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7 **UNITED STATES DISTRICT COURT**
 8 **CENTRAL DISTRICT OF CALIFORNIA-EASTERN DIVISION**

9 JOANNE SIEGEL, an individual; and
 10 LAURA SIEGEL LARSON, an
 11 individual,

12 Plaintiffs,

13 vs.

14 WARNER BROS.
 15 ENTERTAINMENT INC., a
 16 corporation; TIME WARNER INC., a
 17 corporation; DC COMICS, a general
 partnership; and DOES 1-10,

18 Defendants

19
 20 DC COMICS,

21 Counterclaimant

22 vs.

23
 24 JOANNE SIEGEL, an individual; and
 25 LAURA SIEGEL LARSON, an
 individual,

26 Counterclaim Defendants.
 27
 28

Case Nos. CV 04-8400 SGL (RZx)
 CV 04-8776 SGL (RZx)

[Consolidated for Discovery Only]
 Honorable Stephen G. Larson, U.S.D.J.

**PLAINTIFFS' OPPOSITION TO
 DEFENDANTS' *EX PARTE*
 APPLICATION TO SET
 REBUTTAL EXPERT REPORT
 DATE FOR JANUARY 14, 2008**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

INTRODUCTION.....1

FACTUAL AND PROCEDURAL BACKGROUND.....3

ARGUMENT.....7

I. DEFENDANTS ARE NOT ENTITLED TO AN EXTENSION OF TIME FOR THEIR REBUTTAL REPORT PER FRCP 26(a)(2)(C).....7

II. DEFENDANTS ARE NOT ENTITLED TO TAKE THE DEPOSITION OF STEVEN SILLS.....10

III. DEFENDANTS SHOULD FURNISH SILLS WITH THE VITAL FINANCIAL INFORMATION THEY FAILED TO PROVIDE DURING HIS AUDIT.....11

A. Warner Unreasonably Refused to Provide Documents it Agreed to Provide During the Audit Process.....12

1. Warner’s Most Current Financial Statements.....13

2. Despite Its Representations To The Court, Warner Never Provided the Basis for its Purported Distribution Fee, Interest and Overhead Rates14

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. DC Refused To Provide Key Financial Information....15

2. DC Never Provided Sills With Sufficient Information To Segregate Foreign and Domestic Revenue and Expenses.....15

3. DC Refused To Answer Basic Questions Regarding Overlap Between Warner’s Statements To DC and DC Internal Financial Reports.....16

CONCLUSION.....17

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Jacobsen v. Deseret Book Co.,
287 F.3d 936 (10th Cir. 2002).....9

STATUTES

Fed. R. Civ. Pro. 26.....passim

INTRODUCTION

1
2 Plaintiffs and counterclaim Defendants Joanne Siegel and Laura Siegel
3 Larson respectfully submit the following memorandum opposing Defendants'
4 *Ex Parte* Application for an Extension of Time ("Application"). In their
5 Application, Defendants demand double the time allotted by F.R.C.P. 26
6 (a)(2)(C) – adhered to by all of other rebuttal experts in this case – for their
7 financial expert to submit his rebuttal report, while omitting crucial facts
8 concerning Plaintiffs' position and the events leading up to their Application.
9 Simply put, Defendants now seek to extend discovery deadlines applicable to
10 *their* financial expert after repeatedly touting deadlines to deny the same to
11 Plaintiffs, and continuing to withhold critical information from Plaintiffs'
12 financial expert, Steven Sills ("Sills").

13 Defendants also conveniently omit that before making their Application,
14 they tried to leverage the misfortune that the home of Plaintiffs' lead counsel,
15 Marc Toberoff, burnt to the ground in the Malibu wildfires on November 23,
16 2007. Declaration of Marc Toberoff in Opposition to Defendants' *Ex Parte*
17 Application to Set Rebuttal Expert Report Date for January 14, 2008 ("Toberoff
18 Decl."), ¶¶ 34-35. On Monday, November 26, 2007, Mr. Toberoff contacted
19 Defendants' counsel to inform them of the fire and to request a six-week
20 continuance of the trial date in light of this misfortune. *Id.*, ¶ 36. After initially
21 agreeing to this extension, Defendants soon backtracked, refusing to agree
22 unless Plaintiffs made discovery concessions – specifically, that Defendants
23 financial expert be given twice the allotted time to submit his report, and that
24 Defendants be permitted to take the deposition of Sills, well after the expert
25 discovery and deposition cut-off. *Id.*, ¶¶ 36-37.

26 Plaintiffs' position is that they would willingly agree to both requests if
27 Defendants would simply remedy a handful of specific unanswered financial
28 audit issues that Defendants had agreed to resolve during Sills' audit. Toberoff

1 Decl., ¶ 37. Such financial information gaps should necessarily be resolved so
2 that both sides' experts and the Court are "dealing with a full deck" and
3 analyzing the same set of financial data in computing Plaintiffs' damages.

4 Whereas the parties' experts may disagree as to the interpretation of this data, at
5 least they will be disagreeing over the same information. Plaintiffs' expert, Sills,
6 should be provided with the same financial information available to Defendants'
7 financial expert. Unfortunately, that has not transpired. Defendants' recalcitrant
8 behavior, which continued during the Court-ordered audit process, handicapped
9 Plaintiffs' damages analysis and breeds distrust. The impact of this imbalance
10 on meaningful settlement discussions cannot be overstated. *Id.*

11 Though Plaintiffs were willing to reasonably resolve this matter,
12 Defendants flatly refused to address Plaintiffs' simple requests. *Id.* Defendants
13 then changed their tact, agreed to stipulate to a continuance and filed this *ex*
14 *parte* Application. Toberoff Decl., ¶ 38. On December 6, 2007, before being
15 served with the Application, Plaintiffs sent a letter to Defendants outlining their
16 position on the outstanding financial issues for which Sills sought clarification,
17 and in exchange, once again offered to stipulate to the extension of the expert
18 rebuttal deadline and to Sills' deposition. Toberoff Decl., Ex. DD.

19 Leaving aside Defendants' attempts to leverage the destruction of
20 Plaintiffs' counsel's house for tactical concessions, Defendants' position is
21 without merit. Defendants from the outset have been well aware of the issue
22 facing the parties' financial experts, namely the determination of all profits from
23 post-termination Superman and Superboy works. Considering this information
24 has always been within Defendants' control, it makes no sense that they would
25 be starting this analysis only now. In fact, as this financial accounting issue
26 stands at the heart of these cases, Defendants could have submitted their own
27 profit analysis during the initial exchange of expert reports in January, 2007, but
28

1 chose not to do so. Defendants certainly would not have needed a report from
2 Plaintiffs to make these calculations on their own.

3 In light of the Court's request during the September 17, 2007 summary
4 judgment hearing that expert reports be completed "expeditiously," Defendants
5 consistent stonewalling of discovery and holding Plaintiffs' feet to the fire
6 regarding discovery cut-offs, and the fact all relevant information always been
7 within Defendants' sole control, no extra time for Defendants' expert's report is
8 warranted, and none should be granted.

9 As such, Plaintiffs respectfully request that the Court either (a) deny
10 Defendants' Application or (b) grant Defendants' financial expert additional
11 time to submit his report so long as Defendants promptly remedy the continuing
12 gaps in the information provided to Plaintiffs' financial expert.

13 **FACTUAL AND PROCEDURAL BACKGROUND**

14 On May 13, 2005, Plaintiffs served Plaintiffs' Request for Production of
15 Documents and Things to Defendant Warner Bros. Entertainment, Inc., Set One,
16 relating to Plaintiffs' claims and damages. Toberoff Decl., ¶ 2. On May 15,
17 2005, Plaintiffs served Plaintiffs' Request for Production of Documents to
18 Defendant DC Comics ("DC"), Set One, relating to Plaintiffs' claims and
19 damages. *Id.* Plaintiffs thereafter served Plaintiffs' Second Set of Requests for
20 Production to DC on October 17, 2006 and Plaintiffs' Fourth Set of Requests for
21 Production to Defendants Warner Bros. Entertainment Inc., Warner Bros.
22 Television Inc., Time Warner Inc. (collectively, "Warner") and DC on October
23 18, 2006. *Id.*

24 On January 12, 2007, Sills timely submitted a 14-page expert report
25 pursuant to F.R.C.P. 26. Toberoff Decl., Ex. B. Therein, Sills carefully
26 analyzed the financial information which had been provided by Defendants.
27 Any gaps in Sills' report were *solely* due to Defendants' concerted failure to
28 provide Plaintiffs with financial documents in their possession, specifically

1 requested by Plaintiffs by their trade names on Sills' advice. In response to
2 Sills' report Defendants did not submit a substantive rebuttal report by February
3 9, 2007, or otherwise, as prescribed by the scheduling order, nor did they bother
4 to depose Sills by the March 30, 2007 expert discovery cutoff. *Id.*, Ex C.

5 Plaintiffs thereafter submitted a noticed motion to compel the outstanding
6 discovery on April 23, 2007, a hearing on which was held before Magistrate
7 Zarefsky on May 14, 2007. Toberoff Decl., ¶ 7. Magistrate Zarefsky never
8 ruled on Plaintiffs' motion due to the tragedy of his wife's death. *Id.* On August
9 8, 2007, this Court withdrew the reference to Magistrate Zarefsky. *Id.* On
10 August 13, 2007, this Court heard further argument regarding Plaintiffs'
11 outstanding motions to compel, and issued an order on that date, directing a
12 damages-related audit of Defendants by Mr. Sills. *Id.*, Ex. E. After Defendants
13 *refused* to stipulate to reasonably extend the time for Mr. Sills to conduct a bi-
14 coastal audit, Plaintiffs filed an *ex parte* application on September 14, 2007,
15 seeking such extension. *Id.*, ¶ 8. Defendants vigorously *opposed* that
16 application, stressing the looming pre-trial schedule and contending that thirty
17 days was sufficient time to conduct the audit. *Id.*

18 At the September 17, 2007 hearing on the parties' cross motions for
19 summary judgment, arguments on Plaintiffs' *ex parte* application were heard and
20 the Court granted Mr. Sills a short extension. *Id.*, Ex. G. Also, at the very end of
21 September 17, 2007 summary judgment hearing, the following was said:

22 Mr. Perkins: The only other issue, your Honor, relates to after the audit is
23 completed, a schedule for Mr. Sills to provide us with his report and for us
24 to be able to respond with our expert report and the depositions of those
25 folks.

26 The Court: You should schedule those expeditiously.
27 Toberoff Decl., Ex. F at 128:12-17.

28

1 At no point in the parties' briefing or in oral arguments had the issue of
2 expert depositions been raised. Toberoff Decl., ¶ 9. On October 3 and 4, 2007,
3 e-mails were exchanged between Warner Bros. and Mr. Sills regarding financial
4 information contained in the "ultimates." *Id.*, Exs. H, I. On October 4, 2007, as
5 part of the audit process, Mr. Sills sent e-mails to Warner and (via counsel) to
6 DC, requesting additional documents and information. *Id.*, Ex. J, K. Following
7 up on Mr. Sills' e-mails, on October 4, 2007, Plaintiffs' counsel sent a letter to
8 counsel for both Defendants summarizing key documents and information that
9 Warner and DC had yet to produce. *Id.*, Ex. L. For Warner, these documents
10 included participation statements and a production cost detail/bible for
11 *Smallville*. *Id.* On October 8, 2007, Warner responded via e-mail to certain of
12 Mr. Sills' document requests; an additional e-mail was sent on October 9, 2007.
13 *Id.*, Exs. P, R. These e-mails clearly represented that the requested documents
14 would be provided. *Id.*

15 DC vaguely responded to Plaintiffs audit questions by letter on October 8,
16 2007. Toberoff Decl., Ex. N. In response, Plaintiffs sent a letter dated October
17 8, 2007 once again clarifying the information required *inter alia*, the breakdown
18 between DC's foreign and domestic profits. *Id.*, Ex. O. On October 22, 2007,
19 Warner sent an e-mail outlining the additional production it would undertake
20 that day. *Id.*, Ex. S.

21 On November 2, 2007, Sills sent an e-mail to his audit contact at Warner
22 requesting documents that Warner had agreed to provide during the audit but
23 had not yet provided. Toberoff Decl., Ex. U. On November 5, 2007, Plaintiffs'
24 counsel sent a letter to Warner's counsel requesting "explanations as to the basis
25 and calculation of the percentages used for the production overhead and
26 distribution fees and interest figures used in the ultimates," noting that Warner
27 had represented to both the Plaintiffs *and the Court* that such explanations would
28

1 be forthcoming. Plaintiffs' letter also requested other documents Warner had
2 agreed to provide Sills during the audit. *Id.*, Ex. V.

3 Surprisingly, on November 7, 2007, Warner's counsel, Michael Bergman,
4 reneged on Warner's promises and refused to provide the additional
5 documentation promised during Sills' audit. Toberoff Decl., Ex. W. On
6 November 9, 2007, Plaintiffs' counsel discussed with DC's counsel resolving
7 whether Warner's film, television and merchandising statements and payments
8 to DC were reflected in the management summaries provided by DC (i.e., "Blue
9 Books"). *Id.*, ¶ 28. However, on November 13, 2007, DC also refused to clarify
10 or supplement its financial information. *Id.*, Ex. Y. On November 20, 2007,
11 Plaintiffs' counsel sent another letter to Warner's counsel, demanding that
12 Warner provide the documents and information requested and promised during
13 Sills' audit, and that the parties' meet-and-confer regarding this remaining issue.
14 Toberoff Decl., Ex. BB.

15 On Friday, November 23, 2007, Plaintiffs' lead counsel, Marc Toberoff,
16 suffered the misfortune of his home burning down with all his possessions in the
17 Malibu wildfires. Toberoff Decl., Ex. CC.¹ On Monday, November 26, 2007,
18 Mr. Toberoff contacted Defendants' counsel to inform them of the situation and
19 to request that they agree to a six-week continuance of the trial date in light of
20 this disaster. *Id.*, ¶ 36. After initially agreeing to this extension, Defendants
21 then backtracked, refusing to agree to such a continuance unless Plaintiffs made
22 additional concessions – specifically, granting their expert twice the statutory
23 time to provide a rebuttal report and allowing Defendants to take the deposition
24 of Sills well after the expert discovery and deposition cut-off. *Id.*

25 On December 4, 2007, the parties met and conferred regarding a six-week
26 continuance of the trial schedule due to the destruction of Mr. Toberoff's home.

27 _____
28 ¹ A video clip of the destruction was captured by a local news crew and can be seen at
<http://video.knbc.com/player/?id=188740>.

1 Toberoff Decl., ¶ 37. Therein, Defendants *conditioned* their assent to such a
2 continuance on Plaintiffs conceding double the time for Defendants' expert to
3 submit a rebuttal report and agreeing to Sills' deposition, long after the expert
4 deposition cut-off. *Id.* Notwithstanding Defendants' improper attempt to
5 leverage Mr. Toberoff's misfortune, Plaintiffs stated that they would agree as to
6 both issues if Defendants simply resolved a handful of remaining gaps in
7 financial information requested but not received during Sills' audit to ensure all
8 parties had sufficiently accurate information to conduct meaningful settlement
9 mediation. *Id.* Defendants once again refused this request. *Id.*

10 On December 4, 2007, Defendants' counsel Anjani Mandavia informed
11 Plaintiffs' counsel by telephone that Defendants had reconsidered and would
12 stipulate to an extension of the trial date, but would apply *ex parte* as to their
13 expert's rebuttal report. *Id.*, ¶ 38. Plaintiffs' counsel reiterated that such
14 outstanding discovery issues could be reasonably resolved between counsel. *Id.*
15 On December 6, 2007, before service of Defendants' application, Plaintiffs sent
16 a letter to Defendants outlining their position and advocating informal resolution
17 of open issues. Toberoff Decl., Ex. DD. Defendants had nonetheless filed their
18 *ex parte* Application.

19 ARGUMENT

20 **I. DEFENDANTS ARE NOT ENTITLED TO AN EXTENSION OF 21 TIME FOR THEIR REBUTTAL REPORT PER F.R.C.P. 26(a)(2)(C)**

22 Defendants, after endlessly stonewalling the production of financial
23 documentation relating to Plaintiffs' damages; after forcing Plaintiffs to bring
24 several motions to compel such information; after continuing with their dilatory
25 tactics during the Court-ordered audit; after opposing a reasonable extension of
26 time for Sills to gather the financial information which Defendants were
27 obligated to have long ago produced; after refusing to provide documents they
28 previously agreed to furnish Sills, and after refusing to answer basic questions
concerning the scope of their financial reports, now seek double the statutory

1 time allotted for their financial expert to provide a rebuttal expert report.
2 Toberoff Decl., ¶¶ 2-39. Their Application cannot be viewed in isolation:
3 Defendants have consistently touted the “looming” trial and pre-trial schedule,
4 and taken the position that deadlines are absolute when applied to Plaintiffs’
5 reasonable discovery requests.

6 Defendants ask to submit a rebuttal report by January 14, 2008 in
7 contravention of the 30-day rebuttal deadline prescribed by F.R.C.P.
8 26(a)(2)(C). Moreover, the parties previously utilized this 30-day rebuttal
9 period for *all* of their other expert witnesses in the case. Toberoff Decl., ¶ 5.
10 Defendants’ request is particularly improper considering they are well aware of
11 the issue facing the parties’ financial experts, namely the determination of
12 Defendants’ profits from post-termination (17 U.S.C. §304(c)) Superman and
13 Superboy works. Considering this information has been in Defendants’ sole
14 control throughout this litigation, it makes no sense that they would be starting
15 this analysis now. In fact, Defendants could have submitted their own profit
16 analysis during the initial exchange of expert reports in January, 2007, but chose
17 not to do so. Whereas, Sills’ initial 14-page expert report thoroughly analyzed
18 the financial information provided by Defendants as of January 12, 2007; the
19 “rebuttal report” of Defendants’ expert consisted of a mere statement that he was
20 unable to rebut the Sills’ report in its incomplete condition – a condition which
21 directly resulted from *Defendants’* pervasive discovery abuse. *Id.*, Exs. B, C.

22 As to Defendants’ contention that Plaintiffs’ report was somehow
23 untimely, or that F.R.C.P. 26 no longer applies, under F.R.C.P. 26(a)(2)(C),
24 expert reports are due “at least 90 days before the date set for trial” only if there
25 is no court order. Thus, Defendants’ position that Plaintiffs’ expert report was
26 somehow late is deficient for three reasons. Firstly, Sills’ expert report was
27 provided more than 90 days before trial – specifically, it was initially provided
28 to Defendants on January 12, 2007 pursuant to the November 16, 2007

1 stipulation and order, analyzing the spotty financial data Defendants had
2 provided. *Id.*, Exs. A, B. The November 13, 2007 report was expressly a
3 *supplement* to Sills' report after Defendants were compelled to provide
4 additional information in the Court-ordered audit.²

5 Secondly, Defendants' position makes a mockery of the Court's
6 September 17, 2007 order setting October 9, 2007 as the deadline for Mr. Sills to
7 conduct his audit. Under Defendants' logic, Sills' expert report would have
8 been due on October 24, 2007, leaving him only two weeks to complete his
9 report after gathering the relevant financial data in the audit process. This
10 position was taken despite the fact that Defendants expressly acknowledged the
11 need for "a schedule for Mr. Sills to provide us with his report" *after* the audit
12 was completed. Toberoff Decl., Ex. F at 128:13.

13 Thirdly, Defendants were *still* delivering audit documents to Plaintiffs as
14 late as October 22, 2007. Toberoff Decl., Ex. S. Under Defendants' logic, Sills
15 would have had only two days from the final delivery of relevant materials to
16 production of a final report. Defendants' position is nonsensical: the
17 combination of Defendants' delayed production of audited materials, the Court's
18 ordering of the audit and Defendants' own position at the September 17, 2007
19 hearing clearly show that the "90 day requirement" was not operative.

20 Finally, the declaration of Defendants' expert Franklin Johnson states that
21 "the Sills report seems to contain certain revenue and expense numbers...which
22 do not correspond with the revenue and expense number we have been able to
23 determine from our review" and while requesting additional time, gives no
24 indication that Defendants' 30-day delay is primarily due to such purported

25 ² Experts have a continuing duty to supplement their report. F.R.C.P. 26(e)(2) ("For an expert
26 whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement
27 extends both to information included in the report and to information given during the expert's
28 deposition.") *See Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 952 (10th Cir. 2002) ("A
party is under a continuing duty to supplement the expert report if there are additions or
changes to what has been previously disclosed.")

1 discrepancies, nor any indication that such could even be reconciled.

2 Declaration of Franklin Johnson, filed December 6, 2007, ¶ 4.

3 Any delay surrounding the supplementation of Sills' expert report was
4 fundamentally caused by Defendants' strategic decisions to stonewall and delay
5 the production of clearly relevant financial information. To excuse Defendants
6 from deadlines that they themselves have consistently and harshly applied to
7 Plaintiffs would simply be unfair.

8 **II. DEFENDANTS ARE NOT ENTITLED TO TAKE THE**
9 **DEPOSITION OF STEVEN SILLS**

10 Defendants, while not applying to the Court on those grounds, also
11 attempt to introduce the contested issue of expert depositions into their
12 application. *See* Defendants' *Ex Parte* Application to Set Rebuttal Expert
13 Report Date at 4:28-5:1 (referring to "allowing the parties sufficient time for
14 expert depositions.") Moreover, during the parties' discussions, the additional
15 time for the expert rebuttal report was directly tied to the issue of expert
16 depositions. Toberoff Decl., ¶ 36-37. As such, Defendants' Application presents
17 the chance that the issue would be decided without adequate briefing.

18 Plaintiffs' position is that Defendants are not entitled to take the
19 deposition of Sills. Sills was designated by Plaintiffs and submitted his initial
20 expert report on January 12, 2007, both well within the deadlines for same,
21 providing Defendants with more than ample time to take Sills' deposition before
22 the March 30, 2007 cut-off for expert depositions. Toberoff Decl., Ex. B.
23 Defendants should not now be heard to complain that Mr. Sills' January 12,
24 2007 report was incomplete, as it is well documented (even in the report itself)
25 that the sole reason for this was Defendants' consistent failure to produce the
26 relevant financial documents even though such documents were clearly relevant,
27 in Defendants' possession and requested by Plaintiffs on Sills' advice by
28 Defendants' own trade names. Notwithstanding Defendants' abuse, Sills'

1 January 12, 2007 report still carefully covered the financial documents that had
2 been produced by Defendants as of that date. Yet, Defendants chose not to
3 submit a substantive rebuttal report of their own by February 9, 2007, nor to
4 depose Mr. Sills by the March 30, 2007 deposition cut-off, essentially affirming
5 both the scope as well as the absurdity of their own discovery abuse. Toberoff
6 Decl., Exs. B, C.

7 Defendants' consistent obfuscation and delay, necessitating multiple
8 motions to compel, culminated in Sills' court-ordered audit. There is no reason,
9 particularly given Defendants' clear discovery abuse and intentional delay, that
10 they should now be accorded special privileges to take Mr. Sills' depositions
11 over 8 months after the March 30, 2007 cut-off. Any questions Defendants have
12 of Mr. Sills can certainly be raised at trial.

13
14 **III. DEFENDANTS SHOULD FURNISH SILLS WITH THE VITAL**
15 **FINANCIAL INFORMATION THEY FAILED TO PROVIDE**
16 **DURING HIS AUDIT**

17 Defendants' Application elides further reasons Plaintiffs refused to agree
18 to an extended rebuttal period. As it stands, Plaintiffs' expert, Sills, was unable
19 in his audit to resolve important issues pertaining to his financial analysis due to
20 Defendants refusal to provide key information requested by him and Plaintiffs,
21 obviously impacting both Plaintiffs' trial preparation and ability to entertain
22 meaningful settlement discussions. Toberoff Decl., Exs. V-Y, BB, DD. Most
23 notably, DC, while claiming that it is accountable for only *domestic* profits from
24 Superman, refused to provide documentation or information which would enable
25 Sills to distinguish between *foreign* and *domestic* revenue and expenses for key
26 DC divisions. Toberoff Decl., Exs. L, N, O. DC also refused to clarify whether
27 the revenues set forth in its internal financial reports ("Blue Books") include
28 DC's profit participations from Warner for film and television exploitation
and/or DC's merchandising revenues from Warner Bros. Consumer Products,

1 when the numbers in DC's Blue Books and Warner's statements differed
2 significantly. *Id.*, ¶ 28, Exs. X, Y.

3 Warner similarly refused to provide any basis for the *percentage rates*
4 used for purported distribution fees, overhead and interest even though it had
5 represented to Sills *and the Court* that it would do so; and Warner also refused
6 to provide its latest financial statements to DC even though it promised Sills it
7 would do so. *Id.*, Ex. M, W.

8 Without this information, Plaintiffs are still handicapped in their ability to
9 fully calculate their damages, hindering productive settlement negotiations.
10 Toberoff Decl., ¶ 37. Plaintiffs were thus unwilling to agree to an extension of
11 time for Defendants to comply with their expert discovery obligations unless
12 they agreed to address the outstanding gaps in the financial information provided
13 to Sills during the audit process, particularly in light of the parties' pending
14 settlement mediation. Plaintiffs' counsel summarized this in a telephone
15 conversation with Defendants' counsel on December 4, 2007 and again by letter
16 dated December 6, 2007. Toberoff Decl., Ex. DD.

17 Given the nature and number of outstanding issues, Plaintiffs refused to
18 accede to Defendants' demands so long as they refused to discuss these other
19 outstanding discovery issues.

20 **A. Warner Unreasonably Refused to Provide Documents It Agreed**
21 **to Provide During the Audit Process**

22 Warner has (i) failed to provide updated financial participation statements
23 pertaining to *Superman Returns*, *Smallville*, *Superman Animated: Year 3*, *Justice*
24 *League*, *Krypto*, *Science of Superman*, *Legion of Superheroes*, *Superman*
25 *Doomsday* and *Superman II: Donner Cut*, despite confirming to Sills during the
26 audit process that it would do so; and (ii) failed to provide the basis for the
27 *percentage rates* used in the distribution fees, production cost overhead, and
28

1 interest assessed in its “ultimates,” despite representing to Sills and the Court
2 that it would do so.

3 **1. Warner’s Most Current Financial Statements**

4 The documents at issue are as follows:

- 5 • Warner agreed to provide its most recent and critical *participation*
6 *statements to DC* for *Superman Animated: Year 3*, *Science of Superman*,
7 *Legion of Superheroes*, *Superman Doomsday*, and *Superman II: Donner*
8 *Cut*, in Eric Birth’s October 9, 2007 e-mail that expressly stated that “we
9 [Warner] will provide these [participation statements] to you once they are
10 ready in the ordinary course.”
- 11 • Warner also agreed to produce the “June 30, 2007 participation statements
12 for all third party participants” for *Superman Returns*, *Justice League*, and
13 *Krypto*, not simply those that had been generated as of October 9, 2007, in
14 an e-mail dated October 8, 2007, from Warner’s Amie Doft. However,
15 the June 30, 2007 participation statements for *Superman Returns* for JP
16 Organization (Jon Peters), Chris Lee Productions, Minor Demons &
17 Danimal, and Gil Alder Productions were not provided.
- 18 • Warner agreed to provide a “production cost detail/bible” in an e-mail
19 from Eric Birth dated October 8, 2007 that stated “[w]e anticipate
20 delivering this to you tomorrow.” Warner instead produced a “production
21 cost report.”

22 Toberoff Decl., Exs P, R.

23 None of these undertakings were qualified or limited to documents
24 generated on or before October 9, 2007. Whether or not the documents were
25 created before or shortly after October 9, 2007 is of no moment; Defendants
26 agreed to provide them to Sills as part of his audit. Yet, by letter dated
27 November 7, 2007, Warner’s counsel, Michael Bergman, reneged and took the
28 unreasonable position that Warner would not produce any documents not

1 generated on or before October 9, 2007, even though that timing was within
2 Warner's sole control. This position is transparently at odds with the
3 representations in Warner's e-mails during the audit process, specifically Mr.
4 Birth's agreement to provide participation statements "once they are ready in the
5 ordinary course." *Id.*, Ex. R, at p. 3. Additionally, it is contrary to Defendants'
6 continuing duty to supplement discovery. *See* F.R.C.P. 26(e)(1) (A) (a party
7 supplement its disclosure "in a timely manner if the party learns that in some
8 material respect the disclosure or response is incomplete or incorrect, and if the
9 additional or corrective information has not otherwise been made known to the
10 other parties during the discovery process or in writing.")

11 **2. Despite Its Representations To The Court, Warner Never**
12 **Provided the Basis for its Purported Distribution Fee,**
13 **Interest and Overhead Rates**

14 In a September 28, 2007 e-mail, Sills requested the "basis and supporting
15 documentation" for the rates used in percentage-based distribution fees,
16 production cost overhead, and interest in Warner's "ultimates," a request that
17 Warner declined to answer. Toberoff Decl., Ex. H, I. In the October 5, 2007
18 Declaration of Michael Bergman ISO Defendants' Opposition to Plaintiffs' *Ex*
19 *Parte* Motion for Production of the Ultimates, Bergman represented to the Court
20 that "Defendants produced documentation containing the backup information
21 requested by Mr. Sills – cash flows related to the ultimates, and Ms. Doft
22 answered Mr. Sills' questions regarding the bases for the percentages used in the
23 ultimates calculation." Toberoff Decl., Ex. M at p. 5:20-25. This language was
24 adopted by the Court in its Minute Order of October 23, 2007 referring to this
25 "un-rebutted representation." Toberoff Decl., Ex. T, at p. 5, fn. 1. However,
26 Bergman's representation was incorrect; and Plaintiffs had no opportunity to
27 rebut it as it was first brought up by Defendants' Opposition to Plaintiffs' *ex*
28 *parte* application.

1 Whereas Warner provided Sills with “cash flows” to which it applied a
2 fixed interest rate, it failed to provide the basis for the interest *rate* or to
3 demonstrate that this is the actual interest rate/cost incurred by Warner.³ An
4 earlier e-mail had stated that “the other inquiries you have made are the subject
5 of discussions between counsel.” Toberoff Decl., Ex. I. That was it. Neither
6 response, as Defendants well knew, answered Sills’ questions as to the
7 percentage rates applied as distribution fees, production cost overhead, and
8 interest charges, information critical to Defendants’ calculation of profits.
9 Despite letters sent by Plaintiffs November 5 and November 20, 2007,
10 Defendants continued to refuse to answer Plaintiffs’ legitimate requests, made
11 during the audit process.

12 **B. DC Refused To Provided Key Financial Information**

13 **1. DC Never Provided Sills With Sufficient Information To**
14 **Segregate Foreign and Domestic Revenue and Expenses**

15 With respect DC’s “Publishing,” “Retail Products” and “Publishing
16 Division – Media,” the information provided by DC, despite Sills’ and
17 Plaintiffs’ repeated requests, does not offer any breakdown whatsoever between
18 foreign and domestic revenue and expenses, even though DC has claimed that
19 Plaintiffs are only entitled to domestic profits. As such, Sills was unfairly
20 handicapped, and could not make the distinction between DC’s domestic and
21 foreign profits in his report.

22 These issues were expressly raised in an e-mail by Sills forwarded to
23 James Weinberger on October 4, 2007, as well as a letter from Marc Toberoff
24 sent that same day, and an October 8, 2007 letter from Marc Toberoff to James
25

26 ³ Specifically, the only “explanation” for the cash flows was provided in an e-mail dated
27 October 3, 2007, from Warner’s Amie Doft to Sills which reads as follows:

28 “It is my understanding that the cash flows related to the ultimates, which
include the interest calculations, are being produced today directly to
Plaintiffs’ counsel. Therefore, you can obtain these documents from him.”
Toberoff Decl., Ex. I.

1 Weinberger, all before the deadline for Sills audit. Toberoff Decl., Exs. K, L, N.
2 Nonetheless, DC has never offered any documentation or explanation as to how
3 it distinguishes between foreign and domestic revenues and expenses, stating
4 only that it is prepared to demonstrate such items at trial. Plaintiffs duly
5 requested this information both prior to and during the audit process and are
6 squarely entitled to it. The Federal Rules of Civil Procedure militate against
7 such surprise tactics. *See* F.R.C.P. 26.

8 **2. DC Refused To Answer Basic Questions Regarding**
9 **Overlap Between Warner’s Statements To DC and DC**
10 **Internal Financial Reports**

11 With respect to DC’s “Publishing Division – Media” and
12 “Merchandising” divisions, the figures contained in DC’s internal financial
13 summaries or “Blue Books” did not correspond to the figures in Warner’s
14 statements to DC regarding the film, television or merchandising exploitation of
15 Superman. Additionally, with respect to DC as a whole, “General and
16 Administrative Expenses” were charged to a wide variety of products, but were
17 not broken down by title or property. In essence, and as reiterated in Plaintiffs’
18 letter of December 6, 2007 (Toberoff Decl., Ex. DD), Plaintiffs require the
19 following information:

- 20 • Whether DC’s “Blue Books” relating to their “Publishing Division –
21 Media” include or exclude Warner’s film and television participation
22 payments to DC, and, if those payments were included, that DC provide
23 whatever documentation it has that reconciles the large discrepancies
24 between DC’s statements and Warner’s statements to DC.
- 25 • Whether DC’s “Blue Books” relating to their “Marketing” division
26 include or exclude Warner Bros. Consumer Product’s payments to DC,
27 and, if those payments were included, that DC provide whatever
28 documentation it has that reconciles the large discrepancies between the

