F. Daum (236155)
ndaum@kbkfirm.com
10100 Santa Monica Blvd., Suite 1725
Los Angeles, California 90067
Telephone: (310) 556-2700
Facsimile: (310) 556-2705
Attorneys for Defendants-Petitioners Pacific Pictures Corporation, IP Worldwide, LLC, IPW, LLC, and Marc Toberoff

EXHIBIT C
66

O'MELVENY & MYERS, LLP
Daniel M. Petrocelli (97802)
dpetrocelli@omm.com
Matthew T. Kline (211640)
mkline@omm.com
Cassandra L. Seto (246608)
cseto@omm.com
Ashley Pearson (281223)
apearson@omm.com
1999 Avenue of the Stars, 7th Floor
Los Angeles, California 90067
Telephone: (310) 553-6700
Facsimile: (310) 246-6779
Attorneys for Real Party in Interest DC Comics

PERKINS LAW OFFICE, P.C.
Patrick T. Perkins (admitted *pro hac vice*)
pperkins@ptplaw.com
1711 Route 9D
Cold Spring, New York 10516
Telephone: (845) 265-2820
Facsimile: (845) 265-2819
Attorney for Real Party in Interest DC Comics

(ii) Facts Showing the Existence and Nature of the Claimed Emergency

On May 25, 2011, the district court ordered produced numerous privileged documents stolen from the law offices of Marc Toberoff, counsel for petitioner Laura Siegel Larson in the *Siegel v. Warner Bros. Entertainment Inc.*, C.D. Cal. 04-08400 ODW (RZx), which had been provided to the U.S. Attorney's Office pursuant to a grand jury subpoena, and the government's promise, based on its common interests, to maintain the confidentiality of the documents and not to use them for purposes other than its investigation of the crime. However, the district

court expressly stayed its order "until all review is exhausted." Writ Petition, Ex. 24 ("May 25 Order") at 1484.

On July 1, 2012, defendants Pacific Pictures Corporation, IP Worldwide, LLC, IPW, LLC, and Marc Toberoff Mark Warren Peary, as personal representative of the Estate of Joseph Shuster, Jean Adele Peavy, and Laura Siegel Larson, individually and as personal representative of the Estate of Joanne Siegel ("Petitioners") filed a petition for a writ of mandamus, seeking review of the May 25 Order (the "Writ Petition").

On April 17, 2012, a panel of this court affirmed the May 25 Order in a written, published opinion (the "Writ Opinion"), expressly noting the Magistrate had "stayed his order to allow Petitioners to seek review." Writ Opinion at 4245.

On April 25, 2012, real-party-in-interest DC Comics ("DC") filed an *ex parte* application with the district court, seeking to lift the stay imposed by the district court in its May 25, 2011 order (Declaration of Marc Toberoff ("Tob. Decl."), Ex. A), which Petitioners opposed on the grounds set forth herein. *Id.*, Ex. B.

On May 1, 2012, petitioners filed a petition for rehearing and rehearing en banc, on the grounds that the Writ Opinion: (1) is of exceptional importance because it endorses an unprecedented "waiver" rule as to the victims of a crime that conflicts with decisions of this Circuit and others, and warrants consideration

en banc; and (2) contains numerous misstatements of facts that are vigorously disputed, not yet adjudicated by the district court in the first instance or resolved differently by other courts, and highly prejudicial to Petitioners.

On May 7, 2012, the district court granted DC's *ex parte* application to lift the stay, expressing the view that the matter was best addressed by the Ninth Circuit. The district court left the stay in place for a mere four days, or until Friday, May 11, 2012, expressly to allow Petitioners to seek such a stay with this Court. Toberoff Decl., Ex. C at 75 (emphasis added) (holding that arguments about a stay "belongs in the appellate court," and delaying the effective date of lifting the stay for four days to give Petitioners "the option of approaching the circuit if the[y] so choose"). Given the district court's express invitation to seek a stay in this Court, and the four-day deadline until May 11, 2012 it imposed, it would have been impractical to seek reconsideration of that order, or other relief, as such would have prevented a timely motion to this Court. Petitioners therefore brought the instant motion on an emergency basis.

Absent a stay, the purpose of the pending petition for rehearing and rehearing en banc review of this important legal issue, as provided for by FRAP Rules 40(a) and 35(b) and Ninth Circuit Rules 40 and 35, respectively, would be largely frustrated or negated.

(iii) When and How Counsel for the Other Parties Were Notified and Whether They Have Been Served with the Motion; Or, If Not Notified and Served, Why That Was Not Done:

Marc Toberoff, counsel for certain petitioners, gave DC Comics' lead counsel, Daniel Petrocelli, notice of this emergency motion in a telephone conference at approximately 1 p.m. on Monday, May 7, 2012. Tob Decl., ¶ 6. Mr. Toberoff also notified the Court at approximately 1:10 p.m. on Monday, May 7, 2012 that Petitioners would bring this emergency motion. *Id.*

(iv) Relief Requested:

Petitioners ask that the Court stay the production of the stolen privileged documents at issue until the Court has adjudicated the Petition for Rehearing and Rehearing En Banc.

Dated: May 8, 2010

RESPECTFULLY SUBMITTED,

Laura W. Brill
KENDALL BRILL & KLIEGER LLP
Attorneys for Defendants-Petitioners, *Pacific Pictures Corporation, IP Worldwide, LLC, IPW, LLC, and Marc Toberoff*

Marc Toberoff
TOBEROFF & ASSOCIATES, P.C.
Attorneys for Defendants-Petitioners, *Mark Warren Peary, as personal representative of the Estate of Joseph Shuster, Jean Adele Peavy, Joanne Siegel and Laura Siegel Larson*

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MOTION FOR STAY PENDING PETITION FOR REHEARING

I. INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 8(a)(2) and Ninth Circuit Rules 27-2 and 27-3, Petitioners-Defendants ("Petitioners") request an order staying the district court's order dated May 25, 2011 and the district court's removal of its stay of that May 25, 2011 order on May 7, 2012, pending a ruling on Petitioners' May 1, 2012 Petition for a Rehearing and for Rehearing En Banc (Docket No. 31-1; "Rehearing Petition") of the April 17, 2012 decision (Docket No. 27-1; "Opinion" or "Op.") by a panel of this Court denying Petitioners' underlying petition for writ of mandamus ("Writ Petition").

As set forth in greater detail below, a stay is justified because Petitioners will be irreparably harmed absent a stay by the forced production to Petitioners' litigation adversaries of numerous privileged documents stolen from their counsel's legal files. Once Petitioners are forced to produce privileged attorney-client communications, that bell cannot be un-rung, even if the Rehearing Petition is granted.

Absent a stay, the purpose of the Rehearing Petition, and Fed. R. App. P. Rules 40(a) and 35(b) and Ninth Circuit Rules 40 and 35, which provide for such rehearing and rehearing en banc, respectively, could be largely negated, and thereby deprive the full Court of an opportunity to weigh in on the vital legal issues

presented by the Writ Opinion before any damage is done. Federal Rule of Appellate Procedure 41 protects a party's right to seek rehearing or rehearing en banc, as timely filing of a petition for rehearing stays the mandate until disposition of the petition. Fed. R. App. P. 41(d); *see also* Fed. R. App. P. 41(b) (mandate issues seven days after denial of petition for rehearing); *Matter of Thorp*, 655 F.2d 997, 999 (9th Cir. 1981). While this is a writ proceeding, the Court should similarly act to protect this Court's ability to meaningfully rehear its decision before contrary action by the district court, and stay the effect of its ruling as to Petitioners until there is a ruling on the Rehearing Petition.

Pursuant to Circuit Rule 27-3, Petitioners respectfully request that relief be granted **no later than May 11, 2012**, to avoid such irreparable harm.[1]

II. BACKGROUND

Laura Siegel Larson and Joanne Siegel (now deceased) (the "Siegels") are heirs to Superman co-creator Jerry Siegel and the plaintiffs in *Siegel v. Warner Bros. Entertainment Inc., et al.*, C.D. Cal. Case No. 04-08400 ODW (RZx), and *Siegel v. Time Warner Inc., et al.*, Case No. 04-08776 ODW (RZx) (the "*Siegel* litigation"). In the midst of the *Siegel* litigation, wherein they were/are represented by attorney Marc Toberoff, someone stole numerous privileged and work product

[1] Petitioners certify that on May 7, 2012, they provided oral notice to the Clerk of the Court and counsel for DC of this emergency motion, and that DC opposes the relief requested.

documents ("Stolen Documents"), and delivered them to the Siegels' litigation adversaries, Warner Bros. Entertainment Inc. ("Warner") and its affiliate, real party in interest DC Comics ("DC").

Thereafter, DC filed the underlying action, *DC Comics v. Pacific Pictures Corporation, et al.*, Case No. 10-03663 ODW (RZx) ("*Pacific Pictures*"), against the Siegels, the heirs of Joe Shuster (Superman's other co-creator) and their long-time counsel, Mr. Toberoff.

The United States Attorney's Office ("USAO") requested of Mr. Toberoff that it be permitted to review the Stolen Documents in order to evaluate and investigate the crime. Mr. Toberoff thereafter provided the Stolen Documents to the USAO pursuant to a grand jury subpoena, and the government's promise, based on its asserted common interest in the investigation, to maintain the confidentiality of the documents and not to use them for purposes other than its criminal investigation. Writ Petition Appendix Ex. 24 ¶¶ 4-5.

On May 25, 2011, the Magistrate Judge presiding over discovery in *Pacific Pictures* held that this confined disclosure to the USAO waived privilege as to all of the Stolen Documents and ordered them produced in the *Pacific Pictures* action. The Magistrate, recognizing the importance of this issue of first impression, expressly stayed his ruling ***until "all review is exhausted***." Writ Petition, Ex. 24 ("May 25 Order") at 1484 (emphasis added). In ruling on DC's motion for

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"clarification," the Magistrate again confirmed that the stay "would not expire otherwise until review was exhausted," while noting that "***the matter is not clear cut, and [that] the consequences of a wrong decision are significant. "*** Writ Petition, Ex. 32 at 1694.

On April 17, 2012, a panel of this Court affirmed the May 25 Order and in so doing noted that the Magistrate "stayed his order to allow Petitioners to seek review." Docket No. 27-1 at 4245.

On April 24, 2012, DC filed an *ex parte* application with the district court, seeking the immediate production of the Stolen Documents notwithstanding the twice-confirmed stay until "all review is exhausted," and DC's knowledge that Petitioners were submitting the Rehearing Petition. Declaration of Marc Toberoff ("Tob. Decl."), Ex. A. DC purported "urgent" grounds for requiring immediate production of the Stolen Documents are addressed below. Petitioners opposed DC's *ex parte* application. *Id.*, Ex. B.

On May 1, 2012, Petitioners submitted the Rehearing Petition. Docket No. 31-1. A Ninth Circuit judge must request a vote on a petition for rehearing en banc within twenty-one (21) days of the filing of such petition (*i.e.*, by May 22, 2012), or such petition can be summarily denied. Ninth Circuit General Order 5.4(b)(1).

On May 7, 2012, the Magistrate Judge granted DC's *ex parte* application, lifting the stay under its May 25 Order, effective May 11, 2012, and expressly

invited Petitioners to seek a stay from this Court. Toberoff Decl., Ex. C at 75 (emphasis added) (delaying the effective date of ruling by four days in order to give Petitioners "the option of approaching the circuit if the[y] so choose"). The Magistrate Judge expressly did not weigh the likelihood that the petition for rehearing or rehearing en banc would likely be granted. Nor did the Magistrate Judge identify any prejudice that DC would suffer if the stay continued pending resolution of the Rehearing Petition. Nor did he deny the irreparable harm caused Petitioners by production in the absence of a stay. Instead, the Magistrate Judge observed that these questions were for ***this Court*** to decide. Toberoff Decl., Ex. C at 74-75 ("So, any further weighing of the risks, will the matter be taken en banc or cert granted and, if so, will the defendants likely prevail. ***That now properly belongs not here. That belongs in the appellate court***.") (emphasis added).

Hours later, Petitioners informed DC and the Court that they would file the instant motion. Toberoff Decl., ¶ 6. Given the extremely short, four day deadline until May 11, 2012, and the district court's express instruction that the issues relevant to a stay pending the Rehearing Petition are for this Court, Petitioners have brought the instant motion on an emergency basis.

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III. ARGUMENT

A. Standard For A Stay Pending Resolution Of The Petition For Rehearing And Rehearing En Banc

This Court has the authority to stay a district court order granting discovery pending the resolution of the Rehearing Petition where, as here, the party seeking the stay tried for and was denied such relief at the district court level. Toberoff Decl., Ex. B. In this Circuit, a stay of a district court's ruling may issue where there are, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff …. so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). The Ninth Circuit uses these factors as a "sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008).

Here, absent a stay of the disclosure of the documents, the opportunity for this Court to meaningfully consider rehearing or rehearing en banc of its published written ruling on the Writ Petition will be damaged.[2] The right to seek rehearing

[2]The Petition for Rehearing and Rehearing En Banc would not become moot or irrelevant even if the Stolen Documents were turned over. Among other issues, Petitioners have sought rehearing to correct a number of factual misstatements in the Court's opinion; that aspect of the Petition, which addresses a continuing harm

and rehearing en banc is provided for by the Federal Rules of Appellate Procedure, and has long been recognized as serving an important judicial function. *See, e.g. W. Pac. R. Corp. v. W. Pac. R. Co.*, 345 U.S. 247, 261 (1953) ("It is also essential that litigants be left free to suggest to the court … that a particular case is appropriate for consideration by all the judges. A court may take steps to use the en banc power sparingly, but it may not take steps to curtail its use indiscriminately."). This Court has the inherent power to act to protect the attorney-client privilege while a petition for rehearing or rehearing en banc is pending. *Clarke v. Am. Commerce Nat. Bank*, 977 F.2d 1533 (9th Cir. 1992) (modifying order regarding disclosure of privileged documents while a petition for rehearing is pending).

A stay is necessary in order to preserve a meaningful right to rehearing and rehearing en banc of the district court's order concerning the privileged documents. As this Court has noted, "once the [documents] are disclosed to the [adverse party], the disclosure cannot be undone, by appeal or otherwise." *Barton v. United States Dist. Court*, 410 F.3d 1104, 1109 (9th Cir. 2005). Accordingly, the Court should grant a stay of the disclosure consistent with the stay of this Court's mandate on a direct appeal, until seven days following a denial of the Rehearing Petition.

(footnote continued)
separate from the privilege ruling, would not be affected by the disclosure of the Stolen Documents.

B. Petitioners Will Be Irreparably Harmed Absent A Stay

Absent a stay pending the decision on the Rehearing Petition, Petitioners will suffer irreparable injury, and this Court's procedures for providing an opportunity to seek rehearing and rehearing en banc of the denial of the writ petition will be rendered effectively meaningless.

First, it is well-established that erroneous disclosure of privileged material may cause irreparable harm. In *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989), this Court found that "an appeal after disclosure of the privileged communication is an inadequate remedy" for the "irreparable harm a party likely will suffer if erroneously required to disclose privileged materials or communications." *See also SEC v. Rajaratnam*, 622 F.3d 159, 170 (2d Cir. 2010) ("Once the 'cat is out of the bag,' the right against disclosure cannot later be vindicated."); Christopher A. Goelz and Meredith J. Watts, *California Practice Guide: Federal 9th Circuit Civil Appellate Practice*, Ch. 13-C ("Courts have long recognized that a party can suffer irreparable harm if erroneously required to disclose privileged information (*i.e.*, it is impossible to 'unring the bell')."). The Ninth Circuit has emphasized that writ review is appropriate where "discovery orders rais[e] particularly important questions of first impression, especially … [as to] the scope of an important privilege" (*Perry v. Schwarzenegger*, 591 F.3d 1147, 1157 (9th Cir. 2010)), or where a court finds a

broad "waiver of the attorney-client and work product privileges." *Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010). Here, the Ninth Circuit in deciding to hear the Writ Petition effectively acknowledged that it raised important questions of first impression and a broad waiver of the attorney-client and work product privileges. Absent a stay issued by this Court during the pendency of the Rehearing Petition, the "bell cannot be unrung" and the privileged material cannot be protected.[3]

Second, absent a stay, Petitioners will be deprived of any meaningful right to seek rehearing or rehearing en banc of this Court's April 17, 2012 ruling. Circuit rules expressly provide writ petitioners with the right to seek rehearing or rehearing en banc from an order, yet, here, the district court's precipitous action effectively preempts Petitioners ability to meaningfully exercise that right. In direct appeals, the Federal Rules of Appellate Procedure expressly guard against such a possibility by staying the mandate. Fed. R. App. P. 41. This Court has

[3] *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 608 (2009), does not compel a contrary conclusion. Disclosure of the stolen privileged documents would deprive Petitioners of their right to seek effective rehearing on an issue which this Court has already deemed worthy of consideration, and significant enough to warrant a published opinion. Indeed, *Mohawk Industries* itself contemplated that writ review would be an appropriate means of challenging erroneous attorney-client privilege rulings, *see id.*, and it would make little sense to ensure that right but to deny Petitioners their ordinary appellate right to meaningfully seek rehearing. Moreover, this Court has recognized that a "broad" waiver of the attorney-client privilege, such as the one at issue here, may cause irreparable injury that cannot be remedied after final judgment. *Hernandez*, 604 F.3d at 1101.

zealously guarded its rehearing powers by emphasizing that district courts are not to issue orders effectuating this Court's rulings until after the rehearing period has expired. Circuit Advisory Committee Note To Rule 41-1.

Given the district court's premature lifting of its stay, this Court should grant a stay, consistent with Fed. R. App. P. 41, to meaningfully preserve the right to rehearing en banc. *Matter of Thorp,* 655 F.2d 997, 999 (9th Cir. 1981).

C. DC Will Not Be Prejudiced By A Stay

Before the Magistrate Judge, DC offered several reasons why it would purportedly be prejudiced by a stay pending the Rehearing Petition. However, none of DC's arguments have merit.

Appellate Filings: DC averred to the need to have the stolen documents, so it could present such documents to the Court in separate appeals – *DC Comics v. Pacific Pictures Corp.*, 9th Cir. Case No. 11-56934 (the "Anti-SLAPP Appeal"), and *Larson v. Warner Bros. Entertainment, Inc.*, 9th Cir. Case Nos. 11-55863, 11-56034 (the "*Siegel* Appeal"). Tob. Decl., Ex. A at 14. However, this is not a legitimate basis for "prejudice," because if the rehearing petition lacks merit, a ruling to that effect could issue very quickly, and, in any event, if DC seeks to supplement the record, any legitimate scheduling issues are properly addressed in those appeals, rather than by negating Petitioners' right to effective rehearing.

Moreover, the numerous Stolen Documents were never part of the record on

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any order being considered on appeal and have never been presented to the district court in the first instance. It would be highly unusual for any appellate panel to weigh the stolen privileged documents de novo in connection with a pending appeal (*see, e.g.*, Fed. R. App. P. 10(a); Circuit Rule 10-2; *Lowry v. Branhart*, 329 F.3d 1019 (9th Cir. 2003); *Barcamerica Int'l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 593-94 (9th Cir. 2002)), and this exceptionally remote possibility cannot outweigh Petitioners' strong interest in having the full Circuit review the Rehearing Petition.

Discovery Timing: DC also averred to supposed prejudice that a stay (even one lasting a few weeks) would prejudice it because DC would have "to defer depositions for key witnesses." Tob. Decl., Ex. A at 17. However, DC could easily have deposed any witness it wanted while the stay was in effect, and still could, as no discovery cut-off has been set by the district court. Nor did DC ever move to expedite the decision on the Writ Petition. DC waited four years after receiving and reading the Timeline before filing suit based on its allegations. Tob. Decl., Ex. D at 78-79, ¶¶ 2-4. Given DC's delay, DC cannot reasonably complain, and DC's ***choice*** to defer depositions or discovery is not a legitimate "prejudice."

Resolution of the Case: DC also claimed prejudice because it supposedly "needs and has the right to proceed to judgment in this case well before 2012." Tob. Decl., Ex. A at 17. Of course, DC has no "right" to determine the district

court's schedule. The district court has not yet entered a scheduling order in this case (filed in May 2010); any delay in proceeding to judgment is obviously not due to a stay pending the Rehearing Petition. In December 2011, Petitioners ***joined*** in a stipulation to bifurcate and try the First Claim – the key claim which puts at issue the validity of the Shuster termination, the *real issue* in this case – and schedule a trial on that claim for mid-April 2012, but the district court declined to bifurcate. Tob. Decl., Ex. B at 6. Moreover, Petitioners simply wish to maintain their window to meaningfully seek rehearing or rehearing en banc pursuant to the Fed. R. App. P. and Ninth Circuit Rules. If DC were concerned about the delay in obtaining a judgment by the end of 2012, it would not have waited years to file suit. The action below is not otherwise stayed or even affected by a decision to briefly stay turning over the Stolen Documents while the Petition for Rehearing and Rehearing En Banc is pending.

D. Petitioners Have A Strong Likelihood Of Success On The Merits

Petitioners have a substantial likelihood that their Rehearing Petition will be heard and will be successful on the merits, justifying the need for a stay to protect that right to rehearing.

1. The Writ Opinion Concerns Vital Issues Of Law And Warrants En Banc Review

As set forth in greater detail in the Rehearing Petition (Docket No. 31-1 at

17-26), there is ample basis for en banc review of this critical issue of privilege waiver. Under this Opinion, the victims of any crimes involving the theft of privileged or confidential material and third parties, wishing to assist a criminal investigation, will be penalized for cooperating with the government. The panel decision has wide-ranging implications that stand to chill investigation and prosecution by the government, as it is the first decision from ***any*** circuit court on "selective waiver" regarding the *victim* of a crime as opposed to the *target* of a criminal investigation. Even as to targets or suspected criminals there has long been a Circuit split as acknowledged by the Opinion. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977). The panel decided "selective waiver" issues that the Ninth Circuit had expressly declined to reach in two prior decisions, including an en banc decision. *See United States v. Bergonzi*, 403 F.3d 1048, 1050 (9th Cir. 2005); *Bittaker v. Woodford*, 331 F.3d 715, 720 n.5 (9th Cir. 2003) (en banc). In denying the Writ Petition and a victim's ability to safeguard privilege via a confidentiality agreement with the government, the panel's Opinion went further than any circuit before it.

Conflict with Other Courts re: Common Interest: The Opinion also concluded that Petitioners and the government could not share a "common interest" as a matter of law, on the grounds that Petitioners "ha[ve] no more of a common interest with the government than does any individual who wishes to see

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the law upheld." Op. at 4253. That portion of the opinion conflicted with both statute (*see, e.g.*, 18 U.S.C. § 3771 (rights of crime victims)), and numerous decisions recognizing that private entities and the government can "share a common interest in developing legal theories and analyzing information" in enforcement actions *or* where the private party is the victim of the conduct under investigation. *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2nd Cir. 1993). *See also Argenyi v. Creighton Univ.*, 2011 WL 3497489 at *2 (D. Neb. Aug. 10, 2011); *United States v. Gumbaytay*, 2011 U.S. Dist. LEXIS 47142, Civ. A. No. 2:08cv573–MEF at *10–12 (M.D. Ala. Jan. 19, 2011); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *Miller, Anderson, Nash, Yerke & Wiener v. U.S. Dept. of Energy*, 499 F. Supp. 767, 770-771 (D. Ore. 1980).

Conflict With *Bittaker*: In *Bittaker*, this Court en banc addressed a similar issue: whether a waiver of attorney-client privilege based on the assertion of an ineffective assistance of counsel claim also waives privilege as to third parties in a civil litigation. The Court concluded that due to the involuntary nature of the disclosure there was an "implied" waiver *limited to the proceeding in which the disclosure was made*, but not extending to other litigation. 331 F.3d at 719-20.

Bittaker thus limits waiver of the privilege to the proceeding in which a disclosure is made, if, as here, (1) disclosing privileged information is necessary to vindicate a legal right, or (2) the disclosure is made only to a third party who

agrees to maintain the privilege. The logic of the Opinion – that Petitioners must forgo their petition right to seek redress for a crime through law enforcement or forever waive the privilege as to the rest of the world – thus conflicts substantially with *Bittaker*, and risks creating an intra-circuit split on the law of privilege.

2. Factual Errors In The Writ Opinion Require Rehearing And Correction

As set forth in greater detail in the Rehearing Petition (Docket No. 31-1 at 7-17), the Opinion contains numerous misstatements of fact that are highly prejudicial, as to matters in serious dispute in the underlying *Pacific Pictures* case, not yet adjudicated or ruled on by the district court, not supported by the record, and not raised by or germane to the Writ Petition. It also includes misstatements that conflict with binding "Superman" decisions in other cases. Although the harm caused by these prejudicial misstatements of fact will exist regardless of disclosure of the Stolen Documents, the need for the Court to address these factual misstatements through rehearing, and the risk that the Court's misapprehension of the facts affected its judgment as to the legal issues, also counsels in favor of maintaining the status quo with regard to the Stolen Documents until rehearing of all issues can be meaningfully considered by the Court.

E. <u>The Public Interest Favors A Stay</u>

Finally, the public interest favors a stay here. There is a strong, pervasive

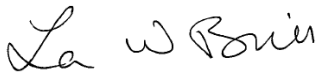
interest throughout the legal community in the selective waiver issue. *See*, *e.g.*, Christopher T. Hines, *Returning to First Principles of Privilege Law: Focusing on the Facts in Internal Corporate Investigations*, 60 U. Kan. L. Rev. 33, 88 (2011). The public interest thus supports a stay, so that this Court en banc court can weigh in on this issue, if such review is deemed warranted, without the risk of mootness. *In re Grand Jury Subpoena Dated June 5, 1985*, 825 F.2d 231, 234 (9th Cir. 1987).

IV. CONCLUSION

It is necessary to stay production of the Stolen Documents until review of the panel's Opinion is exhausted to protect the right afforded by the Federal Rules of Appellate Procedure and Ninth Circuit Rules to seek meaningful rehearing and rehearing en banc of the Opinion. The best course is to issue a stay consistent with the Court's ordinary practice on direct appeal. As such, this Court should stay the production of the Stolen Documents until seven days after the Rehearing Petition is fully resolved.

Dated: May 8, 2010

RESPECTFULLY SUBMITTED,



Laura W. Brill
KENDALL BRILL & KLIEGER LLP
Attorneys for Defendants-Petitioners, *Pacific Pictures Corporation, IP Worldwide, LLC, IPW, LLC, and Marc Toberoff*

Marc Toberoff
TOBEROFF & ASSOCIATES, P.C.
Attorneys for Defendants-Petitioners, *Mark Warren Peary, as personal representative of the Estate of Joseph Shuster, Jean Adele Peavy, Joanne Siegel and Laura Siegel Larson*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d) and 32(a), I certify that the appellant Laura Siegel Larson's brief is proportionately spaced, has a typeface of 14 points or more, and does not exceed 20 pages.

Dated: May 8, 2010

RESPECTFULLY SUBMITTED,

Laura W. Brill
KENDALL BRILL & KLIEGER LLP
Attorneys for Defendants-Petitioners, *Pacific Pictures Corporation, IP Worldwide, LLC, IPW, LLC, and Marc Toberoff*

Marc Toberoff
TOBEROFF & ASSOCIATES, P.C.
Attorneys for Defendants-Petitioners, *Mark Warren Peary, as personal representative of the Estate of Joseph Shuster, Jean Adele Peavy, Joanne Siegel and Laura Siegel Larson*

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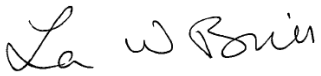
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served electronically by the Court's ECF system and by first class mail on those parties not registered for ECF pursuant to the rules of this court.

Dated: May 8, 2010

RESPECTFULLY SUBMITTED,



Laura W. Brill
KENDALL BRILL & KLIEGER LLP
Attorneys for Defendants-Petitioners, *Pacific Pictures Corporation, IP Worldwide, LLC, IPW, LLC, and Marc Toberoff*

Marc Toberoff
TOBEROFF & ASSOCIATES, P.C.
Attorneys for Defendants-Petitioners, *Mark Warren Peary, as personal representative of the Estate of Joseph Shuster, Jean Adele Peavy, Joanne Siegel and Laura Siegel Larson*

EXHIBIT D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV10-03633-ODW-(RZx)	Date	MAY 7, 2012
Title	DC COMICS v. PACIFIC PICTURES CORP., ET AL.		

Present: The Honorable	RALPH ZAREFSKY, U.S. MAGISTRATE JUDGE

Ilene Bernal	Recorded on Courtsmart
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Daniel M. Petrocelli Matthew T. Kline	Marc Toberoff

Proceedings: HRG: PLAINTIFF'S EX PARTE APPLICATION TO LIFT TEMPORARY STAY ON THE COURT'S MAY 25, 2011 AND AUGUST 8, 2011 ORDERS

The Court orders the previously ordered stays lifted, effective May 11, 2012 at 12:00pm.

: 35

Initials of Preparer igb

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FILED

MAY 10 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: PACIFIC PICTURES CORPORATION; IP WORLDWIDE, LLC; IPW, LLC; MARC TOBEROFF; MARK WARREN PEARY; LAURA SIEGEL LARSON; JEAN ADELE PEAVY,

PACIFIC PICTURES CORPORATION; IP WORLDWIDE, LLC; IPW, LLC; MARK WARREN PEARY, as personal representative of the Estate of Joseph Shuster; MARC TOBEROFF, an individual; JEAN ADELE PEAVY; LAURA SIEGEL LARSON, an individual,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES,

Respondent,

DC COMICS,

Real Party in Interest.

No. 11-71844

D.C. No. 2:10-cv-03633-ODW-RZ
Central District of California,
Los Angeles

ORDER

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Before: KOZINSKI, Chief Judge, O'SCANNLAIN and N.R. SMITH, Circuit Judges.

Petitioners' Motion for Stay Pending Decision on Petition for Rehearing and Rehearing En Banc is **DENIED**.

Petitioner's Motion to Exceed Word Limitation for Petition for Rehearing En Banc is **GRANTED**.

EXHIBIT F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-EASTERN DIVISION

JOANNE SIEGEL and LAURA SIEGEL LARSON, Plaintiffs, vs. WARNER BROS. ENTERTAINMENT INC.; TIME WARNER INC.; DC COMICS; and DOES 1-10, Defendants.	Case No. CV 04-8400 SGL (RZx) Hon. Stephen G. Larson, U.S.D.J. **FINAL PRE-TRIAL CONFERENCE ORDER** **Final Pre-Trial Conference** Date: January 26, 2009 Time: 11:00 a.m. Place: Courtroom 1 **Trial** Date: April 21, 2009 Time: 9:30 a.m. Place: Courtroom 1 [Complaint filed: October 8, 2004]
AND RELATED COUNTERCLAIMS	

B. Defenses

Defendants will not be asserting any affirmative defenses or counterclaims in this phase of the trial.

8. DISCOVERY

Discovery is complete.

Defendants' motion to reopen discovery filed March 2, 2009 is **DENIED**.

9. ALL DISCLOSURES UNDER FED.R.CIV.P. 26(A)(3) HAVE BEEN MADE

The joint exhibit list of the parties has been filed under separate cover as required by L.R. 16-6-1. Unless all parties agree that an exhibit shall be withdrawn, all exhibits will be admitted without objection at trial, except those exhibits objected to in the parties' Joint Exhibit Stipulation filed concurrently herewith.

10. WITNESS LISTS OF THE PARTIES HAVE BEEN FILED WITH THE COURT

Only the witnesses identified in the parties' joint witness list (as amended) will be permitted to testify (other than solely for impeachment).

Neither party is intending to present evidence by way of deposition testimony (other than for cross-examination or impeachment).

11. THE FOLLOWING LAW AND MOTION MATTERS AND MOTIONS *IN LIMINE*, AND NO OTHERS, HAVE BEEN SUBMITTED, HEARD, AND DECIDED BY THE COURT, AS FOLLOWS:

Plaintiffs' Motions in Limine

A. Motion in Limine No. 1

13. CONCLUSION

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues remaining to be litigated, this Final Pretrial Conference Order shall supersede the relevant pleadings relevant to the first phase of trial on April 21, 2009 and govern the course of such trial, unless modified to prevent manifest injustice.

Dated: March 13, 2009

UNITED STATES DISTRICT COURT JUDGE