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14 UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

15 JOANNE SIEGEL and LAURA  
 16 SIEGEL LARSON,

17 Plaintiffs,

18 vs.

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

22 Defendants.

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

) **DEFENDANTS' EX PARTE**  
**APPLICATION TO SET**  
**REBUTTAL EXPERT REPORT**  
**DATE FOR JANUARY 14, 2008;**  
**DECLARATION OF FRANKLIN**  
**JOHNSON; DECLARATION OF**  
**ANJANI MANDAVIA; AND**  
**DECLARATION OF MICHAEL**  
**BERGMAN**

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 28 AND RELATED COUNTERCLAIMS.

1           **A.    Introduction**

2           By this *ex parte* application under Local Rule 7-19, defendants Time  
3 Warner Inc., Warner Communications Inc., Warner Bros. Entertainment Inc.,  
4 Warner Bros. Television Production Inc., and defendant and counterclaimant DC  
5 Comics (collectively “Defendants”), respectfully ask this court to set a due date  
6 of January 14, 2008 for the report of defense financial expert Franklin Johnson,  
7 rebutting the expert report of Plaintiffs’ auditor, Steven Sills (the “Sills Report”),  
8 which was served on Defendants on November 13, 2007.

9           The Sills Report was prepared after an audit ordered by the Court.  
10 Although the Court set a completion date for the audit, it did not set a specific  
11 schedule for the submission of the Sills Report or Defendants’ rebuttal report, or  
12 for the taking of these experts’ depositions, instead simply ordering the parties to  
13 conclude these matters “expeditiously.” Plaintiffs served the Sills Report on  
14 Defendants approximately 90 days after Mr. Sills commenced his audit, and well  
15 over a month after the audit was concluded. It is a lengthy and detailed document  
16 comprising some 48 pages of narrative report and appendices, and is dense with  
17 calculations and conclusions. Defendants’ financial expert reasonably requires  
18 approximately 60 days to adequately review the report and its underlying  
19 assumptions and supporting documentation in order to properly prepare his  
20 response. However – and notwithstanding the fact that Plaintiffs failed to comply  
21 with the timeframe of F.R.C.P. Rule 26(a)(2)(C) in the submission of the Sills  
22 Report in that it was not delivered to Defendants at least 90 days before the then-  
23 scheduled trial date – Plaintiffs are now taking the position that unless  
24 Defendants’ rebuttal report is served on them by December 13, 2007 – 30 days  
25 after the Sills Report was delivered to Defendants’ counsel – it is untimely under  
26 Rule 26(a)(2)(C) and should summarily be disallowed.

27           Defendants submit that the Court intended and expected the parties to work  
28 together to set a reasonable schedule for the expert disclosures and discovery

1 after the conclusion of the audit, and did not intend the blind application of Rule  
 2 26(a)(2)(C) to control the timing of these disclosures. A rebuttal report due date  
 3 of January 14, 2008 would provide reasonable time for Defendants' expert to  
 4 prepare his report and would not result in any prejudice to Plaintiffs. Indeed, the  
 5 rebuttal report would be submitted approximately 60 days before the date  
 6 currently scheduled for trial, thus complying with the timeframe contemplated by  
 7 Rule 26(a)(2)(C) and allowing adequate time for these two expert depositions to  
 8 be conducted and completed well before trial.<sup>1</sup>

9 This *ex parte* application is necessary because Plaintiffs have taken the  
 10 position that the rebuttal report is due no later than December 13, 2007 – which is  
 11 only one week away – and have refused to agree to a later date for the report  
 12 unless Defendants consent to submit to additional financial discovery. On  
 13 December 4, 2007, Defendants' counsel Anjani Mandavia spoke with Plaintiffs'  
 14 counsel Marc Toberoff,<sup>2</sup> and informed him that Defendants would be submitting  
 15 this *ex parte* application to seek to January 14, 2008 for the preparation and  
 16 submission of Mr. Johnson's rebuttal report. (Mandavia Decl., ¶ 2.)

17 **B. Background**

18 On January 12, 2007, Plaintiffs submitted the initial report of their  
 19 financial expert, Mr. Sills, in which Mr. Sills concluded that “[i]n order for us to  
 20 express an opinion on the actual amount due Plaintiffs in an accounting, Warner  
 21 must provide the documents in its possession that on my advice have been  
 22 requested by Plaintiffs.” (Declaration of Michael Bergman (“Bergman Decl.”), ¶  
 23 2, Exh. A.) On February 9, 2007, Defendants submitted the initial rebuttal report  
 24 of their financial expert, Mr. Johnson, in which he stated that “[i]f and when Mr.

25  
 26 <sup>1</sup> In addition, Defendants and Plaintiffs are currently working on a stipulation to  
 27 continue the trial and pre-trial dates in this matter by approximately six weeks due to  
 the misfortune of Plaintiffs' counsel's house burning down in the recent Malibu  
 wildfire. (Declaration of Anjani Mandavia (“Mandavia Decl.”), ¶ 2.)

28 <sup>2</sup> As required by Local Rule 7-19, Mr. Toberoff's address and phone number is: Law  
 Offices of Marc Toberoff, PLC, 2049 Century Park East, Suite 2720, Los Angeles,  
 California 90067, (310)246-3333.

1 Sills submits a report expressing substantive opinions or claims of any amount  
2 purportedly owing to plaintiffs, I will be prepared to and will respond to those  
3 opinions and claims.” (Bergman Decl., ¶ 3, Exh. B.)

4       Thereafter, Plaintiffs moved to compel the production of further financial  
5 documents from Defendants, and on August 13, 2007, the Court entered its Order  
6 requiring the parties to make arrangements for Mr. Sills to conduct a damages-  
7 related audit of Defendants, to be completed by or before September, 17, 2007.  
8 (Bergman Decl., ¶ 4, Exh. C.) On September 17, 2007, after argument on the  
9 parties’ cross-motions for partial summary judgment, the Court heard and  
10 considered Plaintiffs’ ex parte application to continue the completion date of the  
11 Court-ordered audit, and granted Plaintiffs an additional 22 days, to October 9,  
12 2007, for Mr. Sills to complete the audit. (Bergman Decl., ¶ 5, Exh. D at 127:18-  
13 20.)

14       At the conclusion of the September 17 hearing, Defendants’ counsel raised  
15 with the Court the issue of the schedule of the submission of the parties’  
16 respective expert reports, and the depositions of the financial experts, following  
17 the completion of the audit. (*Id.*, Exh. D at 128:12-16.)<sup>3</sup> The Court did not set  
18 such a schedule; rather, it ordered the parties to conduct those matters  
19 “expeditiously.” (*Id.*, Exh. D at 128:17.)

20       Plaintiffs served the Sills Report on November 13, 2007, some 90 days  
21 after the commencement of the audit, and more than a month after its conclusion.  
22 (Bergman Decl., ¶ 6.) The report is 31 pages long, has 17 pages of appendices,  
23 and contains numerous calculations and conclusions for various Superman-  
24 related properties. (*Id.*) Defendants forwarded the Sills report to Mr. Johnson  
25 promptly upon its receipt, and asked him to review and analyze it with a view to  
26 preparing his responsive report as soon as possible. (*Id.*) However, Mr. Johnson

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28 <sup>3</sup> “MR. PERKINS: The only other issue, your honor, relates to after the audit is  
completed, a schedule for Mr. Sills to provide us with his report and for us to be able to  
respond with our expert report and the depositions of those folks.”

1 has advised Defendants' counsel that he needs approximately 60 days – to mid-  
2 January – to adequately analyze and respond to the report. (*Id.*; Declaration of  
3 Franklin Johnson (“Johnson Decl.”), ¶ 3.) This is particularly so because the  
4 Sills Report apparently contains certain alleged revenue and expense numbers for  
5 Defendants' properties which do not correspond with the revenue and expense  
6 numbers Mr. Johnson has been able to determine from his own review of  
7 Defendants' books and records, and additional time is required to determine the  
8 source of the discrepancies and to see if they can be reconciled. (Franklin Decl.,  
9 ¶ 3.)

10 Accordingly, in connection with trying to arrive at a stipulation for revised  
11 trial and pretrial dates to submit to the Court, Defendants advised Plaintiffs'  
12 counsel that they wanted to set the date for Mr. Johnson's report at January 14,  
13 2008, with the depositions of Mr. Sills and Mr. Johnson to follow thereafter.  
14 (Bergman Decl. ¶ 7.) However, Plaintiffs have now taken the position that  
15 Defendants are required to submit the rebuttal report by no later than December  
16 13, 2007 – 30 days after the service of the Sills Report – or it is untimely. (*Id.*)  
17 Indeed, Plaintiffs are not willing to consider any later date for the report unless  
18 Defendants consent to provide Plaintiffs with additional financial discovery. (*Id.*)

19 **C. Argument**

20 In light of the content of the Sills Report – and particularly its  
21 discrepancies with certain revenue and expense numbers determined by  
22 Defendants' expert – 60 days is a reasonable amount of time for Defendants'  
23 expert to adequately analyze that report and prepare his response. There appears  
24 to be no reason for Plaintiffs to not agree to that timeframe, except as a way to  
25 gain unwarranted discovery concessions from Defendants. Indeed, no  
26 conceivable prejudice would result to Plaintiffs from the delivery of the rebuttal  
27 report on January 14, which is approximately 60 days prior to the current trial  
28 date of March 11, 2008, thus allowing the parties sufficient time for expert

1 depositions and preparation prior to trial. In fact, Plaintiffs have articulated no  
2 such possible prejudice, and have even advised Defendants that they will be  
3 seeking a six-week continuance of the trial date – which Defendants fully support  
4 – because of the misfortune of their counsel’s house burning down in the recent  
5 Malibu fire. Such a continuance, if granted, will afford additional time for  
6 Plaintiffs to review the rebuttal report in preparation for trial.

7 Plaintiffs’ only stated basis for opposing Defendants’ proposed date for the  
8 rebuttal report is that because the Court set no express schedule for submission of  
9 the financial expert reports, Rule 26(a)(2) controls, and Defendants are required  
10 to submit their rebuttal report by no later than 30 days after the service of the  
11 Sills Report. Plaintiffs’ position is both curious and, Defendants believe,  
12 unfounded. It is curious because notwithstanding their current position that Rule  
13 26(a)(2) controls, Plaintiffs themselves failed to comply with that Rule, and  
14 indeed served the Sills Report beyond the time permitted by the Rule: The Sills  
15 Report was served on November 13, 2007 – just 70 days prior to the then  
16 scheduled trial date of January 22, 2008 – far less than the 90 days provided for  
17 under Rule 26(a)(2). Accordingly, if Plaintiffs’ present position were to be  
18 applied consistently, then the Sills Report was untimely by 20 days when it was  
19 served and should be stricken.

20 More importantly, however, Defendants believe that Plaintiffs’ present  
21 position does not comport with the intention of the Court: When Defendants’  
22 counsel inquired about a schedule for the financial experts’ reports and  
23 depositions, the Court responded only that they be done “expeditiously.” From  
24 this Defendants reasonably understood that the parties were to work out and  
25 agree to a reasonable schedule – and that appears to be how the Plaintiffs  
26 interpreted the Court’s directions up to the service of the Sills Report, particularly  
27 as Plaintiffs felt at liberty to take more than 30 days to complete their report after  
28 the extended audit deadline, and to serve that report only 70 days prior to the

1 then-scheduled trial date. Defendants' suggested time table is reasonable, is  
2 required for the adequate preparation of their expert rebuttal report, and will  
3 result in no prejudice to Plaintiffs. Indeed, unless sufficient time is allowed for  
4 the preparation of Defendants' expert rebuttal report, Defendants may be  
5 prejudiced in the proper presentation of their defenses at trial.

6 In light of Plaintiffs' position that the rebuttal report is due on December  
7 13, 2007, Defendants do not have adequate time to file a normally noticed motion  
8 for the Court to set a due date. Defendants therefore have promptly filed this *ex*  
9 *parte* application, and respectfully request that the Court set January 14, 2008 as  
10 the due date of Mr. Johnson's rebuttal report.

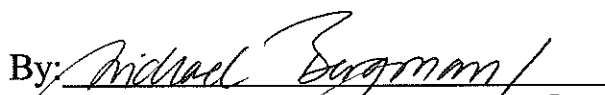
11 Respectfully submitted,

12 DATED: December 6, 2007 FROSS ZELNICK LEHRMAN & ZISSU, P.C.

13 PERKINS LAW OFFICE, P.C

14 -and-

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16 WEISSMANN WOLFF BERGMAN  
17 COLEMAN GRODIN & EVALL LLP

18  
19 By:   
20 Michael Bergman  
21 *Attorneys for Defendants and Counterclaimant*

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**DECLARATION OF FRANKLIN JOHNSON**

I, Franklin Johnson, declare as follows:

1. I was retained by Defendants as an expert witness in this action to address any accounting opinions or claims to be asserted by Plaintiffs' financial expert. I make this Declaration in support of Defendants' Ex Parte Application to Set Rebuttal Expert Report Date for January 14, 2008. The facts set forth below are within my personal knowledge, and if called as a witness I could and would testify competently thereto. I have been a certified public accountant for over 40 years, with over 36 years experience at Price Waterhouse working with financial and operating executives in many industries as an audit engagement partner and a business advisor. I spent three years as chief financial officer of a large entertainment company, and am currently working as a business consultant serving on boards of directors and chairing audit committees, and serving as an expert witness in entertainment industry and other business litigation.

2. I received a copy of the Expert Report of Steven D. Sills dated November 12, 2007 (the "Sills Report") from Defendants' counsel on or about November 14, 2007. The Sills Report is some 48 pages long – with 31 pages of narrative exposition outlining the documents Mr. Sills had reviewed and the conclusions he reached, and 17 pages of appendices. Since I was tasked with the responsibility of responding to and, if appropriate, rebutting, the Sills Report, I promptly reviewed the report, and set about on the task of reviewing the extensive underlying supporting documentation cited by Mr. Sills.

3. Our task is particularly challenging in that we do not have Mr. Sills' support binder. For the records we have inspected to date, many of his numbers do not agree with amounts we have inspected and the reasons for the differences are not readily apparent. There may well be some errors including some double counting.





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**DECLARATION OF ANJANI MANDAVIA**

I, Anjani Mandavia, declare as follows:

1. I am a member of Weissmann Wolff Bergman Coleman Grodin & Evall, LLP, one of the attorneys of record for defendants Time Warner Inc., Warner Communications Inc., Warner Bros. Entertainment Inc., Warner Bros. Television Production Inc., and defendant and counterclaimant DC Comics (collectively "Defendants") in this matter. I make this Declaration in support of Defendants' Ex Parte Application to Set Rebuttal Expert Report Date for January 14, 2008. The facts set forth below are within my personal knowledge, and if called as a witness I could and would testify competently thereto.

2. On December 4, 2007, I informed Plaintiffs' counsel, Marc Toberoff, by telephone, that Defendants would be applying to this Court ex parte for an order setting the due date for the rebuttal report of Defendants' expert, Franklin Johnson, at January 14, 2008. I also advised Mr. Toberoff at that time that we would work with him to arrive at a schedule and enter into a stipulation continuing the other trial and pre-trial dates in this matter for approximately six weeks due to the misfortune of Mr. Toberoff's house burning down in the recent Malibu wildfire.

I declare under penalty of perjury that the foregoing is true and correct and that I executed this Declaration this 4<sup>th</sup> day of December, 2007 at Beverly Hills, California.

  
ANJANI MANDAVIA

**DECLARATION OF MICHAEL BERGMAN**

I, Michael Bergman, declare as follows:

1. I am a member of Weissmann Wolff Bergman Coleman Grodin & Evall, LLP, one of the attorneys of record for defendants Time Warner Inc., Warner Communications Inc., Warner Bros. Entertainment Inc., Warner Bros. Television Production Inc., and defendant and counterclaimant DC Comics (collectively "Defendants") in this matter. I make this Declaration in support of Defendants' Ex Parte Application to Set Rebuttal Expert Report Date for January 14, 2008. The facts set forth below are within my personal knowledge, and if called as a witness I could and would testify competently thereto.

2. On January 12, 2007, Plaintiffs submitted an initial report of their financial expert, Steven Sills, in which Mr. Sills concluded that "[i]n order for us to express an opinion on the actual amount due Plaintiffs in an accounting, Warner must provide the documents in its possession that on my advice have been requested by Plaintiffs." A true and correct copy of the "Conclusion" of that initial report is attached hereto as Exhibit A.

3. On February 9, 2007, Defendants submitted the initial rebuttal report of their financial expert, Franklin Johnson, in which he stated that "[i]f and when Mr. Sills submits a report expressing substantive opinions or claims of any amount purportedly owing to plaintiffs, I will be prepared to and will respond to those opinions and claims." A true and correct copy of Mr. Johnson's initial report is attached hereto as Exhibit B.

4. Thereafter, Plaintiffs moved to compel the production of further financial documents from Defendants, and on August 13, 2007, the Court entered its Order requiring the parties to make arrangements for Mr. Sills to conduct a damages-related audit of Defendants, to be completed by or before September 17, 2007. A true and correct copy of the Court's Order is attached hereto as Exhibit C.

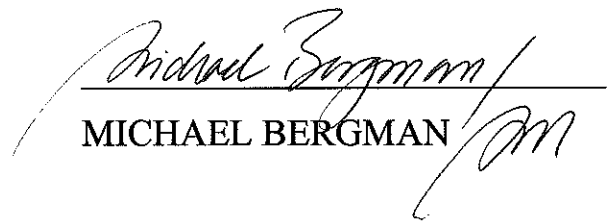
1           5.     On September 17, 2007, after argument on the parties' cross-  
2 motions for partial summary judgment, the Court heard and considered Plaintiffs'  
3 ex parte application to continue the completion date of the Court-ordered audit,  
4 and granted Plaintiffs an extension to October 9, 2007 for Mr. Sills to complete  
5 the audit. (Transcript, at 127:18-20.) At the conclusion of the September 17  
6 hearing, Defendants' counsel raised with the Court the issue of the schedule of  
7 the submission of the parties' respective expert reports, and the depositions of the  
8 financial experts, following the completion of the audit. (Transcript, at 128:12-  
9 16.) The Court did not set such a schedule; rather, it ordered the parties to  
10 conduct those matters "expeditiously." (Transcript, at 128:17.) True and correct  
11 copies of the relevant pages of the transcript of the September 17, 2007 hearing  
12 (the "Transcript") are attached hereto collectively as Exhibit D.

13           6.     Plaintiffs served the Expert Report of Steven D. Sills, dated  
14 November 12, 2007 (the "Sills Report"), at the end of the day on November 13,  
15 2007, some 90 days after the commencement of the audit, and more than a month  
16 after its conclusion. The report is 31 pages long, has 17 pages of appendices, and  
17 contains numerous calculations and conclusions for various Superman-related  
18 properties. I forwarded the Sills Report to Defendants' expert, Mr. Johnson, on  
19 the morning of November 14, and asked him to review and analyze it with a view  
20 to preparing his responsive report as soon as possible. However, Mr. Johnson  
21 has advised me that he needs approximately 60 days – to mid-January – to  
22 adequately analyze and respond to the report.

23           7.     Accordingly, in connection with trying to arrive at a stipulation for  
24 revised trial and pretrial dates to submit to the Court, I advised Plaintiffs'  
25 counsel, Marc Toberoff, that Defendants wanted to set the date for Mr. Johnson's  
26 report at January 14, 2008, with the depositions of Mr. Sills and Mr. Johnson to  
27 follow thereafter. However, Mr. Toberoff took the position that Defendants are  
28 required to submit the rebuttal report by no later than December 13, 2007 – 30

1 days after the service of the Sills Report – or it is untimely. Mr. Toberoff further  
2 advised me that he would not agree to any later date for the submission of  
3 Defendants’ expert rebuttal report unless Defendants consent to provide Plaintiffs  
4 with additional financial documentation or discovery.

5 I declare under penalty of perjury that the foregoing is true and correct and  
6 that I executed this Declaration this 6<sup>th</sup> day of December, 2007 at Beverly Hills,  
7 California.

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10 MICHAEL BERGMAN  
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