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 RESPONSE TO APPELLEES' MOTION TO SUPPLEMENT THE RECORD WITH THE MARKS MEMO

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

Appellees Warner Bros. Entertainment, Inc. and DC Comics' (collectively, "Warner") Motion to Supplement the Record With the Marks Memo ("Mot.") is yet another improper attempt by Warner to inject extra-record material into the appellate record in violation of Fed. R. App. P. 10(a) and Ninth Circuit Rule 10-2. This Court has already emphatically rejected Warner's recent attempt to expand the record on appeal in *DC Comics v. Pacific Pictures Corp. et al.*, Appeal No. 11-56934, denying its motion to supplement and striking its supplemental excerpts of record, plus the entirety of Warner's brief which relied on such knowingly improper extra-record material. *Id.*, Dkt. No. 27.

In this appeal, Warner originally did not even bother to bring a motion to supplement as required. It opted instead to include *dozens* of extra-record documents in its supplemental excerpts of record, while requesting judicial notice of hundreds of pages of this extra-record material, not even colorably subject to judicial notice, in mere footnotes, buried in the index of its excerpts. When Ms. Larson filed a motion to strike this extra-record material (Dkt. No. 42), Warner styled its response as "in the alternative, a motion for judicial notice." Dkt. No. 48. Ms. Larson's motion to strike both these extra-record documents and portions of Warner's Principal Brief is still pending. Dkt. No. 42, 48, 52.

As part of this ongoing pattern of gamesmanship, Warner attempts in its present motion to expand the appellate record even further, making the same failed arguments it made in the *DC Comics* appeal. It concedes that supplementing the record is "not necessary" for the Court to rule on the issues on appeal (Mot. at 6-7), and thus nowhere comes close to establishing the "extraordinary circumstances" required to overcome Rule 10(a)'s fundamental limitation. Instead, Warner improperly devotes most of its motion to arguing, falsely, that the extra-record evidence bolsters its position. This is insufficient to overcome the strict boundaries set by Rule 10(a). Warner's motion should be denied and the extra-record material struck, along with Warner's Reply Brief that relies on it.

ARGUMENT

I. THE RECORD ON APPEAL IS LIMITED

The record on appeal consists of "(1) the original papers and exhibits filed in the district court," (2) "the transcript of proceedings, if any," and (3) "a certified copy of the docket entries prepared by the district court." Fed. R. App. P. 10(a). It is well settled that an appellate court will generally consider only the district court record as developed before appeal. *See Kirshner v. Uniden Corp.*, 842 F.2d 1074 (9th Cir. 1988) ("[material] not filed with the district court . . . cannot be part of the

record on appeal").[1]

This rule is a "fundamental" limitation on the scope of appellate review. *See United States v. W.R. Grace*, 504 F.3d 745, 766 (9th Cir. 2007) (limitation is supported by "[c]onsiderations of institutional expertise and notice"). It therefore works to bar even newly discovered evidence from entering the record for the first time on appeal. *See In re Weisband*, 2011 WL 3303453 (B.A.P. 9th Cir. June 13, 2011).

Exceptions to this general rule are few. The Court may consider extra-record materials only to: (1) "correct inadvertent omissions from the record," (2) "take judicial notice," and (3) "exercise inherent authority . . . in extraordinary cases." *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) (striking supplemental excerpts and imposing sanctions).

II. WARNER PROVIDES NO BASIS FOR EXPANDING THE RECORD

A. The Document At Issue

Warner's latest motion to expand the record on appeal concerns an August 2002 communication from Kevin Marks ("Marks"), Ms. Larson's former counsel (the "Marks Memo"). DC RER 13-14. Therein which Marks purports to give his

[1] *See also Barcamerica Int'l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 593-94 (9th Cir. 2002) ("[R]ecord on appeal is generally limited to 'the original papers and exhibits filed in the district court.'"); *Tigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2001) (noting that the Court will "consider only the district court record as developed before appeal.").

subjective beliefs as to negotiations with Warner (the "Marks Memo") (DC RER 13-14) to convince his clients to continue negotiating despite their extreme disappointment with Warner's February 1, 2002 counter-proposal (SER 472-528), as reflected in Joanne Siegel's May 9, 2002 letter to Time-Warner. SER 412-414. Nowhere does Marks state that there was a binding contract with Warner[2] and, as Marks clearly testified, he did not then, and does not now, believe that an enforceable agreement was formed. RER 55.

B. There Is No Justification For Supplementing The Record With The Marks Memo

Just as with its failed attempt to supplement the record in the *DC Comics* appeal, Warner's argument for supplementing the record here boils down to assertions that this extra-record material (a) is newly discovered (Mot. 1, 5-6) and (b) while not "necessary," is supposedly relevant (Mot. 1, 3-4). If such arguments created an exception to Rule 10(a), the exception would swallow the rule, rendering it meaningless.

[2] Warner's position that the Marks Memo shows that he believed there was a binding contract is entirely inconsistent with the memo's statement that "I believe a deal *will be* finalized with D.C. Comics, even if this process is not entirely smooth. If. . .the parties cannot reach final agreement, then the negotiations would be terminated," and with Marks' twice-repeated qualification that everything was "subject to documentation." DC RER 14 (emphasis added).

1. The Parties' Legitimate Privilege Dispute Does Not Support Supplementing The Appellate Record

Warner attempts to create extraordinary circumstances by arguing that Ms. Larson "impeded DC's efforts to obtain the Marks Memo . . . by pursuing their writ petition." Mot. at 6. This is divorced from reality. The bona fide dispute as to this and other stolen privileged documents occurred in the *DC Comics* action, where the district court acknowledged that the issue fell into a legal "gray" area about which this Court had not ruled and reasonable minds could disagree. *DC Comics*, Dkt. No. 17-2 at 21-22. This Court also regarded the issue as significant enough to warrant mandamus review. DC (*i.e.*, Warner) made no motion to expedite this Court's writ review. In short, there was nothing so "extraordinary" about this discovery matter that would meaningfully distinguish it from any number of cases where one party obtains more information while an order is on appeal. Fed .R. App. P. 10(a); *United States v. Boulware*, 558 F.3d 971, 976.

2. Warner Mischaracterizes The Relevance Of The Marks Memo

Warner's assertions that the Marks Memo "refutes Larson's argument" are without merit. First, as this Court has consistently held, and as Ms. Larson discusses in detail in her Principal and Answering Brief (Dkt. No. 43-1 at 24, 33-34), contract formation turns on objective manifestations of consent, not the subjective intent or beliefs of the parties. *Democracy Council of California v. WRN Ltd., PLC*, 2012 WL 862808 *1 (9th Cir. Mar. 15, 2012) ("Contract

formation is governed by objective manifestations, not subjective intent of any individual involved. The test is what the outward manifestations of consent would lead a reasonable person to believe.") (citation omitted); *Rael v. Davis*, 166 Cal. App. 4th 1608, 1618 n.11 (2008) (same). Thus, it is irrelevant as a matter of law what Marks thought or told his clients in an effort to coax them into a contract.

Indeed, the District Court correctly rejected Warner's attempt to "create issues of fact through post hoc testimony and rationalizations," noting that "[n]one of this subjective belief is sufficient to defeat the objective manifestations of the parties' intent relayed in the documents referenced that aptly demonstrate that there was no 'meeting of the minds' on all material terms." ER 201.

Notwithstanding the above, Marks' sworn testimony as to his beliefs was part of the District Court's record when it ruled that there was no binding contract as a matter of law due to the parties' varying counter-proposals dated October 19, 2001, October 26, 2001 and February 1, 2002.

Despite Warner's hyperbole, the Marks Memo is not even inconsistent with Marks' testimony:

> "Q: Did you as of February 6, '02 believe that you had closed a deal with DC for the Superman interest?
>
> [Objections]
>
> 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 we had come to an agreement back on October

> 19, 2001, that was reflected exactly in the terms that I set out. And 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 from your outline of the deal terms.' So while I thought we had an agreement on those terms, John evidently didn't and where you don't have a meeting of the minds you don't have an agreement." RER 55.

The reservations at the end of Marks' October 19, 2001 letter, referred to in his above testimony, are precisely the type this Court pointed to in ruling that there was not a binding agreement in *Valente-Kritzer Video v. Callan-Pickney*, 881 F.2d 772, 775 (9th Cir. 1989) ("*Valente*"), despite attorney correspondence congratulating each other on "landing the deal." Warner, in a footnote, completely misrepresents *Valente* in asserting that the Court's ruling was based on "the fact that [the] client had not reviewed [the agreement]." Dkt. 49 at 9, n. 3. This Court was explicit that it was the reservation of a right to comment that mattered:

> "The first paragraph, however, undercuts the hint of finality that emanates from the last. In that first paragraph Bailin expressly reserved his client's right to comment on the agreement. This reservation communicates a clear intent not to be bound by the terms of the agreement. Consequently, we hold that the letter and the accompanying agreement were not a memorialization of the oral agreement." *Valente*, 881 F.2d at 775.

All three of the relevant proposals – Marks' October 19, 2001 letter, Shulman's October 26, 2001 response, and the letter transmitting the February

2002 draft – contain this type of reservation, as does the Marks Memo itself. *See* Dkt. No. 43-1 at 28-30; RER 14-15.[3]

Contrary to Warner's mischaracterization, Marks did not state that "he might have to testify against [Larson] if she repudiated" (Dkt. No. 49 at 15) the purported agreement with Warner. Marks conveyed his subjective belief that there was "a deal, *albeit subject to documentation*" – that is all he said he would testify to and, as discussed above, this is what Marks did testify to. Warner conspicuously omits that the Marks Memo also explicitly stated: "I believe a deal *will* be finalized with D.C. Comics, even if this process is not entirely smooth. *If. . . the parties cannot reach final agreement*, then the negotiations would be terminated…" RER 14 (emphasis added). This is completely inconsistent with Warner's position that Marks "believed" there was a final binding contract.

As noted by the District Court, the so-called "deal" fell apart, as is common in contract negotiations: "the parties' correspondence, and the actions taken in response thereto, illustrates that they found themselves in the all-too-familiar

[3]The District Court aptly described these reservations: "defendants' February, 2002, draft agreement was not even considered final by its authors, who reserved the right for their client to 'comment' on it, and would also require the further submission of a number of 'stand alone' agreements yet to be finalized. Indeed, Time Warner's CEO [Richard Parsons] later commented [in a May 21, 2002 letter] that the submission of the [February 2002] draft agreement was 'expected' to result in further 'comments and questions' from the Siegel heirs that 'would need to be resolved.'" ER 200. In the same letter, Mr. Parsons went on to state that Warner "continue[d] *to hope* that this agreement *can be closed*." SER 416 (emph. added).

situation in which verbal settlement negotiations result in what the parties believe to be an agreement …but which, upon further discussion, falls short of the agreement needed to resolve their dispute." SER 200.

Warner also makes much of the fact that the Marks Memo does not expressly discuss the parties' differing counter-proposals. Dkt. 49 at 15. But the memo explicitly proposes sending to Warner a new "revised draft (as it may be modified by [the Siegel's] input)." RER 14. This comports completely with the District Court's finding that there was "no document or set of documents reflecting agreement by the parties to singular, agreed terms." ER 202.

Finally, even if extra-record evidence in some way contradicts the record evidence, that is an insufficient ground to expand the appellate record. *See Great Plains Mut. Ins. Co. v. Nw. Nat. Cas. Co.*, 113 F.3d 1246 (10th Cir. 1997) (denying appellant's motion to supplement with extra-record materials that purportedly counter statements in Appellee's brief); *Audubon Ins. Co. v. Lowery*, 9 F.3d 1547 (5th Cir. 1993) ("We can only review the record and do not take evidence to supplement or contradict it."); *United States v. Superville*, 1997 WL 533100 *1 (5th Cir. 1997) (denying motion to supplement with new evidence that purportedly discredited witness testimony: "[w]e will not consider factual evidence that has not been presented in the district court.").

In sum, the extra-record Marks Memo is legally irrelevant to the issue of contract formation on appeal. Warner's assertions as to the Marks Memo are inaccurate and, in any event, do not support expanding the record on appeal.

3. The Marks Memo Is Also Inappropriate For Judicial Notice

Although Warner nowhere mentions judicial notice in its Motion to Supplement, and does not properly bring a motion for judicial notice, it suggests in a footnote to its Reply Excerpts of Record that judicial notice is appropriate as to the Marks Memo. This has no merit.

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. nn. (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).

The contents of the Marks Memo is not subject to judicial notice. Far from possessing a "high degree of indisputability," the memo and the meaning of its contents are obviously contested. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 386 (9th Cir. 2010) ("[T]he content of [extra-record evidence] is not a clearly

established 'fact' of which this panel can take [judicial] notice"). Moreover, the Marks Memo is rife with inadmissible hearsay and purported legal conclusions. *M/V American Queen v. San Diego Marine Construction,* 708 F.2d 1483, 1491 (9th Cir.1983) (court may not take judicial notice of otherwise inadmissible statements); *see also Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780, 797 (8th Cir. 2009) ("Caution must also be taken to avoid admitting evidence, through the use of judicial notice, in contravention of the relevancy, foundation, and hearsay rules."); *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 777 (9th Cir. 2010) (noting that "legal conclusions are not admissible as factual findings").

C. Supplementing The Record Is Unfair To Defendants

Warner's proposed expansion of the record is fundamentally unfair. Warner erroneously suggests that injecting this stolen privileged document into the record "presents no risk of unfairness or surprise" because Ms. Larson knew of its existence. Mot. at 6. The relevant issue, however, is whether the District Court considered this material in issuing the order on appeal, and whether Defendants had notice so as to address this otherwise privileged document in their filings below and in their Response Brief. *See In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 205 (3d Cir. 1995) (noting "each litigant should be given a fair opportunity to rebut and put into perspective the evidence admitted against its position").

Here the prejudice is exacerbated because Warner's request to supplement came *after* Ms. Larson completed her briefs in her appeal and Warner's cross-appeal, such that she is afforded no merits brief in which to respond to Warner's new arguments based on this extra-record Marks Memo. *Lowry*, 329 at 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."). Warner is also not permitted to make new arguments on appeal that it did not make to the District Court. *World Triathlon Corp. v. Dunbar*, 320 F. App'x 795, 796 (9th Cir. 2009) ("We do not consider. . . new arguments on appeal").

In the unlikely event the Marks Memo and the Reply Brief that relies on it are not struck, Ms. Larson should be given leave to file a response brief addressing Warner's new arguments and extra-record material.

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

Warner, in essence, attacks and asks to reopen the District Court's judgment based on purported newly discovered evidence. Under Fed. R .Civ. P. 60(b)(2) and (c), however, a motion to reopen or alter a judgment based on 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). The time for Warner to seek to reopen or alter the Rule 54(b) 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."). That Warner never requested to expedite writ review of the parties' privilege dispute and obtained the Marks Memo after the one-year deadline does not change the result. *See Brown v. Combs*, 241 F. App'x 761, 762 (2d Cir. 2007) ("The one-year limitation period for Rule 60(b) motions is 'absolute.'") (citations omitted); *Miller v. Shelton*, 2006 WL 753187 (W.D.N.Y. Mar. 20, 2006) ("the one-year limit is absolute and may not be extended by the court").

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). *See also 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").

IV. THE APPROPRIATE REMEDY IS TO STRIKE THE EXTRA-RECORD MATERIAL AND WARNER'S REPLY BRIEF THAT RELIES ON IT

Striking not only this extra-record material, but also Warner's Reply Brief or, at a minimum, those portions of its brief that rely on such material, is the appropriate remedy.[4] *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 relying on them); *LaFontaine v. Massachusetts Cas. Co.*, 257 F. App'x 23, 24 (9th Cir. 2007) (striking supplemental excerpts of record and all references to them in reply brief and noting that "[t]his court has consistently held that "[p]apers not filed with the district court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal.") (citation omitted); *Lowry*, 329 F.3d at 1025-26 (granting sanctions and noting that "[i]f the only penalty for including forbidden material in the excerpts of record is removal of that material, it's hard to see why anyone would think twice before violating the rule.").

Accordingly, in the *DC Comics* appeal, this Court recently struck DC's extra-record supplemental excerpts of record and *the entirety* of DC's brief that referenced the offending material.

[4] The portions of Warner's Reply Brief that reference and rely on the extra-record material are: (a) the fourth sentence on page 1 beginning "Marks said . . ."; (b) the third sentence on page 8 beginning "Everyone continued. . ."; and (c) Section I-D (pages 14-15) in its entirety.

CONCLUSION

Warner has not met its burden of establishing "extraordinary circumstances" that would warrant expanding the record on appeal. Ms. Larson respectfully requests that the Court deny Warner's Motion to Supplement, strike the offending extra-record material (RER 13-14), and strike Warner's reply brief either its entirety or as to those portions that rely on the extra-record material.

Dated: July 2, 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

CERTIFICATE OF COMPLIANCE

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

Dated: July 2, 2012 TOBEROFF & ASSOCIATES, P.C.

/s/ Marc Toberoff
Marc Toberoff
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Laura Siegel Larson, individually and
as personal representative of The Estate
of Joanne Siegel

CERTIFICATE OF SERVICE

I certify that the foregoing was served electronically by the Court's CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 2, 2012

TOBEROFF & ASSOCIATES, P.C.

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