APPELLATE CASE NO. 11-55863
CROSS-APPEAL CASE NO. 11-56034

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAURA SIEGEL LARSON
Plaintiff, Counterclaim-Defendant, and Appellant,
v.
WARNER BROS. ENTERTAINMENT INC., DC COMICS
Defendants, Counterclaimants, and Appellees.

APPELLANT LAURA SIEGEL LARSON'S REPLY IN SUPPORT OF MOTION TO STRIKE APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORDS AND PORTIONS OF PRINCIPAL AND RESPONSE BRIEF AND RESPONSE TO APPELLEES' MOTION FOR JUDICIAL NOTICE

Appeal From The United States District Court
For The Central District of California,
Case No. CV-04-08400 ODW (RZx), Hon. Otis D. Wright II

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INTRODUCTION

In complete disregard for standard appellate procedure, Appellees and Cross-Appellants Warner Bros. Entertainment Inc. and DC Comics (collectively "Warner") entered this appeal with Supplemental Excerpts of Record ("Supplemental Excerpts" or "SER") that included 19 documents, totaling 166 pages, that were not before the District Court. Rather than file a motion to supplement that openly identified these documents, Warner included them in its Supplemental Exerpts, requesting judicial notice in footnotes buried therein. After Plaintiff brought this improper expansion of the record to the Court's attention in her motion to strike, Warner belatedly filed a motion for judicial notice "in the alternative," which is no less substantively and procedurally flawed.[1]

Considering its scale, Warner's request is less a motion for judicial notice than a request for an entirely new record. It is questionable whether any set of circumstances would ever merit such a large-scale, rebuilding of the record on appeal. Warner makes no effort to establish the type of extraordinary circumstance that would warrant the expansion of the record by even a single page. Indeed, Warner's position is self-immolating: in the same breath that it claims its

[1] Instead of filing a 10-page reply in support of its motion to strike plus a 20-page response to Warner's motion for judicial notice (Rule 27(d)(2)), Plaintiff has filed a combined 20-page reply/response brief by the June 20, 2012 deadline for its response (Rule 27(a)(3)(A)).

prejudicial extra-record material is "necessary" (MJN 2), it also asserts that "the Court need not consider any of the [extra-record] evidence discussed herein to rule . . . on all of the questions presented in this appeal." MJN 3. Warner attempts an end run around Fed. R. App. P. 10(a) by requesting judicial notice, but hardly even tries to show why such material would ever be judicially noticeable. As detailed below, these voluminous extra-record materials consist largely of contested factual allegations and inadmissible evidence. These types of materials are not the proper subjects of judicial notice, as this and every other Circuit has agreed, and as Warner almost certainly knows. If litigants were allowed to introduce such extra-record materials on the grounds Warner advances, the judicial notice doctrine would render the fundamental limitation of Fed. R. App. P. 10(a) meaningless, and the appellate record would become a free-for-all.

Judicial notice is not a vehicle to rewrite the record, introduce contested factual content, or bypass the evidentiary rules. Nor should a request for judicial notice be misused as an opportunity to put before the Court, however briefly, page after page of irrelevant, prejudicial material. Accordingly, this Court should reject Warner's efforts to substitute a new record on appeal that was not considered by the District Court, that Defendants had no opportunity to address in their opening brief or rebut with other extra-record evidence, and which is entirely improper under the Federal Rules of Appellate Procedure and the Federal Rules of Evidence.

ARGUMENT

I. WARNER FAILS TO OVERCOME THE FUNDAMENTAL LIMITATION OF RULE 10(a)

Nowhere does Warner address Fed. R. App. P. 10(a)'s limitation of the record on appeal to "the original papers and exhibits filed in the district court," or the settled precedent cited by Plaintiff which expressly forbids Warner's expansion of the record on appeal. *See* Dkt No. 42-1 at 2-3; *Israni v. Bittman*, 10-16726, 2012 WL 1074266 (9th Cir. Apr. 2, 2012) ("[M]otion to strike is granted because Appellant never filed or submitted the relevant documents to the court below.").[2]

A party cannot use judicial notice, as Warner attempts here, "to circumvent the general rule against supplementing the [] record." *Murakami v. United States*, 398 F.3d 1352, 1355 (Fed. Cir. 2005); *see also Native Ecosystems Council v. Weldon*, 2012 WL 991833 (D. Mont. Mar. 26, 2012) ("A party cannot circumvent the rules governing record supplementation by asking for judicial notice...").

Fed. R. App. P. 10(e)(2)(c) allows this Court to supplement the record only in "extraordinary circumstances." *United States v. Boulware*, 558 F.3d 971, 976 (9th Cir. 2009) ("[10(e)(2)(c)] allows the court of appeals to supplement the record

[2] *Wierzba v. E*Trade Fin. LLC*, 2012 WL 821916 (9th Cir. Mar. 13, 2012) (granting motion to strike extra-record excerpts); *Johnson v. Departments of Army & Air Force*, 2012 WL 32132 (9th Cir. Jan. 6, 2012) (same); *In re Phillips*, 460 F. App'x 625, 626 (9th Cir. 2011) (same); *Harrell v. Costco*, 422 F. App'x 635, 636 (9th Cir. 2011) (same).

only by formal motion based on extraordinary circumstances or error correction"). Warner cannot establish, and has not even attempted to argue, such "extraordinary circumstances."

Instead, Warner repeatedly asserts that the scores of extra-record documents it unilaterally inserted are supposedly "self-authenticating," and that this, alone, is sufficient ground for expanding the record. MJN 1-2, 4, 12. *First*, the "very limited exceptions" to Rule 10(a) do not include purportedly self-authenticating documents; if it did the exception would quickly swallow the rule. *Blankson-Arkoful v. Sunrise Sr. Living Services, Inc.*, 449 F. App'x 263, 265 (4th Cir. 2011). *Second*, most of the documents Warner says are self-authenticating and uncontested are anything but. *See, e.g.* SER 810-814 (personal correspondence from non-parties). *Third*, the prejudice that occurs when a party unilaterally injects numerous documents into the record on appeal extends well beyond authentication. In fact, Warner exacerbated this prejudice by failing to request judicial notice until *after* Plaintiff had filed her opening brief. Plaintiff did not have proper notice so as to address these documents in her filings below and/or in her opening appellate brief. As this Court expressly noted in *Lowry v. Barnhart*, 329 F.3d 1019, 1025 (9th Cir. 2003), "unilateral supplementation of the record [is] also unfair. . . because [the opposing party] argue[s] the case on a record different from the [supplemented] one."

Whereas Warner long-planned its appellate strategy, Plaintiff argued her appeal based on the district court record per Fed. R. App. 10(a)– only to be sandbagged by Warner's cross-appeal brief, based on a very different, unilaterally expanded "record." Dkt. Nos. 11, 14, 31, 31-1. Plaintiff is further prejudiced unless she is afforded an equal opportunity to supplement the appellate record with rebuttal evidence to counter DC's misleading arguments based on extra-record materials. Fed. R. App. P. 10(a) and Circuit Rule 10-2 are designed to avoid precisely this sort of unfairness and unmanageable free-for-all.

II. THE "JUDICIAL NOTICE" DOCTRINE IS LIMITED TO INDISPUTABLE FACTS AND DOES NOT PERMIT THE WHOLESALE INJECTION OF DISPUTED EXTRA-RECORD EVIDENCE INTO AN APPEAL

Pursuant to Fed. R. Evid. 201(b), judicial notice is appropriate only as to "uncontroverted fact[s]" that are not subject to reasonable dispute. *Baker v. California Dept. of Corr.*, 2012 WL 2045962 *1 (9th Cir. June 7, 2012). A "high degree of indisputability is the essential prerequisite." Fed. R. Evid. 201, Advisory Comm. N. (2011). Furthermore, "the power to take judicial notice is to be exercised by courts with caution [and] . . . [e]very reasonable doubt upon the subject should be resolved promptly in the negative." *McGill v. Michigan S.S. Co.*, 144 F. 788, 793 (9th Cir. 1906) (internal quotations and citation omitted).[3]

[3] *See also Doss v. Clearwater Title Co.*, 551 F.3d 634, 640 (7th Cir. 2008) ("Judicial notice 'merits the traditional caution it is given, and courts should

"It is rarely appropriate for an appellate court to take judicial notice of facts that were not before the district court," *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 392 n.7 (9th Cir.2000), and even "taking judicial notice of findings of fact from another case exceeds the limits of Rule 201." *Wyatt v. Terhune*, 315 F.3d 1108, 1114 (9th Cir. 2003); *see also G.M. v. Dry Creek Joint Elementary Sch. Dist.*, 458 F. App'x 654, 654-55 (9th Cir. 2011).

Tellingly, the cases Warner relies upon are either inapposite or contrary to their position.[4]

A. Irrelevant and Inadmissible Material Is Particularly Ineligible For Judicial Notice

"[A] court may not take judicial notice of otherwise inadmissible statements merely because they are part of a court record or file." *M/V American Queen v. San Diego Marine Construction*, 708 F.2d 1483, 1491 (9th Cir.1983); *see also In*

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strictly adhere to the criteria by the Federal Rules of Evidence before taking judicial notice of pertinent facts.'") (citation omitted); *Maraldo v. Life Ins. Co. of the Sw.*, 2012 WL 1094462 *6 (N.D. Cal. Mar. 30, 2012) ("The Ninth Circuit has indicated that judicial notice should only be taken sparingly, with caution, and after demonstration of a 'high degree of indisputability.'") (citation omitted).

[4] *See United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) ("The requested judicial notice cannot . . . properly be taken."); *Werner v. Werner*, 267 F.3d 288, 295 (3rd Cir. 2001) (denying "judicial notice of the truth of the contents of a filing from a related action"); *Sandpiper Vill. Condo Ass'n v. Louisiana-Pacific Corp.*, 428 F.3d 831, 837 (9th Cir. 2005) (taking judicial notice of *previously-unavailable* portions of the trial transcript *in the same case*); *In re Indian Palms Associates, Ltd.*, 61 F.3d 197, 205 (3d Cir. 1995) (judicial notice where "documents are not being used to determine disputed facts relating to the merits of the case").

re Blumer, 95 B.R. 143, 146 (B.A.P. 9th Cir. 1988) (same); *Pratt v. California State Bd. of Pharmacy*, 268 F. App'x 600, 603 (9th Cir. 2008) (denying judicial notice as documents were hearsay); *Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780, 797 (8th Cir. 2009) ("Caution must also be taken to avoid admitting evidence, through . . . judicial notice, in contravention of the relevancy, foundation, and hearsay rules.").[5]

Here, Warner attempts to introduce a host of contested inadmissible evidence into the record under the guise of "judicial notice."

B. The Documents At Issue Are Not Judicially Noticeable

- July 2003 Letter from Laura Siegel Larson to Michael Siegel (SER 806-814)

Warner relies on this extra-record letter for its references to what the Siegels' former attorney, Kevin Marks, purportedly said regarding his beliefs as to a "deal" with DC, which the District Court found did not result in a binding agreement. MJN 7; SER 65 ("One need only review the language of the parties' correspondence, their conduct in reaction thereto, and the numerous material differences between the terms relayed in the [counter-proposals], to reach the conclusion that the parties failed to come to an agreement on all material terms."). The letter is inadmissible hearsay. It is also largely irrelevant because contract

[5] *See also Matter of Annis*, 78 B.R. 962, 965 (Bankr. W.D. Mo. 1987) (rejecting "proposition that inadmissible hearsay may be bootstrapped in evidence by employing the practice of 'taking judicial notice of the files.'").

formation is based on objective manifestations of an agreement on all material terms, not a person's subjective belief. *Meyer v. Benko*, 55 Cal. App. 3d 937, 942-943 (1976) (mutual consent to material terms "is determined by objective rather than subjective criteria"). Moreover, legal conclusions are inadmissible. *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 777 (9th Cir. 2010) (noting that "legal conclusions are not admissible as factual findings").

Warner misleadingly describes this hearsay document as a mere "court filing" when it is actually an extra-record exhibit attached to an extra-record declaration. This Court has routinely denied requests to take judicial notice of such documents. *See Wham-O, Inc. v. Manley Toys, Ltd.*, 2009 WL 1353752 *1 (9th Cir. May 15, 2009) ("We do not, and cannot, take judicial notice of. . . a declaration . . . submitted . . . after the district court ruled.")*; Downs v. Baca*, 2012 WL 1883326 *1 (9th Cir. May 24, 2012) (denying "request for judicial notice of non-adjudicative facts in exhibits").[6]

- October 24, 2011 Order Granting DC's Motion for Review (SER 824-825)

The only relevance Warner offers for this extra-record document is that it establishes when it received the July 2003 letter (SER 810-814) described above. MJN 8. As the July 2003 letter is inadmissible hearsay, irrelevant to the issues on

[6] *See also Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 858 (9th Cir. 2008) (declining to take judicial notice of a party's declaration); *Keeler v. Sierra Conservation Ctr.*, 2012 WL 1377030 *1 (9th Cir. Apr. 20, 2012) (denying request for judicial notice of extra-record exhibits).

appeal, there is no reason to extend judicial notice to this order.

- Excerpts of Privilege Log of Bulson Archive (SER 816):

Mr. Bulson was the attorney for non-party Michael Siegel (deceased), not Ms. Larson, whose copyright termination interest is at issue herein. Warner contends that this extra-record log is somehow relevant to show Mr. Toberoff's purported interference in DC's business relationship with Ms. Larson. MJN 8. Mr. Toberoff's alleged interference is not at issue in this case or in the parties' cross-appeals. Dkt. Nos. 11 at 1-2; 31-1 at 5-6. Warner's appeal turns on whether a binding contract was formed between DC and Ms. Larson in the first place. *Id.*

DC filed its concocted interference claim in *DC Comics v. Pacific Pictures Corp., et al.*, C.D. Cal. Case No. 10-CV-03633 ODW (RZx) ("*DC Comics*"), , where it remains subject to adjudication in the first instance by the district court. Moreover, the Bulson privilege log in no way supports the irrelevant proposition that Mr. Toberoff interfered with anything. Warner falsely asserts that this extra-record material refutes Mr. Toberoff's alleged claims in an uncited motion in the *DC Comics* action regarding when "he was in contact with the Siegels." MJN 7-8. Warner misleadingly omits that in that motion the "Siegels" are expressly defined as "Joanne Siegel and [her] daughter Laura Siegel Larson" (*DC Comics*, Dkt No. 145-1 at 5) and do not include Michael Siegel, who has no relevance even to DC's claims in the *DC Comics* case, and is thus not once mentioned in DC's complaint

therein. *Id*., Dkt No. 49. The irrelevant Bulson log is not appropriate for judicial notice. *Meador v. Pleasant Valley State Prison*, 312 F. App'x 954, 956 (9th Cir. 2009) (noting "judicial notice is inappropriate where the facts to be noticed are irrelevant"); *Kazenercom TOO v. Ibar Dev., LLC*, 464 F. App'x 588 (9th Cir. 2011) ("We decline to take judicial notice of these documents because they are irrelevant to the issues on appeal.").

- October 25, 2011 Order Denying anti-SLAPP Motion (SER 817-823)

Warner asserts that an October 2011 order in the *DC Comics* action "explains" Larson's repudiation of an alleged 2001 settlement. MJN 8. The October 2011 order nowhere finds such a repudiation. This is not surprising as the district court in *DC Comics* is the same court that entered the Rule 54(b) Judgment in this case that *no settlement agreement* was reached. ER 236. The *DC Comics* order, which is currently under appeal (Appeal No. 11-56934), found only that DC's tort claims are not subject to California' anti-SLAPP statute and therefore expressly did not reach the merits. *DC Comics*, Dkt. No. 337 at 6.

Moreover, even had there been such a finding, and there was not, it is well settled that judicial notice cannot be extended to contested factual findings in extra-record court filings. *Lowe v. McDonald*, 221 F.2d 228, 230 (9th Cir. 1955) (noting "[a]s a general rule, a court in one case will not take judicial notice of its own records in another and distinct case ***even between the same parties***".)

(emphasis added); *Wyatt*, 315 F.3d at 1114 n.5 ("Factual findings in one case ordinarily are not admissible for their truth in another case through judicial notice."); *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1117 n.14 (9th Cir. 2005) ("We decline. . .request to take judicial notice of [order] because they are offering the factual findings contained in the order for the purpose of proving the truth of the factual findings contained therein."); *M/V American Queen*, 708 F.2d at 1491 ("[A] court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it.").

- September 2, 2011 Joint Stipulation and August 13, 2010 Anti-SLAPP Motion (SER 826-28, 877-80).

Warner asserts that this extra-record material purportedly "shows" that Larson took a contradictory position in the *DC Comics* case as to when her negotiations with DC were officially terminated. MJN 8. The entirety of Warner's argument rests on Ms. Larson describing discussions as "moribund as of May 9, 2002" (MJN 9), which Warner insists means the same thing as terminated (pursuant to the express notification procedures of the parties' written Tolling Agreement).[7] SER 348-51. Larson refutes this specious argument in her Third

[7] Merriam-Webster defines moribund as "being in the state of dying: approaching death." http://www.merriam-webster.com/dictionary/moribund, and judicial notice

Brief on Cross-Appeal. Docket 43-1 at 36-38. The truth of the contents of court filings in another case are not the proper subject of judicial notice, *Werner*, 267 F.3d at 295, and this extra-record material is, in any event, irrelevant to this appeal.

- Kevin Marks Deposition (SER 797-801)

Warner opted below to only submit certain portions of Marks' deposition transcript. Now on appeal, Warner adds new portions without offering any justification. MJN 7. Instead, Warner mischaracterizes this extra-record testimony to draw erroneous conclusions from it. The contents and contested meaning of extra-record testimony is not the proper subject of judicial notice. *See Maraldo*, 2012 WL 1094462 *6. That other portions of Marks' testimony were part of the District Court record is irrelevant under Rule 10 to Warner's belated attempt to add testimony that was not. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 386 (9th Cir. 2010) ("The proper place to call attention to any such [deposition] testimony was in front of the district court [and] . . . the content of a deposition is not a clearly established 'fact' of which this panel can take [judicial] notice"); *Eng v. New York Hosp.*, 1999 WL 980963 *1 (2d Cir. 1999) ("Because the deposition pages . . . were not submitted to the district court . . . the motion to supplement the record is denied, and the cross-motion to strike supplemental materials from the record is granted.").

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of the definition of words *is* proper. *Comerica Bank v. Lexington Ins. Co.*, 3 F.3d 939, 944 (6th Cir. 1993) (judicial notice of the dictionary definition of [a] word).

- Comic Books (SER 714-796)

Warner erroneously claims that "reproductions of comic books" are somehow exempt from Fed. R. App. P. 10(a). MJN at 4. Warner has had access to these comic books for decades and offers no reason why it did not file them with the District Court.[8] Rather, Warner compounds its error by arguing that this non-record evidence is "relevant to determining the copyrightable elements in the Promotional Announcements." MJN 5. Even if this were true, the copyrightable elements in such promotional materials are *irrelevant* to the Rule 54(b) judgment on appeal. *See* Dkt. No. 43-1 at 68-71. Warner also dubiously asserts that these comics are not submitted for the "truth contained therein" (MJN 12) which is at odds with its argument, that focuses entirely on their contents and contested matters not subject to judicial notice. *See* MJN 5; *Flick*, 205 F.3d at 392 n.7 ("It is rarely appropriate for an appellate court to take judicial notice of facts that were not before the district court."); *Yagman v. Republic Ins.*, 987 F.2d 622, 626 n.3 (9th Cir. 1993) (declining to take judicial notice of periodical). In short, Warner seeks to supplement the record with evidence that is irrelevant to this appeal, not subject to judicial notice, and that could readily have been presented below.

- Siegel Memoir (SER 802-805)

Warner also had every opportunity to present below the portions of Jerry

[8] Warner submitted, and the District Court reviewed, enlarged versions of the "Promotional Announcements." SER 2.

Siegel's memoir it now seeks to rely upon. Warner argues it is "appropriate for completeness" (MJN 5), while failing to even provide the complete memoir. SER xiv n.14. Warner relies on *Colbert v. Potter*, 471 F.3d 158, 165-66 (D.C. Cir. 2006), which made a "limited exception" as to the mere flip side of a single receipt submitted below, where there was "no real dispute between the parties … [that this] would establish beyond any doubt the proper resolution of the pending issues." *Id*. at 166. Here we have the exact opposite; Warner seeks for the first time to introduce hundreds of new pages, and the parties are in complete disagreement over what, if anything, these documents establish.

- Cancelled Agreements Between Mr. Toberoff and The Siegels Or Shusters

In its motion for judicial notice, Warner does not directly mention these three extra-record agreements it inserted in its Supplemental Excerpts (SER 838-44, 859-863, 864-868), and instead refers generally to "documents filed" in the *DC Comics* case. MJN 10. These long cancelled or expired agreements, two between Mr. Toberoff and the non-party Shusters, and the other, between Toberoff, the Siegels, and non-party Ari Emanuel, are of absolutely no relevance to the judgment on appeal. For this reason, DC never submitted these agreements to the District Court, and cannot inject them into the record on appeal. *Palasota v. Haggar Clothing Co*., 499 F.3d 474, 489 n.12 (5th Cir. 2007) ("We are limited in our consideration to that information properly before the district court at the time of its

decision."). The factual content of purported evidence not properly admitted or before the District Court, is not the proper subject of judicial notice. *See Flick,* 205 F.3d at 392 n.7; *M/V American Queen,* 708 F.2d at 1491.

- May 2003 Letter, Michael Siegel to Laura Siegel Larson (SER 872-876)

Similarly, nowhere in its opposition/motion does Warner assert any reason why judicial notice is proper as to the extra-record May 2003 Letter from non-party Michael Siegel to his half-sister Ms. Larson. This letter is irrelevant to the issues on appeal, consists almost entirely of *contested* factual statements and inadmissible hearsay, and is thus completely inappropriate for judicial notice. *See id*.; *Pratt,* 268 F. App'x at 603. Fed. R. Evid. 801, 802.

- Shuster Termination Notice (SER 845-858)

Warner seeks to add a statutory notice of termination by the Estate of Joseph Shuster, a non-party. This is irrelevant to this appeal, and the underlying litigation, and it is not the proper subject for judicial notice. *Meador*, 312 F. App'x at 956.

- Declaration of Daniel Petrocelli (SER 829-937)

Warner offers no reason why the Court should extend judicial notice to exerpts from this declaration in the *DC Comics* case, which is rife with contested and irrelevant factual allegations. Petrocelli's inadmissible argumentative declaration and its exhibits prompted Defendants to file 90 pages of evidentiary objections in *DC Comics*. The district court in that case did not rule on these

objections, and the declaration remains subject to objection. Judicial notice of any portion of this document is wholly improper. *Reusser*, 525 F.3d at 858.

- Anonymous Inadmissble Letter (SER 182-188)

Warner also included in its Supplemental Excerpts an *anonymous* letter (the so-called "Timeline") which it improperly relies upon in appealing the District Court's March 26, 2008 summary judgment ruling (certified in the Rule 54(b) judgment on appeal) that rejected Warner's purported settlement agreement defense.[9] Dkt. No. 31-1 at 18,-19, 28. Notwithstanding that this inadmissible diatribe is wholly *irrelevant* to the contract formation issue before this Court, the document was not before the District Court when it rendered the decision in question, and Warner is precluded from raising new arguments based upon it for the first time on appeal.[10] *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("As a general rule, we will not consider arguments that are raised for the first time on appeal."). Tellingly, even though Warner admitted reading the Timeline in 2006 (Appeal No. 11-56934, Dkt. No. 16 at 18), and had full use of it in 2008 (SER 177), Warner did not raise it with the District Court with respect to

[9] The letter, written by a thief, enclosed to Warner the Siegels' and Shusters' privileged documents, stolen from Toberoff & Associates. The thief did not have or purport to have any first-hand knowledge of the 2001-2002 events he pretended to describe by mischaracterizing the stolen documents he enclosed. SER 182-184.

[10] A year after the District Court's summary judgment order, Warner merely attached the "Timeline" among multiple exhibits to a declaration in a discovery motion filed on March 3, 2009. SER Index at vi.

its summary judgment rulings on March 26, 2008 and August 12, 2009, respectively, under appeal. ER 213, 134.

After the District Court upheld the Siegels' statutory terminations here, Warner filed the retaliatory *DC Comics* action on May 14, 2010, and gratuitously attached this salacious anonymous letter to its widely publicized complaint. Dkt. No. 1. Ever since, Warner has transparently attempted to use this anonymous screed to elicit prurient interest and bias, and to derail the merits of the Siegel and Shusters' legal claims by falsely attacking their counsel, Mr. Toberoff. Adjudication of this controversial document, including its provenance, is still pending in *DC Comics*. *See Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004) (cautioning against transforming "the court of appeals into a court of first instance") (citation omitted); *United States v. Ziegler*, 497 F.3d 890, 900 (9th Cir. 2007) (Kozinski, J., dissenting) ("We may not find facts on appeal; we may only review findings made by the courts below us."). This questionable document, written by a thief, is further inappropriate as record evidence because it is irrelevant, inherently unreliable, riddled with hearsay[11] (if not, double or triple hearsay) and, for these reasons, inadmissible. This anonymous, inadmissible and

[11] *See Farkarlun v. Hanning*, 2012 WL 684027 *10 (D. Minn. Mar. 2, 2012) (finding anonymous representations are inadmissible hearsay); *United States v. Mitchell*, 2007 WL 1521212 *1 n.3 (E.D. Pa. May 21, 2007) (anonymous note is inadmissible hearsay); *Bellow v. Charbonnet*, 100 F. Supp. 2d 398, 402 (E.D. La. 2000) (anonymous letter inadmissible as hearsay).

extremely prejudicial document has no place in this appeal. *See M/V American Queen* 708 F.2d at 1491; *In re Luxor Cab Mfg. Corp. of Am.*, 25 F.2d 646, 646 (2d Cir. 1928) (irrelevant material should be purged from the record).

III. WARNER IS PRECLUDED BY FED. R. CIV. P. 60(B)(2) AND (C) FROM ATTEMPTING TO REOPEN THE JUDGMENT BELOW WITH SUPPOSED NEW EVIDENCE

Under Fed. R .Civ. P. 60(b)(2) and (c), a motion to alter a judgment based on purported newly discovered evidence cannot be made "more than one year after the judgment, order, or proceeding was entered or taken." The "pendency of an appeal does not toll the one year period." *Nevitt v. United States*, 866 F.2d 1187, 1188 (9th Cir. 1989). Warner failed to file a Rule 60 motion within one year of the entry of the March 15, 2011 judgment under appeal (*i.e.*, by March 15, 2012), even though it could readily have done so. Instead, Warner has improperly larded its Supplemental Excerpts with dozens of irrelevant extra-record documents and asks to reopen the judgment on this basis. *See* Dkt. No. 31-1 at 37.

Just as Rule 60(b) "may not be used as an end run to effect an appeal outside the specified time limits," neither should an appeal be used to bypass Rule 60(b)'s time limits. *Pryor v. U.S. Postal Service*, 769 F.2d 281, 288 (5th Cir. 1985); *Piedra v. True*, 52 F. App'x 439, 441 (10th Cir. 2002) (noting "[new] evidence is appropriately filed as a F.R.C.P. 60 motion in the district court where judgment was entered, not as a matter of first instance in the Court of Appeals"). The time

for Warner to ask to alter the judgment herein based upon purported newly discovered evidence has passed, and jurisdiction to consider that issue has therefore been extinguished. *See Nevitt*, 866 F.2d at 1188 ("Since the Rule 60(b)(2) motion was not filed within one year of entry of judgment, the district court lacked jurisdiction to consider it.").

IV. THE APPROPRIATE REMEDY IS TO STRIKE THE EXTRA-RECORD MATERIAL AND THOSE PARTS OF WARNER'S BRIEF THAT RELIES ON IT, AND TO SANCTION WARNER

Warner is gaming the system. It has placed hundreds of pages of extra-record material before the Court, and now submits over 3,600 words of extra-argument briefing, styled as an "Appendix," forcing Plaintiff to expend time and space addressing this knowingly improper material.[12] Striking not only the extra-record material but those portions of Warner's brief that rely on it is a common and appropriate remedy. *See Barcamerica Int'l USA Trust.*, 289 F.3d at 595 (9th Cir. 2002) (striking documents not before district court and those portions of opening brief which relied on them); *United States v. Maddox*, 614 F.3d 1046, 1047 (9th Cir. 2010) (striking portion of brief referring to extra-record evidence).

[12] In circumvention of the page limits for Warner's opposition and merits briefing, it attaches a fourteen page "Appendix" under the guise of showing the portions of its briefs that cites both record and non-record evidence. Yet, Warner readily could have accomplished with simple citations instead of its Appendix, loaded with argument. Plaintiff is compelled to lodge a response-appendix to address the mischaracterizations in Warner's improper filing, and respectfully requests that if Warner's appendix is considered, so should Plaintiff's response-appendix.

Warner offers no reason why this Court should not strike the portions of its brief that rely solely on extra-record evidence.[13] Instead it argues that it would be "overbroad" to strike other portions that purportedly rely on both record and extra-record evidence. MJN 13. However, for many such portions the only purported "record" evidence is the anonymous and completely inadmissible "Timeline," which, as shown above, was also not considered by the District Court in rendering the decision Warner appeals. *E.g.*, MJN 21, 24-25, 27. As this Court noted in *Lowry*, the "penalty for including forbidden material in the excerpts" should encourage parties to "think twice before violating the rule." 329 F.3d at 1026. Here, Warner knowingly violated the rules *en masse*. *Lowry's* goal is not achieved by allowing Warner to immunize improper portions of its brief by speckling it with other material, however tenuous, irrelevant or inadmissible.

Finally, Warner should compensate Ms. Larson for the cost of this motion to strike Warner's improper extra-record material and arguments.

CONCLUSION

For all of the above reasons, Appellant requests that the Court grant her Motion to Strike Appellees' Supplemental Excerpts of Records and Portions of Principal and Response Brief, and deny Warner's Motion for Judicial Notice.

[13] These portions appear at pages 12 ("DC has filed. . ."), 17 ("Almost all the…"), 18 ("Thereafter. . ."), 37 ("In *Shuster*…" and "The letter confirms. . ."), 39 ("In *Shuster*. . ."), 63 ("Siegel confirmed . . .") and 78 ("Siegel himself. . .").

Dated: June 20, 2012 TOBEROFF & ASSOCIATES, P.C.

By: /s/ Marc Toberoff
Marc Toberoff
Attorneys for Plaintiff-Appellant,
Laura Siegel Larson, individually and
as personal representative of The Estate
of Joanne Siegel

Warner Argument	Larson Response	Record Evidence
Larson repudiated a purported agreement with DC, fired Marks and began to work with Marc Toberoff and Ari Emanuel (Appendix at 16-17, 22-27)	Notwithstanding that this extra-record argument is false and misleading, it is *irrelevant* to the "work for hire" and contract formation issues before the Court on this appeal. The record is clear that Warner Bros./DC ("Warner") botched their own prospects for an agreement by grinding the elderly Joanne Siegel and her daughter Laura Siegel Larson (the "Siegels") in four long years of negotiations regarding their 1997 statutory notices of termination, well before Mr. Emanuel made a legitimate offer to the Siegels in **August 2002**. In **May, 2002** Joanne Siegel had sent a letter to Time-Warner bitterly complaining about Warner's improper negotiating tactics and February 1, 2002 draft agreement, filled with new/changed terms and Studio accounting tricks, and informing it that "after four years we have no deal and this contract makes an agreement	**May 9, 2002 Letter from Joanne Siegel to President of AOL Time Warner (SER 412-414)**: "Negotiations dragged on for four difficult years. We made painful concessions assured if we did we would arrive at an agreement. . . Your company's unconscionable contract dated February 4, 2002 contained new, outrageous demands that were not in the [earlier] proposal. The document is a heartless attempt to rewrite the history of Superman's creation and to strip Laura and me of the dignity and respect that we deserve. . . After four years we have no deal and this contract makes an agreement impossible. " ***See* Order Granting Partial Summary Judgment (ER 202)**

	impossible." On behalf of the Siegels, Mr. Toberoff resumed negotiations with Warner in 2003. Unable to succeed on the merits of the legal issues on appeal, Warner repeatedly quotes from a ranting ***anonymous*** letter, the so-called "Timeline," written by a thief who stole the Siegels' privileged legal files, that Warner claims it received in 2006. The salacious and prejudicial "Timeline" is inadmissible hearsay (and often double or triple hearsay). F.R.E. 801, 802. It also consists of inadmissible arguments, lay opinion, and speculation. F.R.E. 602, 701,702. It was written years after the relevant time period by a thief who had no first-hand knowledge of the relevant events. *See Valdovinos v. McGrath*, 598 F.3d 568, 579 (9th Cir. 2010) (vacated on other grounds in *Horel v. Valdovinos*, 131 S. Ct. 1042 (U.S. 2011)) (anonymous letter inadmissible at trial).	"One need only review the language of the parties' correspondence, their conduct in reaction thereto, and the numerous material differences between the terms relayed in the October 19 and 26, 2001 letters and the February 1, 2002 draft to reach the conclusion that the parties failed to come to an agreement on all material terms."

	See Larson's Third Brief on Cross-Appeal ("Br.") at 5-8, 13-36.	
"Toberoff insisted in August 2002 that Marks communicate to Larson that he and Emanuel had an unnamed 'investor' willing to purchase her rights for $15 million…" (Appendix at 23-24) Toberoff and Emanuel "promised [a] $15 million investor" (Appendix at 25).	This false and misleading extra-record argument is *irrelevant* to the "work for hire" and contract formation issues on appeal. As it was not raised by Warner before the District Court in this case, Warner is precluded from making such arguments for the first time on appeal. *See Smith v.Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Warner misleadingly asserts that Toberoff/Emanuel had an "unnamed 'investor'" and "promised [a] $15 million investor" citing: (a) testimony by Larson's former attorney, Kevin Marks that says nothing to that effect, and (b) the "Timeline." Warner continues its tactic of misrepresenting Marks' testimony, relying solely on clearly inadmissible double hearsay, argument and speculation in this anonymous rambling document. F.R.E. 801, 802, 602, 701,702. As Warner well knows and	**Deposition of Kevin Marks (RER 31):** Q: Okay. Can you tell me to the best of your recollection what was said by each of you and Mr. Toberoff in that conversation? A: ". . .I believe I said. . . [i]f you have an offer, present it to me, and I'll present it to the client." **Deposition of Kevin Marks (SER 123):** Q: Anything else you can recall of that conversation? A: I think I said, "Thank you, and I will communicate this to the client" or "take this back to my client" As this extra-record argument was neither raised in nor irrelevant to this case, and is the subject of Warner's retaliatory claims in

	has elsewhere admitted the "investor" was Mr. Emanuel (current CEO of the William Morris Endeavor Agency) who made the offer to Marks. Warner also misrepresents that Toberoff "insisted" in August 2002 that Marks convey the offer to Larson. (Appendix at 23-24). Marks' testimony, the only record evidence Warner relies upon, completely contradicts this. Marks testified that he invited an offer and volunteered to take Emanuel's offer to his client. Warner's false tactical claims about their long-time opposing counsel, Mr. Toberoff, are fully addressed in the briefing in the *DC Comics v. Pacific Pictures Corporation et al*. ("*DC Comics*") anti-SLAPP appeal. (Appeal No. 11-56934).	the *DC Comics* case, it is impossible for Plaintiff to fully address it, without reference to extra-record evidence. **Answering Brief of Appellee DC Comics in Appeal No. 11-56934 (Dkt No. 16 at 13)** "The 'investor' was. . . Ari Emanuel, a Hollywood talent agent."
"Toberoff's entertainment company also secured a 50% ownership interest in the Shusters' putative rights – later trading that	Mr. Toberoff's legal contingency fee is irrelevant to the issues on appeal and Warner can have no other justification for bringing it in other than to transparently elicit prejudice. Warner, again, solely relies on the inadmissible anonymous	

50% ownership for 50% contingency fee." (Appendix at 27)	"Timeline." F.R.E. 801, 802, 602,701,702.	
The Cover of Action Comics #1 ("Cover") was created by DC's Artists (Appendix at 18, 19, 28)	The record evidence Warner purports to rely on is: 1) the Cover and 2) an ambiguous letter by Vince Sullivan containing "limited" information which the District Court viewed as just as easily supporting the fact that Shuster created the Cover. The extra-record evidence Warner relies upon – a portion of Jerry Siegel's memoir – actually confirms the District Court's reading of the Sullivan letter, i.e., that one Shuster's pre-existing promotional art panels based on an interior panel of Siegel and Shuster's was used by DC for the Cover. *See* Br. at 49-51.	***See* Order Granting Partial Summary Judgment (ER 188)** "Finally, defendants argue that the cover for Action Comics, Vol. 1, was drawn by Detective Comics' in-house artists. However the scant evidentiary basis provided in support of this argument is ambiguous. . . Of course, given the very limited nature of the information contained in the passage [of the Vice Sullivan letter] it could also be argued that, in his earlier letter, Siegel enclosed an illustration by Shuster as a suggestion for the comic book's cover and Detective Comics decided to "use" this suggestion. . . Shuster had in the past drawn exemplars for the cover illustration for his comics well before they were ever accepted for publication."

		Siegel Memoir(SER 804): Extra-record evidence relied on by DC "A couple large promotional panel-drawings had several years earlier been prepared by Joe and me to illustrate Superman in action; these were shown by Joe and me to syndicate editors to demonstrate the impact and appeal of the feature. At my suggestion, Sullivan selected one of them and used it for the now very famous cover for [Action Comics, No. 1]."
"DC artists also created 'Promotional Announcements' – a black-and-white version of its artists' cover art- to promote Action Comics #1. (Appendix at 19)	This is false as to the Cover, and otherwise, entirely irrelevant to the Rule 54 Judgment on appeal herein. *See* Br. at 68-71. As described directly above, DC's artists did not create the Cover, nor any other aspect of Siegel and Shuster's Superman story published in *Action Comics #1*, which the District Court ruled had been successfully recaptured by the Siegels' statutory notices of termination. (ER 133-4).	***See* Order Granting Partial Summary Judgment (ER 188, 181)** "The Court begins by observing what is <u>not</u> depicted in the announcements. Obviously, nothing concerning the Superman storyline (that is, the literary elements contained in <u>Action Comics</u>, Vol. 1) is on display in the ads; thus, Superman's name, his alter ego, his compatriots, his origins, his mission to serve as a champion of the oppressed, or his heroic abilities in general, do not remain within defendants sole possession to

	The "promotional announcements" contain nothing more than a reduced black-and-white image of Siegel and Shuster's Cover and are entirely derivative thereof, with no new copyrightable elements. The only record evidence cited by DC's is the inadmissible lay opinion of Paul Levitz (DC's CEO) who has no first-hand knowledge of what happened in 1938. F.R.E. 701, 702. *See* Br. 71-74.	exploit.
Mr. Toberoff induced the Shusters "to repudiate their existing contractual arrangements with DC." (Appendix at 21-22).	The heirs of Joseph Shuster, Superman's co-creator, are not parties to this case; their purported "contractual arrangements" are entirely irrelevant to this appeal, and Warner's irrelevant argument was not before the District Court when it entered the rulings (certified in the Rule 54(b) judgment) on appeal. *See In re Luxor Cab Mfg. Corp. of Am.*, 25 F.2d 646, 646 (2d Cir. 1928) (irrelevant material should be purged from the record).	As Warner's extra-record arguments or claims regarding the Shusters were not a part of this case and are irrelevant to this appeal, it is impossible for Plaintiff to fully address them without reference to extra-record evidence. **1992 Agreement Between Jean Peavy, Frank Shuster and DC Comics (Appeal No. 11-56934, Dkt. No. 10 at ER 671)**

	Furthermore, the only record "evidence" that DC relies upon is not evidence at all: it is the anonymous and clearly inadmissible "Timeline" comprised of inadmissible hearsay, argument, lay opinion and speculation. F.R.E. 801, 802, 602,701,702. Mr. Toberoff's so-called "inducement" was nothing more, than his agreement to help probate the Shuster estate and to represent the estate in exercising their inalienable termination rights under the Copyright Act, 17 U.S.C. § 304(d). The "contractual relationship" that DC claims Mr. Toberoff interfered with was a one-page 1992 agreement between DC and Joe Shuster's siblings [Frank Shuster (died in 1996) and Jean Peavy] ("1992 Agreement") who as siblings had no termination rights under the Copyright Act, 17 U.S.C. § 304(c)(2). This 1992 Agreement, which nowhere even mentions Superman merely gave the siblings a small pension, and included a quitclaim of any rights or	**2001 PPC Agreement (Appeal No. 11-56934, Dkt. No. 10 at ER 725-26)** "PPC and Claimants hereby form a joint venture. . .[for] the establishment of Joe Shuster's estate and the estate's termination pursuant to Section 304(c) of the U.S. Copyright Law. . ." "Marc Toberoff, Esq. to render legal services in connection with the Rights and Venture, including in connection with all legal disputes, litigation, arbitration and/or mediation regarding the Rights; to implement, enforce and prosecute the Rights; and to handle the negotiation of any contracts regarding exploitation of the Rights." "To cover the unlikely event that Marc Toberoff dies or is disabled; PPC will. . . (a) arrange for a suitable replacement attorney experienced in copyright litigation and willing to enforce the Rights on solely a contingent fee basis." **2003 PPC Agreement (Appeal No. 11-56934, Dkt. No. 10 at ER 730-33))** ". . . Marc Toberoff ("Toberoff") to furnish directly to Client all legal services

	claims these *siblings* might have. Moreover, it is well-settled that the statutory termination right cannot be waived nor re-assigned to the original grantee or its successor until *after* it is exercised by service of a notice of termination. 17 U.S.C. §§ 304(c)(5), (c)(6)(D). The Shuster estate's notice of termination could not be served and was not served until 2003. 17 U.S.C. § 304(d). Consequently, Mr. Toberoff's representation or assistance of the Shuster estate in the exercise of its statutory termination right and the estate's proper service of a copyright notice of termination in 2003, had absolutely no effect on the 1992 Agreement, and did not constitute a repudiation by Ms. Peavy of such agreement. After the Siegels, represented by Mr. Toberoff, succeeded here in upholding their statutory termination in four years of hard-fought litigation, Warner, on May 14,	required by Client in connection with the Rights, including in connection with all legal disputes, litigation, arbitration and/or meditation regarding the Rights." **Shuster Estate's Notice of Termination (SER 846-858)** Signed by "Marc Toberoff, Esq., counsel for the Estate of Joseph Shuster."

	2010, filed concocted retaliatory claims of tortious interference, regarding the Siegels' and Shuster estate's notices of termination, in *DC Comics v. Pacific Pictures Corporation* et al. (Case no. 2:10-cv-03633-ODW-RZ). Defendants' anti-SLAPP motion in that case is the subject of a pending appeal. (Appeal No. 11-56934).	
"Siegel and Shusters' additions were also created at DC's expense"	The District Court properly rejected Warner's claim that random aspects of Action Comics #1 to convert it from a newspaper format to a magazine format were "works-for-hire," ruling that this argument was made and rejected by the Second Circuit in *Siegel v. Nat'l Periodical Publications*, 508 F.2d 909, 914 (2d Cir. 1974). ER 183. *See* Br. at 39-53	***See* Order Granting Partial Summary Judgment (ER 183)** "The thrust of defendants' argument was made and rejected by the Second Circuit in the 1970s copyright renewal litigation, and is thus precluded as a matter of collateral estoppel here. In that litigation, defendants' predecessors-in-interest presented much of the same evidence now submitted in this case to argue that this additional material transformed the entirety of Siegel and Shuster's pre-existing Superman material published in Action Comics, Vol. 1, into a work made for hire. The Second Circuit rejected this argument, elaborating: 'In the case before us, Superman and

		his miraculous powers were completely developed long before the employment relationship was instituted. The record indicates that the revisions directed by the defendants were simply to accommodate Superman to a magazine format. We do not consider this sufficient to create the presumption that the [comic book] strip was a work for hire.'"

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: June 20, 2012 TOBEROFF & ASSOCIATES, P.C.

/s/ Marc Toberoff
Marc Toberoff
Attorneys for Plaintiff-Appellant,
Laura Siegel Larson, individually and
as personal representative of The Estate
of Joanne Siegel

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. I also caused to be served a true and correct copy of the foregoing by personal service on the following interested parties in this action:

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Dated: June 20, 2012

TOBEROFF & ASSOCIATES, P.C.

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