

Appeal Nos. 11-55863, 11-56034

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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LAURA SIEGEL LARSON,

*Plaintiff, Counterclaim-Defendant, Appellant, and Cross-Appellee,*

v.

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

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

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**WARNER BROS. ENTERTAINMENT INC. AND DC COMICS'  
REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE**

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## INTRODUCTION

A simple, uncontroversial rule governs DC’s motion for judicial notice: this Court may take judicial notice of relevant, authenticated evidence whose accuracy cannot reasonably be questioned. Nothing Larson says in 32 pages of briefing overcomes that rule.

1. Larson contends that DC is “precluded” by Rule 60(b)(2) from “attempting to reopen the judgment below.” Resp. 18-19. But DC does not seek to reopen the judgment or record below. Reopening a district court judgment under Federal Rule of Civil Procedure 60(b) is an entirely different matter from invoking the court’s inherent power to take judicial notice under Federal Rule of Evidence 201, and an appellate court can take judicial notice even when the court below did not. *E.g.*, *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992); *Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971); *Colbert v. Potter*, 471 F.3d 158, 165-66 (D.C. Cir. 2006) (taking judicial notice of back side of receipt where only front was introduced below); *McKay v. U.S.*, 516 F.3d 848, 849 n.2 (10th Cir. 2008) (taking judicial notice of deed available but not submitted at time of prior proceeding “to inform [its] general understanding of the case”). An appellate court need not “reopen” a trial court record to take notice of documents already inherently within its purview under Federal Rule of Evidence 201.

Further, Rule 60(b) is inapplicable on its own terms. That rule provides for relief from a final judgment, but as DC has explained at length in prior briefing, the judgment below has never closed, but rather has several open issues rendering this appeal premature. Dkt. 5-1, 8-1.

Rule 60(b) is simply irrelevant to this motion for judicial notice.

2. Larson's accusation that DC "sandbagged" by failing to request judicial notice until after she filed her opening brief (Resp. 5) is also baseless. There is no requirement that a party request judicial notice of every document it could conceivably want to cite before it has even seen what the other side intends to argue; it was not clear which documents would be relevant to DC's opposition brief until Larson filed her opening brief. In any event, Larson had access to the materials at all times, as they were either authored or produced by her, or filed in the related *Pacific Pictures* case, Case No. 10-3633, C.D. Cal.; Appeal No. 11-71844. And she had 17,500 words in her Reply Brief to address any lingering issues.

3. The rest of Larson's arguments were made initially in her motion to Strike; DC has already addressed these, and so will not belabor those points here. As explained in DC's request for judicial notice, there is ample basis for this Court to take judicial notice of the documents at issue. These reasons are summarized in condensed form in the chart below for clarity.

| SER     | Document Title   | Basis for Judicial Notice  |
|---------|--|--|
| 714-727 | Reproduction of <i>Action Comics #1</i>  | Comic books are self-authenticating documents, FED. R. EVID. 902(6), and it is appropriate for this Court to take judicial notice where the authenticity of evidence is not disputed. <i>See</i> Mot. at 4-5.  |
| 728     | Reproduction of <i>Detective Comics #15</i>  | This cover is a portion of a self-authenticating document, FED. R. EVID. 902(6), and it is appropriate for this Court to take judicial notice where the authenticity of evidence is not disputed. <i>See</i> Mot. at 4-5.  |
| 797-01  | Excerpt from the transcript of the October 7, 2006, deposition of Kevin Marks  | Portions of the deposition transcript are already in the record. Both parties participated in the deposition and relied on other parts of the transcript, and the accuracy or authenticity of the transcript is not in dispute. <i>See</i> Mot. at 9-10.   |
| 802-05  | Excerpt from Jerome Siegel's unpublished memoir, <i>Creation of a Superhero</i>  | Portions of the memoir are already in the district court record and have been relied on extensively by Larson in this appeal. The excerpt also constitutes a judicially noticeable direct admission by Larson's predecessor-in-interest, <i>Bucci v. Essex Ins. Co.</i> , 393 F.3d 285, 296 n.5 (1st Cir. 2005), and its authenticity is not in dispute. <i>See</i> Mot. at 5-6. |
| 806-16  | Declaration Of Cassandra Seto In Support Of DC Comics' Motion To Compel Production Of Documents and Exhibits C and F thereto<br><br><u>Exhibit C: Letter from Laura Siegel Larson to</u> | These documents are judicially noticeable as court filings. Their authenticity is not at issue, as (1) there is no dispute that Ms. Seto had the required personal knowledge to prepare her declaration, and her signature attests to its accuracy; (2) the July 2003 letter was written by Larson herself (with help from Toberoff); and  |

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|        | <p><i>Michael Siegel, dated July 11, 2003</i></p> <p><i>Exhibit F: Excerpt from the Privilege Log of Bulson Archive</i></p>  | <p>(3) the privilege log was prepared by Toberoff and produced by Larson. <i>See</i> Mot. at 6-8.</p> <p>Contrary to Larson's assertion, Resp. at 7, the July 2003 letter is not hearsay, as it was written by Larson herself (with edits from Toberoff), and is thus admissible as an admission by a party-opponent. FED. R. EVID. 801(d)(2).</p> |
| 817-23 | Order Denying Defendants' Motion To Strike Pursuant To Anti-SLAPP Statute  | This document is judicially noticeable as a court filing from the related <i>Pacific Pictures</i> case. <i>See</i> Mot. at 6, 8.   |
| 824-25 | Order Granting DC Comics' Notice Of Motion And Motion For Review Of Magistrate's Order On Plaintiff's Motion To Compel Or, In The Alternative, For Reconsideration Of The Court's June 20 And April 11, 2011, Orders Pursuant To FED. R. CIV. P. 72(a) And L.R. 72-2.1 | This document is judicially noticeable as a court filing from the related <i>Pacific Pictures</i> case. <i>See</i> Mot. at 6, 8.   |
| 826-28 | Excerpt of the Joint Stipulation Regarding DC Comics' Motion To Compel The Production Of Documents Or, In The Alternative, For Reconsideration Of The Court's June 20 And April 11, 2011 Orders  | This document is a judicially noticeable as a court filing, and is also a direct admission by Larson in the related <i>Pacific Pictures</i> case that contradicts positions she has taken here. <i>See</i> Mot. at 8-9.  |
| 829-68 | Declaration Of Daniel M. Petrocelli In Support Of DC Comics' Updated, Initial  | These documents, submitted to both the district court in <i>Pacific Pictures</i> and this Court in a writ proceeding arising from  |

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|        | <p>Opposition To Defendants' Motion To Strike Under California's Anti-SLAPP Statute and Exhibits 26, 38, 40, and 56 thereto</p> <p><i>Exhibit 26: Agreement signed by Joanne Siegel, Laura Siegel Larson, and Marc Toberoff, dated October 3, 2004</i></p> <p><i>Exhibit 38: Notice of Termination of Transfer Covering Extended Copyright Renewal Term of "Superman," dated November 10, 2003</i></p> <p><i>Exhibit 40: Agreement signed by Mark Warren Peary on behalf of the Estate of Joseph Shuster, Jean Peavy, and Marc Toberoff, dated November 23, 2001</i></p> <p><i>Exhibit 56: Agreement signed by Joanne Siegel, Laura Siegel Larson, and Marc Toberoff and Ariel Emanuel on behalf of IP Worldwide, dated October 3, 2002</i></p> | <p>that case, are judicially noticeable as court filings. <i>See</i> Mot. at 10-11.</p> <p>The district court gave no credence to the evidentiary objections to Mr. Petrocelli's declaration argued by Larson and her co-defendants in <i>Pacific Pictures</i>.</p> <p>Exhibit 38 is independently noticeable as a self-authenticating public record. <i>See Lee v. City of Los Angeles</i>, 250 F.3d 668, 689 (9th Cir. 2001) ("a court may take judicial notice of 'matters of public record'"); <i>In re Chippendales USA, Inc.</i>, 622 F.3d 1346, 1356 n.14 (Fed. Cir. 2010) (registration documents by Patent and Trademark Office are judicially noticeable).</p> |
| 869-71 | Defendants' Opposition To DC Comics' Motion For Reconsideration Of April 11, 2011 Order   | This document is judicially noticeable as a court filing from the related <i>Pacific Pictures</i> case. <i>See</i> Mot. at 6, 8.   |
| 872-76 | Declaration Of Cassandra Seto In Support Of DC Comics' Motion For   | These documents, submitted to both the district court in <i>Pacific Pictures</i> and this Court in a writ proceeding arising from  |

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|        | <p>Review Of Magistrate's Order On Plaintiff's Motion To Compel Pursuant To FED. R. Civ. P. 72(a) And L.R. 72-2.1 and Exhibit B thereto</p> <p><i>Exhibit B: Letter from Michael Siegel to Laura Siegel Larson, dated May 13, 2003</i></p> | <p>that case, are judicially noticeable as court filings. <i>See</i> Mot. at 10-11.</p> <p>Their authenticity is not at issue, as: (1) there is no dispute that Ms. Seto had the required personal knowledge to prepare her declaration, and her signature attests to its accuracy; and (2) the May 2003 letter was written by Larson's co-defendant and produced by her and her co-defendants themselves.</p> <p>The May 2003 letter, authored by Larson's half-brother Michael Siegel, is admissible as an admission of a party-opponent based on Larson and Michael's claimed common-interest, FED. R. EVID. 801(d)(2), or under the residual exception to the hearsay rule, FED. R. EVID. 807. There is no reason to doubt the trustworthiness of Michael's personal correspondence with Larson, especially in light of their claimed common interest, <i>U.S. v. Morgan</i>, 385 F.3d 196, 208-09 (2d Cir. 2004), and Michael's letter is the most probative evidence of Toberoff's interactions with him and the rest of the Siegels since he passed away before he could be deposed. The letter is relevant to DC's settlement defense, a determinative issue in this cross-appeal, and its inclusion would promote the interests of justice by providing the Court with a more comprehensive background of the facts relevant to this dispute.</p> |
| 877-80 | <p>Notice Of Motion And Motion To Strike Plaintiff's State Law Causes Of Action Pursuant To California's Anti-SLAPP Law (Cal.</p>  | <p>This document is judicially noticeable as a court filing from the related <i>Pacific Pictures</i> case. <i>See</i> Mot. at 6-9.</p>   |

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|  | Code Civ. Proc. § 425,16);<br>Memorandum Of Points<br>And Authorities |  |
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4. Although the failure of Larson's arguments on appeal is readily evident even absent consideration of these documents, their inclusion would provide the Court with a more comprehensive overview of the case and promote a more accurate resolution of the disputes at issue. Thus, DC respectfully requests this Court grant its request for judicial notice.

Dated: July 2, 2012

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli

Daniel M. Petrocelli

Attorneys for Warner Bros.  
Entertainment Inc. and DC Comics

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

Pursuant to Federal Rules of Appellate Procedure 27(d) and 32(a), I certify that Warner Bros. Entertainment Inc. and DC Comics' brief is proportionately spaced, has a typeface of 14 points or more, and does not exceed 10 pages.

Dated: July 2, 2012

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli

Daniel M. Petrocelli  
Attorneys for Warner Bros.  
Entertainment Inc. and DC Comics

**CERTIFICATE OF SERVICE**

I hereby certify that on July 2, 2012, I caused to be electronically filed Warner Bros. Entertainment Inc. and DC Comics' Reply In Support Of Motion For Judicial Notice with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all interested parties in this case are registered CM/ECF users.

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on July 2, 2012, at Los Angeles, California.

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/s/ Ashley Pearson  
Ashley Pearson