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14 **UNITED STATES DISTRICT COURT**
 15 **CENTRAL DISTRICT OF CALIFORNIA**

16 JOANNE SIEGEL and LAURA
 SIEGEL LARSON,
 17 Plaintiffs,
 18 vs.
 19 WARNER BROS. ENTERTAINMENT
 INC.; TIME WARNER INC.; DC
 COMICS; and DOES 1-10,
 20 Defendants.

21 JOANNE SIEGEL and LAURA
 SIEGEL LARSON,
 22 Plaintiffs,
 23 vs.
 24 TIME WARNER INC.; WARNER
 COMMUNICATIONS INC.; WARNER
 BROS. ENTERTAINMENT INC.;
 25 WARNER BROS. TELEVISION
 PRODUCTION INC.; DC COMICS;
 and DOES 1-10,
 26 Defendants.

27 **AND RELATED COUNTERCLAIMS**

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.

**NOTICE OF NEW EVIDENCE RE:
 DEFENDANTS' DECLARATION
 FILED PURSUANT TO THE
 COURT'S SEPTEMBER 17, 2007
 ORDER RE "ESCROW
 DOCUMENTS"**

**DISCOVERY MATTER
 LOCAL RULE 37**

Time: N/A
 Date: N/A
 Courtroom: 2
 Hon. Stephen G. Larson
 Discovery Cutoff: Nov. 17, 2006

28

1 Defendants Time Warner Inc., Warner Communications Inc., Warner Bros.
2 Entertainment Inc., Warner Bros Television Production Inc. and defendant and
3 counterclaimant DC Comics hereby submit this notice of new evidence that has
4 recently come to light in view of proceedings in this case before the United States
5 District Court for the Northern District of Ohio (the "Ohio Proceedings"), which
6 bears on the parties' declarations filed pursuant to the Court's September 17, 2007
7 Order re "Escrow Documents", currently *sub judice* (the "Escrow Declarations").¹

8 **A. The Escrow Motion**

9 As the Court will recall, by Defendants' Motion to Compel Production of
10 Whistleblower Documents, originally filed on March 26, 2007 with Magistrate
11 Zarefsky, Defendants sought production of certain materials that were delivered by
12 an anonymous "whistleblower" to defendant Warner Bros. Entertainment in June
13 2006. Magistrate Zarefsky heard that Motion on April 30, 2007 and issued an oral
14 ruling relating to those documents, which he called "Escrow Documents," (1)
15 requiring Plaintiffs' counsel Mr. Toberoff to submit a declaration identifying the
16 Escrow Documents that Mr. Toberoff claimed had been listed on a privilege log or
17 produced; and (2) requiring Plaintiffs to produce any Escrow Documents that had
18 not been previously produced or listed by Plaintiffs or their counsel on any privilege
19 logs.

20 Because Mr. Toberoff submitted an equivocal declaration that did not comply
21 with Magistrate Zarefsky's directive, Defendants filed a Motion to Compel
22 Compliance with the Court's 4/30/07 Order on September 17, 2007. That same day,
23 this Court heard argument on the issue and ordered the parties to submit declarations
24 setting forth their respective positions regarding Plaintiffs' privilege claims with

25 _____
26 ¹ Plaintiffs have taken the position that Defendants are required to engage in the joint-
27 stipulation and/or meet-and-confer process prior to notifying this Court of Judge Oliver's
28 ruling in the Northern District of Ohio. Defendants respectfully submit, however, that
because Judge Oliver's Order directly relates to the "Escrow Documents" issues that are
already pending before the Court, it is procedurally proper for Defendants to notify the
Court of that Order through this Notice.

1 respect to certain of the Escrow Documents. Plaintiffs filed a declaration pursuant
2 to that Order on September 20, 2007; Defendants filed a responsive declaration on
3 September 25, 2007; Plaintiffs filed an "Objection" to defendants' declaration on
4 September 27, 2007; and Defendants filed Objections to plaintiffs' filing on
5 September 28, 2007. Familiarity with these declarations is assumed.

6 **B. The Ohio Proceedings**

7 The Ohio Proceedings involve documents that a third-party witness, Don
8 Bulson ("Bulson"), asserted were covered by an alleged joint attorney-client
9 privilege held between the plaintiffs Joanne Siegel and Laura Siegel Larson
10 ("Plaintiffs") and Michael Siegel (deceased), the half-brother of plaintiff Laura
11 Siegel Larson. Certain of the Bulson Documents overlap with the Escrow
12 Documents, and in his Escrow Declarations arguments Plaintiffs' counsel relied on
13 Bulson's assertion of privilege in the Ohio Proceedings in asserting that those
14 documents were privileged. Bulson and Plaintiffs were represented in the Ohio
15 Proceeding by Plaintiffs' counsel in this underlying action, Marc Toberoff.

16 The Ohio Proceedings grew out of a subpoena served by defendants on
17 Bulson, who was Michael Siegel's counsel, in August 2006. In response to the
18 subpoena, Mr. Bulson's office forwarded the documents to Mr. Toberoff, who
19 prepared a privilege log (the "Bulson Privilege Log," a copy of which is attached as
20 Exhibit A to the concurrently submitted Declaration of James D. Weinberger
21 ("Weinberger Decl.)) asserting various privileges, including a purported
22 joint/common interest exception to the waiver of attorney-client privilege as to
23 numerous communications between plaintiffs and their counsel, on the one hand,
24 and Michael Siegel and his counsel, on the other.

25 In proceedings before this Court relating to the Escrow Documents, Plaintiffs
26 have relied on assertions of privilege made in the Bulson Privilege Log in arguing
27 that nine of the Escrow Documents are privileged and not subject to production. *See*
28 Declaration of Marc Toberoff Pursuant to Magistrate Zarefsky's April 30, 2007

1 Order, dated May 21, 2007 (entries corresponding to Escrow Documents nos.
2 Q0040, Q0057-58, Q0075-76, Q0352, Q0400-01, Q0489-90, Q0635, Q0672-73 and
3 Q0761-62). Specifically, Mr. Toberoff claimed that assertions of privilege on the
4 Bulson Privilege Log as to document nos. 318, 327 and 328 covered nine of the
5 Escrow Documents. All three documents were claimed on the Bulson Privilege Log
6 to be covered by the joint/common interest exception to the privilege waiver.
7 (Weinberger Decl. Exh. A).

8 In the Ohio Proceedings, Defendants objected to the assertions of privilege
9 served in response to the Bulson subpoena and filed a motion to compel production
10 in October 2006. After a 15 month delay, the Court in Ohio scheduled a hearing on
11 the motion for February 1, 2008, held before Hon. Solomon Oliver, Jr., U.S.D.J. and
12 made an oral ruling confirmed by an Amended Order dated February 5, 2008
13 (Weinberger Decl. Exh. B). In that Order, the Court held that:

14 Mr. Bulson must submit a revised privilege log by February 11, 2008.
15 That revised log shall relate only to the 15 communications set forth
16 on page 8 of the Movant's Reply Memorandum in Support of their
17 Motion to Compel. The description portion of the log shall be
revised to give sufficient detail so that Movants can determine
whether they have a basis for objecting to the assertion of the
attorney-client privilege . . .

18 (*Id.* at 3). The revised privilege log (the "Revised Bulson Privilege Log,"
19 Weinberger Decl. Exh. C), includes expanded descriptions of, *inter alia*, the three
20 Bulson Privilege Log documents (nos. 318, 327 and 328) that Mr. Toberoff relied on
21 in his May 21, 2007 Declaration regarding the Escrow Documents.

22 On April 1, 2008, the Ohio Court issued a second ruling following an *in*
23 *camera* review of the documents at issue, compelling production of all documents
24 that Bulson and Plaintiffs asserted in the Revised Bulson Privilege Log were
25 protected by the common interest exception to the waiver of attorney-client
26 privilege. (Weinberger Decl. Exh. D at 2-3.) The Court specifically found (1) "that
27 none of the 15 communications reflected in log numbers 299, 301, 319, 325, 327,
28 328, 377, 378, 379, 380, 381, 386, 393 and 412 are for purposes of giving legal

1 advice, (2) that “the communications [in 13 of the 15 log numbers, including 319,
2 327 and 328] are not made in regard to a joint and common legal or defense
3 strategy,” and (3) “that the interest of Michael Siegel, as reflected in these 13
4 communications, is separate and apart from those of Joanne Siegel and Laura
5 Siegel.” (*Id* at 3 (emphasis added).) As the Ohio Court observed:

6 These documents relate to the offers back and forth between Mike
7 [sic] Toberoff on behalf of an investor who wishes to purchase
8 Michael Siegel’s interest and Bulson on behalf of Michael Siegel.
 The primary subject matter does not relate to settlement offers
 regarding Warner Brothers or the risk of litigation.

9 *Id.* The court ordered that the documents be produced “immediately.” *Id.* The
10 documents were produced to defendants the next day, and Revised Bulson Privilege
11 Log documents nos. 319, 327 and 328 (listed in Mr. Toberoff’s May 21, 2007
12 Declaration as corresponding to nine Escrow Documents), were among those
13 produced. *See* Weinberger Decl. Exh. E.

14 The Revised Bulson Privilege Log identified documents 319, 327 and 328 as
15 subject to the common interest exception to the waiver of privilege on the following
16 grounds:

17 [Communication] discussing Warner Bros.’ settlement offers as they
18 relate to Michael Siegel re: Joanne & Laura Siegel’s 17 U.S.C. §
 304(c) termination regarding Jerome Siegel’s “Superman Copyright.”

19 Weinberger Decl. Exh. D. Even a cursory review of the subsequently produced
20 documents (Weinberger Decl. Exh. E) shows that this description does not fit the
21 claimed privilege. For example, Revised Bulson Privilege Log document 319 is a
22 letter from Mr. Bulson to Mr. Toberoff that simply rejects an offer to purchase
23 Michael Siegel’s interest in the Superman copyright. The letter does not in any
24 sense “discuss[] Warner Bros.’ settlement offers and the risks of litigation” as
25 represented in the Log.

26 **C. Impact of Ohio Ruling on the Escrow Declarations**

27 First, since it has been established in the Ohio Proceedings that Mr.
28 Toberoff’s claims of joint privilege in connection with Michael Siegel are not well

1 taken, all remaining communications with Michael Siegel for which privilege has
2 been claimed should be immediately produced. (See Weinberger Decl. Exhs. D, E.)
3 One of the Escrow Documents that has not been produced by Plaintiffs is believed
4 to be a communication from plaintiff Laura Siegel Larson to Michael Siegel directed
5 to this same subject matter. (Second Supplemental Declaration of Wayne M. Smith
6 (“Smith Decl.”), ¶¶ 3-7.)² It is clear from the related correspondence which has
7 now been produced as a result of the Ohio Proceedings that the substance of the
8 communications is not privileged because it involved an adverse financial
9 negotiation; accordingly Defendants respectfully request that the Court order
10 Escrow Document Q0027-33 to be produced.

11 Second, in finding that Plaintiffs’ asserted claim of privilege was without
12 basis, the Ohio rulings (Weinberger Decl. Exhs. B, D) and the documents
13 themselves (*id.* Exh. E) cast doubt on the legitimacy of Plaintiffs’ privilege claims
14 as to the remaining documents sought by Defendants and which are still held by the
15 escrow agent. This further justifies Defendants’ previous request for a review to
16 determine whether each such Escrow Document has in fact been properly identified
17 on Plaintiffs’ privilege logs, whether such a review be conducted by the escrow
18 agent or by the Court *in camera*. See Sept. 25, 2007 Bergman Decl., ¶¶ 48-51.
19 Thus, Defendants respectfully renew their request for such a review. *Id.*

20 Finally, to the extent Defendants sought certain documents (Q0040, Q0057-
21 58, Q0075-76, Q0352, Q0400-01, Q0489-90, Q0635, Q0672-73 and Q0761-62) that
22 are also the subject of the Ohio ruling (*i.e.* Revised Bulson Privilege Log documents
23 nos. 319, 327 and 328), that portion of the Escrow Declarations is now moot. See
24 Sept. 25, 2007 Bergman Decl., ¶¶ 31-48 (seeking production of, *inter alia*, certain

25 _____
26 ² This document is understood to be a letter dated on or about July 11, 2003, which
27 Defendants believe is in fact Escrow Document Q0027-33. See also April 2, 2007
28 Declaration of Wayne M. Smith, Esq. in support of Defendants’ Motion to Compel
Production of Whistleblower Documents, ¶ 3 (identifying and describing general substance
of communication at issue and misdescription of such document on Plaintiffs’ privilege
log).

1 correspondence between Messrs. Toberoff and Bulson). That is, since the
2 documents at issue have been produced by way of Judge Oliver's order finding that
3 they were not subject to any applicable privilege, there is no need for Defendants to
4 seek their production a second time through the Escrow Declarations.

5 DATED: April 9, 2008

Respectfully submitted,

6 WEISSMANN WOLFF BERGMAN
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-and-
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9
10 By 
11 Michael Bergman

12 Attorneys for Defendants and Counterclaimant
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