Appeal Nos. 11-55863, 11-56034

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

REPLY IN SUPPORT OF WARNER BROS. ENTERTAINMENT INC. AND DC COMICS' MOTION TO SUPPLEMENT THE RECORD WITH THE MARKS MEMO

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I. Introduction

Larson's response once again misses the point. DC does not deny that in most cases the record on appeal is limited to evidence considered by the court below. Rather, DC requests, on the basis of established case law, that this Court use its inherent authority to consider a single document recently produced by Larson. The contents of this document were discussed and disclosed in the "Toberoff Timeline," a document filed with and considered by the district court in 2009. SER-182-88; Dkt. 50-2 at 36-63. The single new document that DC asks this Court to consider is a 2002 memo (the "Marks Memo") written by Kevin Marks—Larson's lead negotiator with DC, and a key first-hand witness to the settlement agreement DC seeks to enforce in its first question presented on its cross-appeal. DC Br. at 25-37.

DC has diligently attempted to obtain the Marks Memo *for years*, but Larson refused to produce it until May 14, 2012—and only after this Court denied both her mandamus petition and subsequent petitions for rehearing of that ruling. *In re Pacific Pictures*, 679 F.3d 1121 (9th Cir. 2012); Dkt. 50-2 at 94-95; Decl. of Ashley Pearson ("Pearson Decl.") Ex. A at [13-14]. There are no legitimate authenticity or fairness concerns regarding the Marks Memo, because Larson produced it from her own files; its existence and basic contents were disclosed to

the district court in 2009; and DC put Larson on notice of its intent—weeks ago—that it would use the Memo in its Reply Brief on this appeal. *Infra* at 6-7.

II. The Court Should Exercise Its Authority To Consider Marks' Memo

1. Larson's insistence that the record on appeal is strictly limited to the original papers and exhibits filed in the district court ignores established case law granting this Court ultimate discretion over the contents of the record. *E.g., Lowry v. Barnhart*, 329 F.3d at 1019, 1025 (9th Cir. 2003), *following Dickerson v. State of Ala.*, 667 F.2d 1364, 1367-1368 (11th Cir. 1982) ("Whether an appellate record should be supplemented under the particular circumstances of a case is a matter left to the discretion of the federal courts of appeals.").[1]

This "inherent authority" to supplement the record on appeal, *Lowry*, 329 F.3d at 1025, extends to any relevant and helpful evidence, even when it was not submitted to or considered by the court below. *E.g., Manjiyani v. Ashcroft*, 343 F.3d 1018, 1019-20 (9th Cir. 2003) (granting motion to supplement record with complete copy of application filed with immigration agency where only partial copy was filed below); *Mangini v. U.S.*, 314 F.3d 1158, 1160-61 (9th Cir. 2003) (same; three newly discovered letters refuting material misstatement in opposing

[1] *Accord Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F.3d 1011, 1020 n.3 (9th Cir. 2010); *Siskiyou Regional Educ. Project v. Goodman*, 219 Fed. Appx. 692, 694 n.1 (9th Cir. 2007); *Colbert v. Potter*, 471 F.3d 158, 165-166 (D.C. Cir. 2006); *Salinger v. Random House, Inc.*, 818 F.2d 252, 253 (2d Cir. 1987); *Gibson v. Blackburn*, 744 F.2d 403, 405 n.3 (5th Cir. 1984).

party's affidavits); *Nat'l Sr. Citizens Law Ctr. v. Social Sec. Admin.*, 849 F.2d 401, 402 & n.3 (9th Cir. 1988) (same; declaration and attached letter); *Colbert*, 471 F.3d at 165-166 (same; photocopy of both sides of return receipt where only one side of receipt had been submitted below).

2. The relevance of the Marks Memo to DC's settlement defense, Br. at 25-37, is obvious: the Memo was written by Kevin Marks, Larson's lead negotiator and the key eye-witness to settlement. RER-13-14. The Memo repeatedly references the "existing deal" and "agreement of last October [2001]" between Larson and DC and explains to the Siegel-Larson family the consequences of the "deal" they made. *Id*. Given his unique role and intimate involvement in the settlement discussions, Marks' contemporaneous memo stating that the parties had a "deal" in October 2001 is not only relevant to the dispute over whether an agreement was formed, *but is one of the most direct and reliable pieces of evidence on the issue*. Larson's extensive reliance—both in the district court and here, SER-551-60; Dkt. 43-1 at 33-34—on Marks' deposition testimony about his views on whether a deal was made estops Larson from claiming now that Marks' views on the subject are "irrelevant as a matter of law," Resp. at 6-7. The Memo was

written years closer in time to the 2001 agreement, and is far better evidence than a deposition taken years later *without* the Memo in hand.[2]

The Memo's contemporaneous clarity on the question whether the parties reached a deal in 2001 stands in stark contrast with Marks' inconsistent testimony given years later, which the district court credited and relied on in finding no agreement had been reached. ER-200; Dkt. 31-1 at 30-33; 49 at 4, 10. In his 2006 deposition, Marks testified that while there was an agreement in October 2001, it was not, in his opinion, "binding." RER-55. Larson used this testimony to argue that Marks' October 19, 2001, letter to DC was a non-binding counter-offer rather than an acceptance of DC's October 16 offer. SER-549-60.

But Marks' contemporaneous Memo reveals that when the agreement was reached in 2001, and in the year that followed, Marks believed the opposite—that a "deal" was made in 2001 and it bound the Siegels. Indeed, as recounted in his August 2002 memo, Marks turned away Toberoff's first offer (made in February 2002), saying he "did not feel that it was appropriate [for Toberoff] to be making offers while *[Marks] was in the process of documenting an existing deal*," RER-13 (emphasis added). Marks warned Larson that if her family repudiated their

[2] Larson's assertion that the Memo is irrelevant is also belied by her request to file an additional brief discussing its relevance. Resp. at 12. No such leave is warranted in any event. Larson already spends many more pages discussing the Memo in her response than DC did in its merits reply. Compare Resp. at 3-7, with DC Reply at 14-15.

"agreement" with DC in favor of Toberoff's competing summer 2002 offer, he would testify against them. *Id.* And in the Memo, he beseeched Larson to continue documenting her deal with DC in accord with her duty of "good faith," and warned that failure to do so would get her and Toberoff sued. RER-14.

While Larson argues the Memo does not support DC's position that a binding agreement was reached in 2001 because Marks references the need to "document" the "existing deal," Resp. at 8; RER-13, DC has showed in its merits briefing that binding contracts *can be reached and are reached* even when the parties plan to complete formal documentation later, and those documentation efforts fall apart. Br. at 25-28 (collecting cases); Reply at 7-9. This has been the law in California for decades, *id.*, and Marks would have had no reason to turn away Toberoff's "better" offers in 2002, much less to warn the Siegels of litigation, if Marks did not know and believe that the "deal" he told DC the Siegels had accepted on October 19, 2001 was binding. SER-455; RER-13-14; *cf.* Resp. at 4. Moreover, unlike Larson's current efforts to say her acceptance was mistaken, or that Marks and DC really exchanged competing counter-offers, the Marks Memo definitively shows that, in 2001 and 2002, Marks never took these positions invented by Toberoff to get Larson out of her contract. DC Reply at 14-15.

3. There are no legitimate fairness concerns here that would prevent the Court from exercising its authority to consider the Marks Memo. The Memo's

existence and certain of its contents have been part of the district court record since 2009, when DC submitted the Toberoff Timeline document (and its description of the Marks Memo) to re-open discovery. SER-182-88; Dkt. 50-2 at 37-38, 50-55. The Timeline reports that in August 2002, Marks conveyed an offer from Toberoff to the Siegels and that Marks warned the Siegels that "he would testify in court against [them] if they accepted this offer because he believe[d] there ha[d] already been an agreement reached" with DC. SER-183. The Marks Memo confirms this description. *Compare* SER-183, *with* RER-13-14; Mot. at 4-5.

Larson claims she would be prejudiced by this Court's consideration of the Memo because it was produced after she "completed her briefs" here, Resp. at 12, but the timing of production was always in her control, and she is the sole cause of delay. DC first requested the document in 2006, Dkt. 50-1 at 58-59, again in 2009, Dkt. 50-2 at 37-38, 50-55, and a third time this year in the related *Pacific Pictures* case, Pearson Decl. Ex. B. The district court ordered the Marks Memo produced to DC in May 2011, Dkt. 50-2 at 93, but Larson refused to comply with that order and filed a writ petition, Pearson Decl. Ex. A at [13-14]. After this Court affirmed that discovery order on April 17, 2012, *Pacific Pictures*, 679 F.3d at 1131, Larson once again tried to keep the document from this Court on this appeal, unsuccessfully asking the district court and this Court to stay its production pending en banc or writ of certiorari review. Dkt. 50-2 at 64-92; Pearson Decl. Ex. A at 13-14.

In opposing Larson's requests for a stay, DC told the courts and Larson that it intended to use the Marks Memo in its briefing in this appeal. Pearson Decl. Ex. A at 15 (filed Apr. 25, 2012: "DC needs the Timeline documents for soon-to-be-filed appellate briefs.... A central issue in [the *Larson*] appeal—indeed, DC's lead argument on its cross-appeal—is whether the parties reached a binding settlement agreement in 2001 that bars Laura Siegel Larson's claims.... the Marks memo, which is among the Timeline documents, confirms that the Siegels had a 'deal' with DC."); C at 41 (filed May 2, 2012: "At least one [of the Timeline documents the Ninth Circuit] can and should consider is the Marks memo, which … fully supports DC's position in both appeals"). This Court and the district court lifted the stay on discovery and denied Larson's stay applications. Dkt. 50-2 at 93-95; Pearson Decl. Ex. D.

Any dispute over the privileged nature of the Marks Memo was settled—*in DC's favor*—weeks before Larson's filing deadlines on this appeal. Larson was on notice that DC intended to use this document in its Reply, and had ample opportunity to address the Memo in her Second Brief on Cross-Appeal (which she filed *one month* after this Court ordered the document produced, and 10 days after she finally produced it). There is thus no basis for Larson's request that she be given a *third* opportunity to address the Memo in yet another brief. Resp. at 12; *see also supra* n.2. If anything, it was DC that was prejudiced by not being able to

use this document before the district court or in its opening brief here, and it would be unfair to penalize DC for Larson's decision to ignore the Memo in her briefing despite having this Court's April 17, 2012, opinion in hand, and being on notice of DC's intent to submit it to this Court.

4. Finally, 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 Rule 60(b) is an entirely different matter from invoking the court's inherent power to supplement the record with one document—the existence and certain contents of which were already before the court, and which can be done regardless of whether the district court weighed in on the evidence. *E.g.*, *Manjiyani*, 343 F.3d at 1019-20; *Mangini*, 314 F.3d at 1160-61; *Nat'l Sr. Citizens Law Ctr. v. Social Sec. Admin.*, 849 F.2d 401, 402 & n.3 (9th Cir. 1988); *Colbert*, 471 F.3d at 165-166. An appellate court need not "reopen" a trial court record to supplement the record with documents already inherently within its purview.

5. For the reasons above, DC respectfully requests this Court grant its motion and exercise its authority to supplement the record with the Marks Memo.

Respectfully submitted,

Dated: July 11, 2012

O'MELVENY & MYERS LLP

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

DECLARATION OF ASHLEY PEARSON

I, Ashley Pearson, declare and state as follows:

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

2. Attached hereto as Exhibit A is a true and correct copy of DC Comics' *Ex Parte* Application To Lift Temporary Stay On Court's May 25, 2011, And August 8, 2011, Orders, filed in *Pacific Pictures*, dated April 25, 2012.

3. Attached hereto as Exhibit B is a true and correct copy of DC Comics' Notice Of Motion And Motion To Compel Production Of Documents, filed in *DC Comics v. Pacific Pictures Corp.*, Case No. CV 10-3633 ODW (RZx), United States District Court for the Central District of California ("*Pacific Pictures*"), dated January 23, 2012.

4. Attached hereto as Exhibit C is a true and correct copy of DC Comics' Reply In Support Of *Ex Parte* Application To Lift Temporary Stay On Court's May 25, 2011, And August 8, 2011, Orders, filed in *Pacific Pictures* and dated

May 2, 2012.

5. Attached hereto as Exhibit D is a true and correct copy of an order issued by the district court in *Pacific Pictures* and dated May 10, 2012.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration is executed this 11th day of July, 2012, at Los Angeles, California.

/s/ Ashley Pearson
Ashley Pearson

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

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

Dated: July 11, 2012

O'MELVENY & MYERS LLP

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

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2012, I caused to be electronically filed the Motion To Supplement The Record With The Marks Memo with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all interested parties in this case are registered CM/ECF users.

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on July 11, 2012, at Los Angeles, California.

/s/ Ashley Pearson
Ashley Pearson

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