

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MARVEL WORLDWIDE, INC.,
MARVEL CHARACTERS, INC. and
MVL RIGHTS, LLC,

Plaintiffs,

- against-

LISA R. KIRBY, BARBARA J. KIRBY,
NEAL L. KIRBY and SUSAN N. KIRBY,

Defendants.

-----X
LISA R. KIRBY, BARBARA J. KIRBY,
NEAL L. KIRBY and SUSAN N. KIRBY,

Counterclaimants,

- against-

MARVEL ENTERTAINMENT, INC.,
MARVEL WORLDWIDE, INC.,
MARVEL CHARACTERS, INC.,
MVL RIGHTS, LLC,
THE WALT DISNEY COMPANY,
and DOES 1 through 10,

Counterclaim-Defendants.

Civil Action No. 10 Civ. 141 (CM) (KNF)

**PLAINTIFFS’ AND COUNTERCLAIM-
DEFENDANTS’ REPLY LOCAL RULE
56.1 STATEMENT OF UNDISPUTED
MATERIAL FACTS IN SUPPORT OF
THEIR MOTION FOR SUMMARY
JUDGMENT**

Pursuant to Local Rule 56.1 of the Local Rules of the United States District Court for the Southern District of New York (“Local Rules”), Plaintiffs Marvel Worldwide, Inc. (“MWI”), Marvel Characters, Inc. (“MCI”) and MVL Rights, LLC (“MVL”) (collectively, “Plaintiffs”), and Counterclaim-Defendants Marvel Entertainment, LLC, sued herein as Marvel Entertainment, Inc. (“Marvel Entertainment”) and The Walt Disney Company (“Disney”), by and through their undersigned counsel, respectfully submit the following Reply Statement Of Undisputed Material Facts in support of their motion for summary judgment.

THE PARTIES

Statement of Undisputed Fact	Defendants’ Response	Plaintiffs’ and Counterclaim-Defendants’ Reply
<p>1. Since its inception in the 1930s as Timely Comics, the companies now known as Marvel were preceded by numerous predecessors-in-interest (collectively with MWI, MCI, MVL and Marvel Entertainment, “Marvel”), including Amazing Detective Cases Corp., Americas Magman Sales Corp., Animated Timely Features, Inc., Animirth Comics, Inc., Atlas Magazines, Inc., Atlas News Co., Inc., Bard Publishing Corp., Bilbara Publishing Co., Inc., Brief Digest Corp., Britan Publishing Corp., Broadcast Features Publications, Inc., Canam Publishers Sales Corp., Chipiden Publishing Corp., Christiana Publishing Corp., Classic Detective Stories, Inc., Classic Syndicate, Inc., Comedy Publications, Inc., Comic Combine Corp., Commonwealth Publishing Corp., Complete Photo Story Corp., Cornell Publishing Corp., Crime Bureau Stores, Inc., Crime Files, Inc., Current Detective Stories, Inc., Daring Comics Inc., Emgee Publications, Inc., Empire State Consolidated Adv. Corp., Euclid Publishing Co., Inc., Eye Publishing Corp., Fantasy Comics, Inc., Feature Story Corp., Foto Parade, Inc., Gem Publications, Inc., Hercules Publishing Co., H-K Publications, Inc., International Magazine Sales, Interstate Publishing Co., Jaygee Publications, Inc., Jeangood Publishing Corp., Jest Publishing Co., Inc., Leading Comic Corp., Leading</p>	<p>Disputed to the extent that this paragraph does not list all of the Marvel Predecessors; otherwise admitted</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 1 as required by Local Rule 56.1(c). Therefore, Paragraph 1 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co.</i>, 472 F.3d 33, 41 (2d Cir. 2006) (A party opposing summary judgment “must set forth specific facts showing that there is a genuine issue for trial”); <i>Giannullo v. City of N.Y.</i>, 322 F.3d 139, 140 (2d Cir. 2003).</p> <p>Additionally, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). For this additional reason, Paragraph 1 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>

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<p>Magazine Corp., Lion Books, Inc, Magazine Management Co., Inc., Magman Export Corp., Male Publishing Corp., Manvis Publications, Inc., Margood Publishing Corp., Marjean Magazine Corp., Marjean TV Enterprises, Marvel Comics Group, Marvel Comics, Inc., Medalion Publishing Corp., Miss America Publishing Corp., Mohawk Publishing Corp., Mutual Magazine Corp., Newsstand Publications, Inc., Non Pareil Publishing Corp., Official Magazine Corp., Olympia Publications, Inc., Olympus Publishing Corp., Postal Publications, Inc., Prime Publications, Inc., Red Circle Magazines, Inc., Revere Publishing Corp., Select Publications Inc., Snap Publishing Co., Inc., Sphere Publications, Inc., Sports Action, Inc., Stag Publishing Corp., Timely Comics, Inc., Timely Publications, Tip Top Publications, Inc., 20th Century Comic Magazine Corp., 20th Century Comics Corp., Universal Crime Stories, Inc., U.S.A. Comic Magazine Corp., Transcontinental Publishing Corp., Vista Publications, Inc., Walden Publishing Co., Inc., Warwick Publications, Inc., Western Fiction Pub. Co. Inc., Young Allies, Inc., Zenith Books, Inc., Zenith Publishing Corporation and Zest Publishing Co., Inc., Martin Goodman, Jean Goodman, Perfect Film & and Chemical Corporation, Cadence Industries Corporation and Marvel Entertainment Group, Inc. (collectively, the "Marvel Predecessors"). Declaration of Eli</p>		

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>Bard dated February 18, 2011 (“Bard Decl.”) ¶ 2; Declaration of Randi W. Singer dated February 18, 2011 (“Singer Decl.”) Exhibit (“Ex.”) 12 at ¶ 14.</p>		
<p>2. Jack Kirby (“Kirby”) was a comic book artist whose drawings appeared in comic books published by Marvel during the period September 1958 through September 1963, and at various times before and after that period. Singer Decl. Ex. 13 at ¶ 8; <i>id.</i> Ex. 12 at ¶¶ 18-19.</p>	<p>Disputed to the extent that Jack Kirby also provided plotting, dialogue, and scripting for comic books published by Marvel during the period September 1958 through September 1963, and at various times before and after that period; otherwise admitted. Declaration of Marc Toberoff (“Tob. Dec.”) Ex. MM at 151 (<i>Stan Lee</i>: “Certainly 90 percent of the ‘Tales of Asgard’ stories were Jack’s plots, and they were great! He certainly knew more about Norse mythology than I ever did (or at least he enjoyed making it up!”), at 6 (<i>Stan Lee</i>: “Some artists, such as Jack Kirby, need no plot at all. I mean I’ll just say to Jack, ‘Let’s let the next villain be Dr. Doom’ ... or I may not even say that. He may tell me. And then he goes home and does it. He’s so good at plots, I’m sure he’s a thousand times better than I. He just about makes up the plots for these stories.”); Singer Dec., Ex. 53 at 36-37 (<i>Stan Lee</i>: “Jack is certainly one of the most talented, if not the most talented guy that the comic book industry has ever produced. He is the most imaginative, the most creative guy I have ever known in this business. His mind is an endless source of stories, concepts and ideas.”); Ex. NN (<i>Stan Lee</i>: “[Jack Kirby] was a virtually inexhaustible wellspring of fantastic new ideas, concepts and designs.”); Ex. I at 23:4-13; Ex. FF; Ex. GG at 193; Ex. HH at 45</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 2 as required by Local Rule 56.1(c). Therefore, Paragraph 2 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Additionally, Defendants’ citations to the Declaration of Randi W. Singer dated February 18, 2011 (“Singer Decl.”) Ex. 53 and the Declaration of Marc Toberoff dated March 25, 2011 (“Toberoff Decl.”) Exs. I, FF, GG, and II do not support Defendants’ response. <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citations to Exs. FF, GG, HH, II, JJ, KK, and OO to the Toberoff Decl. are hearsay evidence which may not be used to dispute facts. <i>Sarno v. Douglas Elliman-Gibbons & Ives, Inc.</i>, 183 F.3d 155, 160 (2d Cir. 1999); <i>Hidden Brook Air, Inc. v. Thabet Aviation Int’l Inc.</i>, 241 F. Supp. 2d 246, 270 (S.D.N.Y. 2002) (McMahon, J.) (“These statements are inadmissible hearsay, and therefore not competent to raise a genuine issue of</p>

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	<p>(“<i>Kirby</i>: the artists were doing the plotting- Stan was just coordinating the books, which was his job. Stan was production coordinator. But the artists were the ones that were handling both story and art. We had to- there was no time not to!”); Ex. II (“<i>Jack Kirby</i>: According to statistics, I’ve done one quarter of Marvel’s entire output. There’s a lot of hard work behind it. It’s something that’s highly individual, highly creative and above all, it sold very well.”); Ex. OO (“Q: A lot of people don’t know that you actually scripted a lot of these stories-most of them. Even the Marvel stuff. <i>Kirby</i>: I did.”); Ex. JJ at 45, 49 (“And I did that with the Marvel books. I wrote the stories. I wrote the plots ,I did the drawings- I did the entire thing…”); Ex. KK at 122 (“Q: You have written your own stories, text and drawings? <i>Kirby</i>: Yes, that’s what I always did and that’s what I am doing now.”)</p>	<p>material fact.”).</p> <p>Defendants’ citation to Toberoff Decl. Ex. MM at 151 refers to work created outside the 1958-1963 time period at issue in this case (“the Time Period”) and is therefore irrelevant. Fed. R. Evid. 402.</p> <p>Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Exs. GG, JJ and OO, as these cited documents were not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie v. EVCITCI Coll. Admin.</i>, No. 08 Civ. 5226(HB), 2009 WL 1404325, at *1 n.4 (S.D.N.Y., May 20, 2009), <i>aff’d</i>, 374 F. App’x 150 (2d Cir. 2010).</p>
<p>3. Between 1958 and 1963, Kirby contributed to the creation of many now iconic comic book stories and characters appearing in publications of the Marvel Predecessors, including <i>The Fantastic Four</i>, <i>The Incredible Hulk</i> and <i>The X-Men</i>. <i>Id.</i> Ex. 12 at ¶ 19.</p>	<p>Disputed to the extent that between 1958-1963 Jack Kirby authored or co-authored numerous original comic book stories featuring a variety of characters, including “The Fantastic Four,” “X-Men,” “Iron Man,” “Spider-Man,” “The Incredible Hulk,” “Thor,” “The Avengers,” “Nick Fury” and “Ant-Man,” which were purchased by Marvel’s Predecessors and published in their following periodicals: <i>Amazing Adventures</i>, Vol. 1, Nos. 1-6; <i>Amazing Fantasy</i>, Vol. 1, No. 15; <i>The Amazing Spider-Man</i>, Vol. 1, Nos. 1-7; <i>The Avengers</i>, Vol. 1, Nos. 1-2; <i>The Fantastic Four</i>, Vol. 1, Nos. 1-21; <i>The Fantastic Four Annual</i>,</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 3 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 3 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
	No. 1; <i>Journey Into Mystery</i> , Vol. 1, Nos. 51-98; <i>The Incredible Hulk</i> , Vol. 1, Nos. 1-6; <i>The Rawhide Kid</i> , Vol. 1, Nos. 17-35; <i>Sgt. Fury and His Howling Commandoes</i> , Vol. 1, Nos. 1-4; <i>Strange Tales</i> , Vol. 1, Nos. 67-115; <i>Tales of Suspense</i> , Nos. 1, 3-48; <i>Tales to Astonish</i> , Vol. 1, Nos. 1, 3-50; and <i>The X-Men</i> , Vol. 1, Nos. 1-2; otherwise admitted.	
4. Kirby died in 1994. <i>Id.</i> Ex. 12 at ¶ 18; <i>see also</i> November 9, 2010 Deposition of Mark Evanier (“Evanier Dep. (11/9/10)”) annexed as Ex. 8 to the Singer Decl. at 27:1-4.	Admitted.	No reply is necessary.
5. Kirby was married to Rosalind (“Roz”) Kirby and together they had four children: Susan M. Kirby, Neal L. Kirby, Barbara J. Kirby and Lisa R. Kirby (the “Defendants”). Singer Decl. Ex. 12 at ¶ 7. Roz Kirby died on December 22, 1997. <i>See id.</i> Ex. 14.	Admitted.	No reply is necessary.

THE TERMINATION NOTICES AND CLAIMS OF COPYRIGHT OWNERSHIP

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
6. On August 31, 2009, Disney announced publicly that it had agreed to acquire Marvel Entertainment, Inc. <i>See id.</i> Ex. 15.	Admitted.	No reply is necessary.
7. In approximately mid-September, 2009, Defendants served forty-five (45) notices on Marvel, Disney and various other entities purporting to terminate an alleged assignment of the copyrights in various works to which Kirby	Disputed to the extent that Defendants' forty-five notices of termination (the “Termination Notices”) were served on September 16, 2009 pursuant to 17 U.S.C. § 304(c), and gave notice of the termination, on the respective effective	Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 7 as required by Local Rule 56.1(c). Therefore, Paragraph 7 is deemed admitted in its entirety for the purposes of

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
had allegedly contributed (the "Termination Notices"). <i>See id.</i> Ex. 16; <i>id.</i> Ex. 12 at ¶ 12.	dates listed therein, of any and all pre-January 1, 1978 grants or express or implied licenses by Jack Kirby and any other person defined in 17 U.S.C. § 304(c) of Kirby's respective copyright interest to Marvel's predecessors, including an "Assignment" to Marvel executed by Kirby on May 30, 1972 (the "1972 Assignment"). <i>See Singer Dec.</i> , Ex. 16.	this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i> , 472 F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140.
8. The Termination Notices identify the following published works (including the story lines, characters and other copyrightable elements contained therein), each of which was published with a cover date ranging from 1958 to 1963, as purportedly being subject to termination: <i>Amazing Adventures</i> , Vol. 1, Nos. 1-6; <i>Amazing Fantasy</i> , Vol. 1, No. 15; <i>The Amazing Spider-Man</i> , Vol. 1, Nos. 1-7; <i>The Avengers</i> , Vol. 1, Nos. 1-2; <i>The Fantastic Four</i> , Vol. 1, Nos. 1-21; <i>The Fantastic Four Annual</i> , No. 1; <i>Journey Into Mystery</i> , Vol. 1, Nos. 51-98; <i>The Incredible Hulk</i> , Vol. 1, Nos. 1-6; <i>The Rawhide Kid</i> , Vol. 1, Nos. 17-35; <i>Sgt. Fury and His Howling Commandos</i> , Vol. 1, Nos. 1-4; <i>Strange Tales</i> , Vol. 1, Nos. 67-115; <i>Tales of Suspense</i> , Vol. 1, Nos. 1, 3-48; <i>Tales to Astonish</i> , Vol. 1, Nos. 1, 3-50; and <i>The X-Men</i> , Vol. 1, Nos. 1-2 (collectively, the "Works"). <i>See id.</i> Ex. 16.	Disputed to the extent that the Termination Notices also apply to any works which includes or embodies any character, story element or indicia reasonably associated with the listed works, even if such work were omitted. <i>See generally Singer Decl.</i> , Ex. 16 (<i>Amazing Adventures Termination</i>) at fn. 1.	Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 8 as required by Local Rule 56.1(c). Therefore, Paragraph 8 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i> , 472 F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140.
9. The alleged assignment to which the Termination Notices relate, executed by Kirby on May 30, 1972 (the "1972 Agreement"), purports to assign from Kirby to Magazine	Disputed to the extent that the terms of the 1972 Assignment are as fully set forth therein, and the Termination Notices applied as well to any and all pre-January 1, 1978 grants or express or	Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 9 as required by Local Rule 56.1(c). Therefore, Paragraph 9 is deemed

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>Management Co., Inc. “any and all right, title and interest [Kirby] may have or control” in any work Kirby ever created for Marvel. <i>Id.</i> Ex. 17 at ¶ 1.A.(1).</p>	<p>implied licenses by Jack Kirby and any other person defined in 17 U.S.C. § 304(c) of Kirby’s respective copyright interest to Marvel. <i>See generally</i> Singer Decl. Ex. 16 (Amazing Adventures Termination) at ¶ 3; fn. 3.</p>	<p>admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>10. The 1972 Agreement further provides that “Kirby acknowledges and agrees that all his work on the MATERIALS, and all his work which created or related to the RIGHTS, was done as an employee for hire of” Marvel. <i>Id.</i> at ¶ 5.</p>	<p>Disputed to the extent that (i) the terms of the 1972 Assignment are as fully set forth therein, (ii) the vast majority of the 1972 Assignment is devoted to a very detailed and explicit assignment by Kirby to a Marvel Predecessor of specified rights in the works authored or co-authored by Kirby and published by Marvel, which contradicts this language; and (ii) this retroactive language seeking to recharacterize prior works as “made for hire” long after their creation was specifically held to be invalid in <i>Marvel Characters, Inc. v. Simon</i> (“<i>Marvel</i>”), 310 F.3d 280 (2d Cir. 2002) (Marvel cannot bar termination rights under the Copyright Act by re-characterizing works as “made for hire,” after the fact).</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 10 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 10 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions cannot be used to dispute facts on summary judgment. <i>Schwapp v. Town of Avon</i>, 118 F.3d 106, 111 (2d Cir. 1997).</p>
<p>11. According to the terms of the Termination Notices, and under the statutory scheme set forth in section 304(c) of the Copyright Act of 1976, the earliest date on which any of the Termination Notices will become effective is in 2014 and the latest effective date is in 2019. <i>See id.</i> Ex. 16; June 30, 2010 Deposition of Neal Kirby (“N. Kirby Dep.”) annexed as Ex. 5 to the Singer Decl. at</p>	<p>Admitted.</p>	<p>No reply is necessary.</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>172:12-17.</p> <p>12. The initial copyright registration for each of the Works was filed with the United States Copyright Office in the name of the relevant Marvel Predecessor as author. Marvel also filed renewal copyright registrations for the following works in the United States Copyright Office, each of which lists one of the Marvel Predecessors as the renewal claimant and proprietor of copyright in the subject works as works made for hire: <i>Amazing Adventures</i>, Vol. 1, Nos. 1-6; <i>Amazing Fantasy</i>, Vol. 1, No. 15; <i>The Amazing Spider-Man</i>, Vol. 1, Nos. 1-7; <i>The Avengers</i>, Vol. 1, Nos. 1-2; <i>The Fantastic Four</i>, Vol. 1, Nos. 1-21; <i>The Fantastic Four Annual</i>, No. 1; <i>Journey Into Mystery</i>, Vol. 1, Nos. 51-98; <i>The Incredible Hulk</i>, Vol. 1, Nos. 1-6; <i>The Rawhide Kid</i>, Vol. 1, Nos. 17-26, 28-35; <i>Sgt. Fury and His Howling Commandos</i>, Vol. 1, Nos. 1-4; <i>Strange Tales</i>, Vol. 1, Nos. 67-84, 96-115; <i>Tales of Suspense</i>, Vol. 1, Nos. 3-48; <i>Tales to Astonish</i>, Vol. 1, Nos. 3-50; and <i>The X-Men</i>, Vol. 1, Nos. 1-2. See Bard Decl. Ex. 1. There is no evidence in the record that Kirby ever sought to register the copyrights in the Works in his own name.</p>	<p>Disputed to the extent that it omits that the original copyright registrations filed on or around the time the Works were actually created did <i>not</i> list the Works as “made for hire,” and it was commonplace for authors to rely on publishers to which they had sold their copyrights to register and renew such copyrights. See generally, Tob. Dec., Ex. A.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 12 as required by Local Rule 56.1(c). Therefore, Paragraph 12 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); see also <i>Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>13. Copyright title passed from Martin and Jean Goodman – the owners of various of the Marvel Predecessors – to MCI and MVL through a series of copyright assignments. Specifically, on June 28, 1968, Martin and Jean Goodman (and all of their various companies),</p>	<p>Disputed to the extent that this paragraph does not list all of the Marvel Predecessors or assignments therefrom; otherwise admitted.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 13 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d).</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>executed a Copyright Assignment to Cadence Industries Corporation (previously, before a change of name, known as Perfect Film & Chemical Corporation) of all copyrights in the publications listed on Schedule B annexed to the assignment, which included, among other things, the Works. <i>Id.</i> Ex. 2. On January 1, 1972, Magazine Management Co., Inc. executed a Copyright Assignment to Cadence Industries Corporation of all copyrights relating to Magazine Management Co.'s Marvel Comics Group Division and its comics business. <i>Id.</i> Ex. 3. On December 29, 1986, Cadence Industries Corporation executed a Copyright Assignment to Marvel Entertainment Group, Inc. of all copyrights relating to the Marvel Comics Group business. <i>Id.</i> Ex. 4. On September 1, 1995, Marvel Entertainment Group, Inc. executed a Copyright Assignment to MCI of all copyrights relating to its comics business. <i>Id.</i> Ex. 5. On August 31, 2005, MCI executed a Short Form Copyright Assignment to MVL of all copyrights relating to the characters and works and the registered copyrights set forth on the schedules attached to the assignment. <i>Id.</i> Ex. 6. Finally, pursuant to a Supplemental Short Form Copyright Assignment made as of September 29, 2006, MCI assigned all copyrights relating to the main characters, subsidiary characters and minor characters of <i>Hulk</i> and <i>Iron Man</i> and the registered copyrights set forth on the schedules attached to the assignment, to MVL. <i>Id.</i> Ex. 7.</p>		<p>Therefore, Paragraph 13 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>

MARVEL’S WORK-MADE-FOR-HIRE PRACTICES

Martin Goodman Had The Right And Authority To Control Marvel’s Creations And Bore The Financial Risk Relating to Marvel’s Comic Book Business

Statement of Undisputed Fact	Defendants’ Response	Plaintiffs’ and Counterclaim-Defendants’ Reply
<p>14. During the years 1958 through 1963 (the “Time Period”), Martin Goodman was Marvel’s publisher and Stan Lee was Marvel’s editor. May 13, 2010 and December 8, 2010 Deposition of Stan Lee (“Lee Dep.”) annexed as Ex. 1 to the Singer Decl. at 11:18-23, 14:2-17.</p>	<p>Disputed to the extent that Stan Lee also submitted stories to Marvel as a freelancer. Tob. Dec., Ex. J at 396:1-14.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 14 as required by Local Rule 56.1(c). Therefore, Paragraph 14 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>15. At all times during the Time Period, as publisher, Goodman had the authority to supervise and direct the creation of all of Marvel comic books, including the creation of characters and storylines, and had the final say as to what comic books Marvel would publish. Lee, as editor, at all times answered to Goodman, who was the “ultimate boss” and who always “had to be happy with what [Lee] was doing.” Lee Dep. at 16:14-19, 18:17-19:17, 19:24:-20:6, 25:22-26:21, 97:8-11; Singer Decl. Ex. 18 at MARVEL0017522 (“I was just doing what my publisher asked me to do.”); <i>see also</i> October 26 and 27, 2010 Deposition of Roy Thomas (“Thomas Dep.”) annexed as Ex. 3 to the Singer Decl. at 59:6-21, 60:22-61:4; October 21, 2010 Deposition of John V. Romita (“Romita Dep.”) annexed as Ex. 2 to the Singer Decl. at 242:21-243:4; December 6, 2010 Deposition of Mark Evanier (“Evanier Dep.</p>	<p>Disputed to the extent that whether or not Goodman was the “ultimate boss” directing what Marvel published is not relevant to determining whether or not the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel. <i>See</i> Opp. at 13-20.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 15 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 15 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p>

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(12/6/10)”) annexed as Ex. 9 to the Singer Decl. at 100:4-21, 104:20-105:5, 148:12-23; January 10, 2011 Deposition of John Morrow (“Morrow Dep.”) annexed as Ex. 10 to the Singer Decl. at 149:4-18.		
16. No comic book was ever published by Marvel unless Goodman approved of it. Lee Dep. at 97:8-11; <i>see also</i> Evanier Dep. (12/6/10) at 104:20-105:5.	Disputed. The deposition testimony of Mark Evanier cited by Marvel states only that the publisher or editor had final approval. However, this fact is not relevant to determining whether or not the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel. <i>See</i> Opp. at 13-20.	Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 16 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 16 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i> , 472 F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140.
17. Martin Goodman first hired Stan Lee in approximately 1939 or 1940. From the outset of his career and, except for a brief period in the fall of 1998, Stan Lee has always been an employee of Marvel and all his work, including the work he did as a freelance writer, was done as works made for hire. <i>See</i> Singer Decl. Exs. 19-25.	Disputed. Lee testified, consistent with other freelance artists, that his freelance work was <i>purchased</i> by Marvel. Tob. Dec., Ex. J at 396:1-14; Ex. E at 100:21-101:9; Ex. F at 65:17-66:4; Ex. K at 232:5-10. In Lee’s November 1, 1998 agreement with Marvel, Lee agreed to “assign, convey and grant ... all right, title and interest,” and “any copyrights” in all of his alleged material published by Marvel. Singer Dec. Ex. 25 at ¶ 5(a). The agreement nowhere mentions “work for hire,” if Marvel fails to pay the monies due in the agreement, Lee can revoke the assignment. <i>Id.</i> Ex. 25 at ¶ 5(f), all of which is inconsistent with Marvel’s “work for hire” claim.	Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 17 as required by Local Rule 56.1(c). Therefore, Paragraph 17 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i> , 472 F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140. Defendants’ response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i> , 118 F.3d at 111. Moreover, Defendants’ citations do not

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		support Defendants' response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).
<p>18. From time to time, Lee also performed work for Marvel as a freelance writer, for which he was separately compensated on a per-page basis for scripts that he submitted, the same as every other freelance writer. Lee Dep. at 17:8-25.</p>	<p>Disputed to the extent that the statement implies Lee was paid as a purported "freelance writer" the same per page rate "as every other freelance writer."</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 18 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 18 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>19. If a particular comic book did not sell well or lost money, Martin Goodman, as publisher and owner of Marvel, would bear the loss. Lee Dep. at 43:3-44:2; <i>see also</i> Evanier Dep. (12/6/10) at 40:7-41:3, 149:10-16.</p>	<p>Disputed to the extent that this is not relevant to determining the issue of whether or not the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel. <i>See</i> Opp. at 13-20.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 19 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 19 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>20. During the Time Period, Marvel artists and writers were paid for work they submitted before the book to which they contributed went on sale, and payment to artists and writers did not depend on whether or not the book was successful. Lee Dep. at 42:21-43:2.</p>	<p>Disputed. Like other freelancers who sold their work to Marvel, Kirby was not paid a fixed salary or wage, and Marvel was not legally obligated to purchase his artwork. Ev. Dec., Ex. A at 9, 11-12; Mor. Dec., Ex. A at 7-10; Tob. Dec., Ex. C at 23:4-24:4; 105:15-17; Ex. E at 71:17-72:7; 72:22-73:8; 73:11-74:5; 76:25-79:4;</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 20 as required by Local Rule 56.1(c). Therefore, Paragraph 20 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472</p>

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	<p>Ex. F at 194:11-21; 200:4-201:13; 204:24-205:15; Ex. J at 256:25-257:25; 367:15-369:16; 371:3-18; 372:8-10; 396:1-14; Ex. L, ¶¶ 1, 3; Declaration of Gene Colan (“Colan Dec.”) at ¶ 8, 9, 12, 14; Declaration of Neal Adams (“Adams Dec.”) at ¶¶ 6-14; Declaration of James Steranko (“Ster. Dec.”) at ¶¶ 8-14; Declaration of Joe Sinnott (“Sinn. Dec.”) at ¶¶ 9-15; Declaration of Richard Ayers (“Ayers Dec.”) at ¶¶ 8-14. Marvel did not have any written agreement with Kirby during the 1958-1963 period. Mor. Dec., Ex. A at 9, 11-12; Ev. Dec., Ex. A at 11; Tob. Dec., Ex. E at 71:17-72:7; 72:22-73:8; 73:11- 74:5; 76:25-77:6; Ex. F at 194:11-21; 200:4-201:13; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L, ¶¶ 1, 3; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14. The first written agreement with Kirby produced by Marvel was executed on June 5, 1972. Tob. Dec., Ex. M. Kirby was paid on a per-page basis for those pages of artwork ultimately accepted and purchased by Marvel. Ev. Dec., Ex. A at 12; Mor. Dec., Ex. A at 8-10; Tob. Dec., Ex. B at 61:20-62:9; Ex. C at 136:7-138:22; 140:19-141:3; Ex. D at 89:13-92:5; 180:4-182:12; Ex. E at 103:7-105:17; Ex. F at 123:18-125:9; Ex. V at 396; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14. If a page(s) or story was rejected by Marvel, Kirby was not</p>	<p>F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants’ citations do not support Defendants’ response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citations to the inadmissible testimony and reports of Mark Evanier and John Morrow may not be considered on summary judgment. <i>See Daubert v. Merrell Dow Pharm., Inc.</i>, 509 U.S. 579 (1993); <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Ex. V to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citations to the testimony of Neal and Susan Kirby are also inadmissible as neither defendant has personal knowledge of whether Jack Kirby was paid for pages he submitted to Marvel during the Time Period. <i>Id.</i></p>

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	<p>compensated, and personally took the financial loss. <i>Id.</i> Kirby was also not paid for work Marvel asked him to redraw. Ev. Dec., Ex. A at 12; Mor. Dec., Ex. A at 8-9; Tob. Dec., Ex. B at 61:20-62:9; Ex. C at 136:7-138:22; Ex. D at 89:13-92:5; Ex. E at 77:20-79:4; Ex. G at 57:18-58:21, 234:12-236:1; Ex. H at 37:6-19. Colan Dec. at ¶ 9; Adams Dec. at ¶ 10; Ster. Dec. at ¶ 13; Sinn. Dec. at ¶ 13; Ayers Dec. at ¶ 11.</p>	<p>Defendants' citations to the irrelevant Declaration of Neal Adams ("Adams Decl.") and the Declaration of James Steranko ("Steranko Decl.") cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks v. Baines</i>, 593 F.3d 159, 167 (2d Cir. 2010) ("On summary judgment, [a] supporting or opposing affidavit must be made on personal knowledge.") (internal citations omitted).</p> <p>Finally, Defendants' citations to the Steranko Decl. and the Declaration of Joe Sinnott ("Sinnott Decl."), are inadmissible as neither Steranko nor Sinnott was identified as a potential witness by Defendants. Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial."); <i>see also Design Strategy, Inc. v. Davis</i>, 469 F.3d 284 (2d Cir. 2006) (affirming preclusion pursuant to Fed. R. Civ. P. 37(c)(1) of witness disclosed for first time in proposed list of trial witnesses).</p>
21. At times, Goodman decided to	Disputed to the extent Goodman would	Defendants' response does not set forth any

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<p>discontinue certain comic book series if they were not selling well. Romita Dep. at 204:6-17; <i>see also</i> Lee Dep. at 56:18-22; Evanier Dep. (12/6/10) at 41:6-42:13.</p>	<p>discontinue a comic book for any number of reasons, as testified to by Mr. Evanier. Tob. Dec., Ex. C at 41:6-11.</p>	<p>specific facts to dispute the facts set forth in Paragraph 21 as required by Local Rule 56.1(c). Therefore, Paragraph 21 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' citation to the inadmissible testimony of Evanier may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67.</p>

Stan Lee Had The Right And Authority To Control Marvel's Comic Book Creations

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<p>22. One of Stan Lee's main responsibilities in his role as editor and creative director of Marvel during the 1950s and 1960s was to originate the ideas for most of the stories that Marvel published during that timeframe. Lee Dep. at 35:5-10, 35:23-36:6; Romita Dep. at 19:24-20:15; January 7, 2011 Deposition of Lawrence Lieber ("Lieber Dep.") annexed as Ex. 4 to the Singer Decl. at 12:19-13:5, 13:22-14:4. Lee provided the characters' origin stories and personalities, and the role of the artist was to create the characters' look or costume. Romita Dep. at 85:10-86:6, 109:6-110:6.</p>	<p>Disputed. Stan Lee did not provide the "origin stories and personalities" for many of Marvel's most famous characters. Instead Jack Kirby provided these. Ev. Dec., Ex. A at 14-17; Mor. Dec., Ex. A at 10-13. Tob. Dec., Ex. FF; Ex. GG at 193; Ex. HH at 45 ("Kirby: the artists were doing the plotting- Stan was just coordinating the books, which was his job. Stan was production coordinator. But the artists were the ones that were handling both story and art. We had to- there was no time not to!"); Ex. II ("According to statistics, I've done one quarter of Marvel's entire output. There's a lot of hard work behind it. It's something that's highly</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 22 as required by Local Rule 56.1(c). Therefore, Paragraph 22 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶¶ Nos. 79-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107, <i>infra</i>.</p> <p>Defendants' citations do not support Defendants' response and therefore do not dispute the facts alleged as required by</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
	<p>individual, highly creative and above all, it sold very well.”); Ex. OO (“Q: A lot of people don’t know that you actually scripted a lot of these stories-most of them. Even the Marvel stuff. Kirby: I did.”); Ex. JJ at 45, 49 (Kirby: “And I did that with the Marvel books. I wrote the stories. I wrote the plots ,I did the drawings- I did the entire thing...”); Ex. KK at 122 (“Q:You have written your own stories, text and drawings? Kirby: Yes, that’s what I always did and that’s what I am doing now.”); Ex. NN at K1759 (Lee: “[Jack Kirby] was a virtually inexhaustible wellspring of fantastic new ideas, concepts and designs.”); Ex. I at 23:4-13 (Q: “Do you recall creating any new characters for Marvel after 1970? Lee: There was a time in the – maybe in the 90s when I started to create a new line of comics for Marvel...We never published them...I was working with new people and it just-they didn’t turn out right. But aside from that, no.”); Singer Dec., Ex, 53 at 36-37 (“Jack is certainly one of the most talented, if not the most talented guy that the comic book industry has ever produced. He is the most imaginative, the most creative guy I have ever known in this business. His mind is an endless source of stories, concepts and ideas.”). <i>See also</i> responses to ¶¶ 79-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107, <i>infra</i>.</p>	<p>Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Exs. FF, GG, HH, II, JJ, KK and OO to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Exs. GG, JJ and OO, as these cited documents were not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
<p>23. As editor of Marvel, Lee oversaw all of the creative and editorial aspects of every comic book that Marvel published during the Time</p>	<p>Disputed. Kirby was not legally “required to report to Lee and to abide by his ‘marching orders’” as he had no contract with Marvel.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 23 as required by Local Rule</p>

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<p>Period. Lee Dep. at 16:14-19. Marvel's artists and writers were always required to report to Lee and to abide by his "marching orders." Thomas Dep. at 28:19-29:5. In all events, Marvel's contributors during the 1950s and 1960s were bound to perform their duties in "the way Stan wanted the stuff done." Romita Dep. at 39:7-13; Lieber Dep. at 15:5-15; Singer Decl. Ex. 26 at MARVEL0017350 ("The only one I was concerned about was Stan because I had to show it to him. I was only hoping Stan would like it . . ."); <i>id.</i> Ex. 11, Track 3 (Kirby stating, "[w]ell, that's Stan Lee's department and he can answer that. The editor always has the last word on that.").</p>	<p>Mor. Dec., Ex. A at 8-10; Ev. Dec., Ex. A at 11-12; Tob. Dec., Ex. E at 71:17-72:7; 72:22-73:8; 73:11- 74:5; 76:25-77:6; Ex. F at 194:11-21; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L at ¶ 1, 3. Kirby had no legal obligation to provide work to Marvel, finish artwork he had started with the intention to sell to Marvel, nor could Marvel demand unfinished artwork from him. Kirby was free to reject any of Marvel's requests or to submit material that Marvel did not request. Ev. Dec. ¶ 17, 19, 20; Ex. B at 355-56 (Captain Glory); Ex. C (<i>Jack Kirby's Gods</i> portfolio), D (<i>New Gods</i> presentation pieces). Tob. Dec., Ex. MM at 6 ("Some artists, such as Jack Kirby, need no plot at all. I mean I'll just say to Jack, 'Let's let the next villain be Dr. Doom' ... or I may not even say that. He may tell me. And then he goes home and does it. He's so good at plots, I'm sure he's a thousand times better than I. He just about makes up the plots for these stories."), 151; Ex. GG at 193; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14. <i>See</i> Opp. at 13-20.</p>	<p>56.1(c). Therefore, Paragraph 23 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants' citations do not support Defendants' response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants' citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants' citations to inadmissible hearsay in Exs. B, C, and D to the Declaration of Mark Evanier dated March 25, 2011 ("Evanier Decl.") and Ex. GG to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants' citations to the Evanier Decl.</p>

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		<p>are also inadmissible for the additional reason that they are outside the scope of Evanier's expert report, and therefore cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); <i>see also Highland Capital Mgmt., L.P. v. Schneider</i>, 551 F. Supp. 2d 173, 182 (S.D.N.Y. 2008) (striking expert's declaration where the expert offered a new opinion that was not in his expert report).</p> <p>Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Additionally, neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Ex. GG as this document was not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>

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<p>24. During the Time Period, Stan Lee was responsible for assigning particular writers and artists to each comic book issue to be published by Marvel. Lee Dep. at 15:14-20, 15:22-16:7; Lieber Dep. at 14:5-8, 23:18-21; <i>see also</i> Thomas Dep. at 48:10-14, 48:17-49:8, 56:16-18, 59:6-21, 61:12-24 (Lee gave assignments to artist and writers during the 1960s); Romita Dep. at 18:15-20, 61:4-6, 61:12-19 (same in 1950s and 1960s); Evanier Dep. (12/6/10) at 155:15-20. Artists did not have the authority to assign themselves to work on any comic book they chose. Thomas Dep. at 58:10-13.</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel. <i>See</i> Opp. at 13-20.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 24 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 24 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>25. Lee had the authority to reassign artists and writers onto different projects when he deemed it necessary or appropriate to do so, and he exercised that authority on numerous occasions during the Time Period. Singer Decl. Ex. 11, Track 5; Lee Dep. at 113:16-115:13; <i>see also</i> Thomas Dep. at 58:24-59:5 (Lee had the authority to reassign artists and writers in the 1960s); Romita Dep. at 44:22-46:12, 68:22-70:3 (same in 1950s and 1960s); Singer Decl. Ex. 27 at THOM0002629; Morrow Dep. at 57:14-58:6. For example, if an artist was not able to do one book, Lee was in charge of assigning another artist that book, and then the second artist had to be replaced on his book by yet another artist, and so on; Lee has described this process as “falling dominos.” Lee Dep. at 115:6-13.</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel. <i>See</i> Opp. at 13-20. Kirby was not legally “required to report to Lee and to abide by his ‘marching orders’” as he had no contract with Marvel. Mor. Dec., Ex. A at 8-10; Ev. Dec., Ex. A at 11-12; Tob. Dec., Ex. E at 71:17-72:7; 72:22-73:8; 73:11-74:5; 76:25-77:6; Ex. F at 194:11-21; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L at ¶ 1, 3. Kirby had no legal obligation to provide work to Marvel, finish artwork he had started with the intention to sell to Marvel, nor could Marvel demand unfinished artwork from him. Kirby was free to reject any of Marvel’s requests or to submit material that Marvel did not request. Ev.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 25 as required by Local Rule 56.1(c). Therefore, Paragraph 25 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants’ citations do not support Defendants’ response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p>

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	<p>Dec. ¶ 17, 19, 20; Ex. B at 355-56 (Captain Glory); Ex. C (<i>Jack Kirby's Gods</i> portfolio), D (<i>New Gods</i> presentation pieces). Tob. Dec., Ex. MM at 6 (“Some artists, such as Jack Kirby, need no plot at all. I mean I’ll just say to Jack, ‘Let’s let the next villain be Dr. Doom’ ... or I may not even say that. He may tell me. And then he goes home and does it. He’s so good at plots, I’m sure he’s a thousand times better than I. He just about makes up the plots for these stories.”), 151; Ex. GG at 193; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.</p>	<p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Exs. B, C, and D to the Evanier Decl. and Ex. GG to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citations to the Evanier Decl. are also inadmissible for the additional reason that they are outside the scope of Evanier’s expert report, and therefore cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); <i>see also Highland Capital Mgmt.</i>, 551 F. Supp. 2d at 182.</p> <p>Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Additionally, neither Steranko nor Sinnott</p>

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		<p>was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Ex. GG as this document was not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
<p>26. During the Time Period, Stan Lee set deadlines for each person who contributed to a finished comic book to ensure that each book would be published and distributed on schedule each month. The schedule was established by the printer; if a comic book was not ready to be printed at the time designated in the printer's schedule, Marvel would be responsible for the substantial costs associated with the delay because Marvel had already scheduled the press time. Deadlines were very important to Marvel's operation; artists always knew their work was required to be delivered by a specified date. Lee Dep. at 42:10-20, 384:22-385:11; <i>see also</i> Thomas Dep. at 59:22-60:21.</p>	<p>Disputed and not relevant to determining whether or not the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel. <i>See</i> Opp. at 13-20. Kirby was not legally "required to report to Lee and to abide by his 'marching orders'" as he had no contract with Marvel. Mor. Dec., Ex. A at 8-10; Ev. Dec., Ex. A at 11-12; Tob. Dec., Ex. E at 71:17-72:7; 72:22-73:8; 73:11- 74:5; 76:25-77:6; Ex. F at 194:11-21; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L at ¶ 1, 3. Kirby had no legal obligation to provide work to Marvel, finish artwork he had started with the intention to sell to Marvel, nor could Marvel demand unfinished artwork from him. Kirby was free to reject any of Marvel's requests or to submit material that Marvel did not request. Ev. Dec. ¶ 17, 19, 20; Ex. B at 355-56 (Captain Glory); Ex. C (<i>Jack Kirby's Gods</i></p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 26 as required by Local Rule 56.1(c). Therefore, Paragraph 26 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants' citations do not support Defendants' response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p>

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	<p>portfolio), D (<i>New Gods</i> presentation pieces). Tob. Dec., Ex. MM at 6 (“Some artists, such as Jack Kirby, need no plot at all. I mean I’ll just say to Jack, ‘Let’s let the next villain be Dr. Doom’ ... or I may not even say that. He may tell me. And then he goes home and does it. He’s so good at plots, I’m sure he’s a thousand times better than I. He just about makes up the plots for these stories.”), 151; Ex. GG at 193; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.</p>	<p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Exs. B, C, and D to the Evanier Decl. and Ex. GG to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citations to the Evanier Decl. are also inadmissible for the additional reason that they are outside the scope of Evanier’s expert report, and therefore cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); <i>see also Highland Capital Mgmt.</i>, 551 F. Supp. 2d at 182.</p> <p>Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Additionally, neither Steranko nor Sinnott was identified as a potential witness by</p>

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		<p>Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Ex. GG as this document was not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
<p>27. Marvel – and, during the Time Period, Lee – supervised all aspects of the process for the creation of a comic book, which involved contributions by numerous different people. First, after Lee developed the initial concept for a story, he assigned a penciler to draw the initial pencil artwork for the comic book issue and provide the assigned penciler with the story he was to draw, in either a detailed script or at least a plot outline. Once completed, the pencil drawings were submitted to Lee for his review. If the pages met with Lee’s approval, they were given to a writer to fill in the captions and dialogue balloons to match the action in the artwork; during the Time Period, Lee himself was the designated writer for most of Marvel’s comic books. Lee Dep. at 17:5-13, 31:23-33:7; <i>see also Romita Dep.</i> at 70:4-8 (Lee was usually the designated writer of comics in the 1950s and 1960s); Thomas Dep. at 48:4-50:22 (same in 1960s).</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel. <i>See Opp.</i> at 13-20.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 27 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 27 is deemed admitted in its entirety for the purposes of this motion. <i>See Local Rule 56.1(b)-(d)</i>; <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>

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<p>28. Once the captions and dialogue balloons also were completed in pencil, the pages were provided to a letterer, who went over the dialogue balloons and captions in ink. The next step was to provide the drawings to the inker, who went over the pencil drawings in ink. Singer Decl. Ex. 11, Track 4; Lee Dep. at 31:23-33:7; Thomas Dep. at 50:23-52:10.</p>	<p>Admitted only to the extent that this is referring generally to Marvel's process of physically assembling a comic book for publication, and not to any specific comic book, character(s) or creation.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 28 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 28 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>29. After the pages were lettered and inked, they were sent to the engraver, who ran the inked drawings through a Photostat machine to reduce them to the proper size of a comic book page. The engraver then sent the pages to the colorist, who colored the pages and sent them back to the engraver and ultimately to the printer for publication. Lee Dep. at 31:23-33:7; Thomas Dep. at 52:11-53:14.</p>	<p>Admitted only to the extent that this is referring generally to Marvel's process of physically assembling a comic book, and not to any specific comic book, character(s) or creation.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 29 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 29 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>30. As Marvel's editor during the Time Period, it was Lee's responsibility to hire and supervise all of the pencil artists, letterers, inkers and colorists who, among others, contributed to the creation of the comic book. Lee Dep. at 15:9-13. Specifically, Lee reviewed all artwork that was submitted for publication by each of these individuals, and had the final say on whether artwork would be published. No artwork or story was published while Lee was</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel. <i>See</i> Opp. at 13-20.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 30 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 30 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41;</p>

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<p>editor of Marvel unless Lee himself had approved it. Lee Dep. at 33:25-34:7; <i>see also</i> Thomas Dep. at 112:25-113:23.</p>		<p><i>Giannullo</i>, 322 F.3d at 140.</p>
<p>31. Likewise, as editor, Lee always had the last say on the plot and dialogue of all of Marvel's comic book stories during the Time Period, and would explain to the artists the way in which the story should proceed. This was so even though artists might submit margin notes with suggestions as to plot or dialogue from time to time. Lee took pride in creating the characters' personalities through the dialogue and has explained that he typically would ignore these margin notes because he was not able to write in another person's style. Lee Dep. at 16:8-13, 51:17-52:5; <i>see also</i> Thomas Dep. at 66:13-67:2; Romita Dep. at 70:9-74:17.</p>	<p>Disputed. Stan Lee did not provide the "origin stories and personalities" for many Marvel's most famous characters. Instead Jack Kirby provided these. Ev. Dec., Ex. A at 14-17; Mor. Dec., Ex. A at 10-13. Tob. Dec., Ex. HH at 45 ("Kirby: the artists were doing the plotting - Stan was just coordinating the books, which was his job. Stan was production coordinator. But the artists were the ones that were handling both story and art. We had to- there was no time not to!"); Ex. II ("According to statistics, I've done one quarter of Marvel's entire output. There's a lot of hard work behind it. It's something that's highly individual, highly creative and above all, it sold very well."); Ex. OO ("Q: A lot of people don't know that you actually scripted a lot of these stories-most of them. Even the Marvel stuff. Kirby: I did."); Ex. JJ at 45, 49 (Kirby: "And I did that with the Marvel books. I wrote the stories. I wrote the plots, I did the drawings- I did the entire thing..."); Ex. KK at 122 ("Q: You have written your own stories, text and drawings? Kirby: Yes, that's what I always did and that's what I am doing now."); Ex. NN at K1759 ("[Jack Kirby] was a virtually inexhaustible wellspring of fantastic new ideas, concepts and designs."); Ex. MM at 6 ("Some artists, such as Jack Kirby, need no plot at all. I mean I'll just say to Jack, 'Let's let the next</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 31 as required by Local Rule 56.1(c). Therefore, Paragraph 31 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶¶ Nos. 79-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107, <i>infra</i>.</p> <p>Defendants' citations do not support Defendants' response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants' citation to Toberoff Decl. Ex. MM at 151 refers to work created outside the Time Period and is therefore irrelevant. Fed. R. Evid. 402.</p> <p>Defendants' citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants' citations to inadmissible</p>

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	<p>villain be Dr. Doom' ... or I may not even say that. He may tell me. And then he goes home and does it. He's so good at plots, I'm sure he's a thousand times better than I. He just about makes up the plots for these stories."), 151; Ex. GG at 193; Ex. I at 23:4-13 ("Do you recall creating any new characters for Marvel after 1970? There was a time in the –maybe in the 90s when I started to create a new line of comics for Marvel... We never published them... I was working with new people and it just-they didn't turn out right. But aside from that, no."). Singer Dec., Ex. 53 at 36-37 ("Jack is certainly one of the most talented, if not the most talented guy that the comic book industry has ever produced. He is the most imaginative, the most creative guy I have ever known in this business. His mind is an endless source of stories, concepts and ideas."). See also responses to ¶¶ 79-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107. Paragraph 31 is further disputed to the extent that Lee would consult and use margins notes provided by Kirby. Ev. Dec., Ex. A at 9-10; Tob. Dec., Ex. D at 66:8-22; Ex. FF; Ex. GG at 192-199.</p>	<p>hearsay in Exs. FF, GG, HH, II, JJ, KK and OO the Toberoff Decl. also may not be used to dispute facts. See <i>Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Exs. GG, JJ and OO as these cited documents were not produced in discovery in this action and thus may not be considered on summary judgment. See <i>Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
<p>32. It was part of Lee's job to make edits, or direct that edits be made by others, to any work that was submitted for publication. Lee Dep. at 16:20-17:4, 22:11-14, 33:9-17, 33:25-34:7; Thomas Dep. at 62:6-63:6, 115:23-116:12; Romita Dep. at 21:12-19, 23:4-25, 59:25-60:7; Lieber Dep. at 15:16-16:8, 16:14-17:4. For</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel. See Opp. at 13-20.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 32 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 32 is deemed</p>

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<p>example, Lee requested changes if he felt that the artwork on the page lacked sufficient action, or if he felt the panels as they were drawn were confusing to the reader. Lee Dep. at 16:20-17:4. Lee at times required changes to the facial features or expressions of a character in a drawing when he did not like its appearance, or when he thought it was “not as glamorous or not as effective as it should be,” or would require that a scene be changed from a nighttime setting to the daytime. Romita Dep. at 23:4-25, 55:23-56:25.</p>		<p>admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>33. Lee often had changes made to artwork without first consulting the original artist. Thomas Dep. at 63:23-64:19. Lee commonly exercised his authority to require changes to the artwork when he deemed it necessary, but did not do so too often, because it wasted Marvel’s money and time. Lee Dep. at 33:9-17.</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel. <i>See</i> Opp. at 13-20. Kirby was not legally “required to report to Lee and to abide by his ‘marching orders’” as he had no contract with Marvel. Mor. Dec., Ex. A at 8-10; Ev. Dec., Ex. A at 11-12; Tob. Dec., Ex. E at 71:17-72:7; 72:22-73:8; 73:11- 74:5; 76:25-77:6; Ex. F at 194:11-21; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L at ¶ 1, 3. Kirby had no legal obligation to provide work to Marvel, finish artwork he had started with the intention to sell to Marvel, nor could Marvel demand unfinished artwork from him. Kirby was free to reject any of Marvel’s requests or to submit material that Marvel did not request. Ev. Dec. ¶ 17, 19, 20; Ex. B at 355-56 (Captain Glory); Ex. C (<i>Jack Kirby’s Gods</i></p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 33 as required by Local Rule 56.1(c). Therefore, Paragraph 33 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants’ citations do not support Defendants’ response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p>

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	<p>portfolio), D (<i>New Gods</i> presentation pieces). Tob. Dec., Ex. MM at 6 (“Some artists, such as Jack Kirby, need no plot at all. I mean I’ll just say to Jack, ‘Let’s let the next villain be Dr. Doom’ ... or I may not even say that. He may tell me. And then he goes home and does it. He’s so good at plots, I’m sure he’s a thousand times better than I. He just about makes up the plots for these stories.”), 151; Ex. GG at 193; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.</p>	<p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Exs. B, C, and D to the Evanier Decl. and Ex. GG to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citations to the Evanier Decl. are also inadmissible for the additional reason that they are outside the scope of Evanier’s expert report, and therefore cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); <i>see also Highland Capital Mgmt.</i>, 551 F. Supp. 2d at 182.</p> <p>Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Additionally, neither Steranko nor Sinnott was identified as a potential witness by</p>

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		<p>Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Ex. GG as this document was not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
<p>34. At all times during the Time Period, Lee maintained editorial control over comic book covers as well as stories. Lee and Goodman agreed that covers were the most important part of a comic book because they were what caught the readers' eye. Lee frequently conceptualized how he wanted the covers to look and he decided which artist would be assigned to draw the cover, sometimes assigning a different artist to draw the cover than the artist who was assigned to draw the comic book itself. Lee Dep. at 36:19-37:2, 37:17-21, 38:4-20, 44:4-17; <i>see also</i> Thomas Dep. at 67:16-68:6.</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel. <i>See</i> Opp. at 13-20.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 34 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 34 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>35. Lee had the authority to make changes or revisions to comic book covers and he exercised that authority frequently. Lee Dep. at 38:21-22, 44:21-23; Thomas Dep. at 68:7-10; <i>see also</i> Evanier Dep. (12/6/10) at 202:6-204:18. For example, Mark Evanier's biography of Kirby includes an exemplar of a cover sketch featuring the character Thor, drawn by Kirby, that features</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel. <i>See</i> Opp. at 13-20. Evanier testified that this cover was "very rare" and "one of the few times Jack ever did a cover sketch like this." Tob. Dec., Ex. C at</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 35 as required by Local Rule 56.1(c). Therefore, Paragraph 35 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>

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Lee's handwritten notes directing Kirby to make certain changes. Singer Decl. Ex. 28 at K00299; <i>see also</i> Evanier Dep. (12/6/10) at 202:6-204:18.	203:8-204:9.	Defendants' citation to the inadmissible testimony of Evanier may not be considered on summary judgment. <i>See Daubert</i> , 509 U.S. at 579; <i>see also</i> Docket No. 67.

Development of the Marvel Method

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<p>36. Prior to the early 1960s, Marvel's artists drew comic book stories based on detailed scripts that were written either by Lee or another writer who had received from Lee a plot outline or a synopsis (which could be either written or oral). These scripts were extremely detailed, similar to film shooting scripts, and included a title, an allocation of pages, and a panel-by-panel breakdown for each page that gave the artist explicit instructions as to the action that was to take place in each panel and the dialogue that would be inserted later. These detailed scripts were written before any artwork for the comic book was drawn, and the artists based the artwork on the script. Romita Dep. at 17:13-18:14; Lieber Dep. at 9:14-18, 11:6-13:5; Singer Decl. Ex. 29 at MARVEL0018165; <i>see also</i> Evanier Dep. (12/6/10) at 201:14-202:5.</p>	Disputed. Evanier testified that Lee only wrote full scripts for "some artists." Singer Decl., Ex. 9 at 201:21.	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 36 as required by Local Rule 56.1(c). Therefore, Paragraph 36 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' citation to the inadmissible testimony of Evanier may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket No. 67.</p>
<p>37. During the Time Period, Lee developed a new system wherein he provided the artist with a short outline or synopsis – which could be</p>	Disputed. This statement only purports to describe the Marvel Method in general and not as applied to Jack Kirby nor to the works at	Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 37 as required by Local Rule

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<p>written or oral – that instructed the artist as to what Lee wanted to happen, what he wanted the hero to do, and how he wanted it to look. After Lee provided the synopsis to the assigned artist, they would then discuss it at a “plotting conference.” Following the plotting conference, the artist proceeded to draw a complete story based on Lee’s directions. Once Lee received the penciled drawings and had approved them – after any changes that had to be made – he inserted dialogue and captions to develop the story the way he wanted it to progress. This process became known as the “Marvel Method.” Singer Decl. Ex. 11, Track 7, Track 2 and Track 6; Lee Dep. at 20:11-21:25, 35:11-22; Singer Decl. Ex. 30 ; <i>id.</i> Ex. 27; <i>see also</i> Thomas Dep. at 218:14-219:16; Romita Dep. at 39:14-42:13; Evanier Dep. (11/9/10) at 92:22-93:4; Morrow Dep. at 60:18-61:20.</p>	<p>issue in this action. Ev. Dec., Ex. A at 7-8; Mor Dec., Ex. A at 8; Tob. Dec., Ex. MM at 151 (<i>Stan Lee</i>: “Certainly 90 percent of the ‘Tales of Asgard’ stories were Jack’s plots, and they were great! He certainly knew more about Norse mythology that I ever did (or at least he enjoyed making it up!)”), at 6 (<i>Stan Lee</i>: “Some artists, such as Jack Kirby, need no plot at all. I mean I’ll just say to Jack, ‘Let’s let the next villain be Dr. Doom’ ... or I may not even say that. He may tell me. And then he goes home and does it. He’s so good at plots, I’m sure he’s a thousand times better than I. He just about makes up the plots for these stories.”); Ex. HH at 45 (“<i>Kirby</i>: the artists were doing the plotting- Stan was just coordinating the books, which was his job. Stan was production coordinator. But the artists were the ones that were handling both story and art. We had to- there was no time not to!”); Ex. II (“According to statistics, I’ve done one quarter of Marvel’s entire output. There’s a lot of hard work behind it. It’s something that’s highly individual, highly creative and above all, it sold very well.”); Ex. OO (“<i>Q</i>: A lot of people don’t know that you actually scripted a lot of these stories-most of them. Even the Marvel stuff. <i>Kirby</i>: I did.”); Ex. JJ at 45, 49 (<i>Kirby</i>: “And I did that with the Marvel books. I wrote the stories. I wrote the plots, I did the drawings- I did the entire thing...”); Ex. KK at 122 (“<i>Q</i>: You have written your own stories, text and drawings? <i>Kirby</i>: Yes, that’s what I always did</p>	<p>56.1(c). Therefore, Paragraph 37 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; reply to ¶¶ Nos. 79-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107, <i>infra</i>.</p> <p>Defendants’ citations do not support Defendants’ response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citation to Toberoff Decl. Ex. MM at 151 refers to work created outside the Time Period and is therefore irrelevant. Fed. R. Evid. 402.</p> <p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Exs. HH, II, JJ, KK and OO to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Finally, Defendants cannot create a factual</p>

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	<p>and that's what I am doing now."); Ex. NN at K1759 ("[Jack Kirby] was a virtually inexhaustible wellspring of fantastic new ideas, concepts and designs."); Ex. I at 23:4-13 ("Do you recall creating any new characters for Marvel after 1970? There was a time in the – maybe in the 90s when I started to create a new line of comics for Marvel...We never published them...I was working with new people and it just-they didn't turn out right. But aside from that, no."); Singer Dec., Ex, 53 at 36-37 ("Jack is certainly one of the most talented, if not the most talented guy that the comic book industry has ever produced. He is the most imaginative, the most creative guy I have ever known in this business. His mind is an endless source of stories, concepts and ideas."). <i>See also</i> responses to ¶¶ 79-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107, <i>infra</i>.</p>	<p>dispute through their reliance on Toberoff Decl. Exs. JJ and OO, as these cited documents were not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
<p>38. The Marvel Method was developed because Lee had become so busy that he could not write scripts quickly enough to keep up with the artists. As Marvel's freelance artists were paid by the page that they submitted to Marvel for publication, if they were not given an assignment by Lee, they would not get paid by Marvel. Lee Dep. at 20:11-21:25; Singer Decl. Ex. 11, Track 6; Romita Dep. at 41:13-42:13; <i>see also</i> Lieber Dep. at 14:9-15:4.</p>	<p>Admitted that freelance artists were paid by the page for those artwork pages that were accepted for publication, but otherwise disputed. <i>See</i> Response to Plaintiff's Statement No. 37.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 38 as required by Local Rule 56.1(c). Therefore, Paragraph 38 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶ No. 37.</p>
<p>39. Artists and writers did not draw pages prior to obtaining an assignment and a plot or synopsis from Stan Lee. Lee Dep. at 41:20-</p>	<p>Disputed. <i>See</i> Response to Plaintiff's Statement No. 37.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 39 as required by Local Rule</p>

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<p>42:9; <i>see also id.</i> at 383:18-21, 384:18-21; Thomas Dep. at 56:12-15, 57:25-58:9; Evanier Dep. (11/9/10) at 91:15-18.</p>		<p>56.1(c). Therefore, Paragraph 39 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶ No. 37.</p>
<p>40. Working under the Marvel Method, artists were afforded greater freedom to draw the stories, but at all times the artists were constrained to keep to the main theme and plot that Lee supplied and the instructions he gave. If the artwork strayed too far from his expectations for the plot of the story or had done something wrong, Lee “fixed” some of the discrepancies by inserting dialogue and captions to ensure that it kept to the story he had envisioned without having to spend the time to request changes to the artwork. At Lee’s discretion, he could fill in the plot through his own dialogue to make the finished work a seamless product that followed from his original plot; Lee has often mused that this process “was like doing a crossword puzzle.” Lee Dep. at 20:11-21:25, 55:9-13, 343:18-344:22; Singer Decl. Ex. 31 at 83.</p>	<p>Disputed. <i>See</i> Response to Plaintiff’s Statement No. 37.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 40 as required by Local Rule 56.1(c). Therefore, Paragraph 40 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶ No. 37.</p>
<p>41. Under the Marvel Method process of story creation during the Time Period, it was part of the artists’ assignment to fill in any necessary details or to create new characters or plot elements to flesh out the plot that Lee had provided for the story. Lee Dep. at 54:16-56:9, 72:21-73:23, 377:12-19; Singer Decl. Ex. 32 at</p>	<p>Disputed. Kirby had no contract with Marvel in 1958-1970. Kirby had no legal obligation to provide work to Marvel, finish artwork he had started with the intention to sell to Marvel, nor could Marvel demand unfinished artwork from him. He was free to create characters and to choose to insert them into a story to be sold to</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 41 as required by Local Rule 56.1(c). Therefore, Paragraph 41 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472</p>

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<p>MARVEL0017515 (explaining that Marvel Method involved Lee “discussing the story with the artist and having the artist do the penciled art on his own, drawing whatever he wants so long as it tells the story we’ve discussed”); <i>see also</i> Thomas Dep. at 55:4-15, 55:16-56:3, 220:7-221:12.</p>	<p>Marvel or to use such characters elsewhere, and Marvel did not own the characters he decided to use elsewhere, or object to such use. Ev. Dec. ¶ 17, 19, 20; Ex. B at 355-56 (Captain Glory); Ex. C (Jack Kirby’s Gods portfolio), D (New Gods presentation pieces). <i>See also</i> Mor. Dec., Ex. A at 8-10; Ev. Dec., Ex. A at 11-12; Tob. Dec., Ex. E at 71:17- 72:7; 72:22-73:8; 73:11- 74:5; 76:25-77:6; Ex. F at 194:11-21; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L at ¶ 1, 3; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14. That Marvel, like any publisher, could choose the characters it wished to buy or to publish after buying Kirby’s work is not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire.” <i>See</i> Opp. at 13-20.</p>	<p>F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants’ citations do not support Defendants’ response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay Exs. B, C, and D to the Evanier Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citations to the Evanier Decl. are also inadmissible for the additional reason that they are outside the scope of Evanier’s expert report, and therefore cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); <i>see also Highland Capital</i></p>

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		<p><i>Mgmt.</i>, 551 F. Supp. 2d at 182.</p> <p>Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Finally, neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p>
<p>42. If an artist or writer introduced a new character into an existing comic book, it was the responsibility of either Goodman as publisher or Lee as editor to decide whether the character was interesting enough to create a new comic book title devoted it. Lee Dep. at 79:3-19.</p>	<p>Disputed to the extent Kirby could create characters and choose to insert them into a story or not, and Marvel would not own these characters if he decided to use them elsewhere. Kirby had no legal obligation to provide work to Marvel, finish artwork he had started with the intention to sell to Marvel, nor could Marvel demand unfinished artwork from him. Ev. Dec. 17, 19, 20; Ex. B at 355-56 (Captain Glory); Ex. C (<i>Jack Kirby's Gods</i> portfolio), D (<i>New Gods</i> presentation pieces). <i>See also</i> Mor. Dec., Ex. A at 8-10; Ev. Dec., Ex. A at 11-12; Tob. Dec., Ex. E at 71:17-72:7; 72:22-73:8; 73:11- 74:5; 76:25-77:6; Ex. F at 194:11-21; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L at ¶ 1, 3; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 42 as required by Local Rule 56.1(c). Therefore, Paragraph 42 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants' citations do not support Defendants' response and so</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
	<p>15; Ayers Dec. at ¶¶ 8-14. Further disputed to the extent that whether or not Marvel could choose the characters it wished to publish is not relevant to determining whether or not the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire.” <i>See Opp.</i> at 13-20.</p>	<p>cannot be used to dispute facts. <i>See Local Rule 56.1(b)-(d).</i></p> <p>Defendants' citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants' citations to inadmissible hearsay Exs. B, C, and D to the Evanier Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants' citations to the Evanier Decl. are also inadmissible for the additional reason that they are outside the scope of Evanier's expert report, and therefore cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); <i>see also Highland Capital Mgmt.</i>, 551 F. Supp. 2d at 182.</p> <p>Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p>

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		<p>Finally, neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p>
<p>43. At all times during the Time Period, Lee maintained the ability to edit and make changes to work that writers and artists had created, and, when necessary, he determined that it was not fit for publication. Lee Dep. at 22:11-16.</p>	<p>Disputed and not relevant to determining whether or not the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel. Kirby could create characters and choose to insert them into a story or not, and Marvel would not own these characters if he decided to use them elsewhere. Kirby had no legal obligation to provide work to Marvel, finish artwork he had started with the intention to sell to Marvel, or to make revisions to such artwork requested by Marvel as a condition to his acceptance and purchase of such artwork. Ev. Dec. ¶ 17, 19, 20; Ex. B at 355-56 (Captain Glory); Ex. C (<i>Jack Kirby's Gods</i> portfolio), D (<i>New Gods</i> presentation pieces). <i>See also</i> Mor. Dec., Ex. A at 8-10; Ev. Dec., Ex. A at 11-12; Tob. Dec., Ex. E at 71:17-72:7; 72:22-73:8; 73:11- 74:5; 76:25-77:6; Ex. F at 194:11-21; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L at ¶ 1, 3; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 43 as required by Local Rule 56.1(c). Therefore, Paragraph 43 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants' citations do not support Defendants' response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants' citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants' citations to inadmissible</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
		<p>hearsay Exs. B, C, and D to the Evanier Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants' citations to the Evanier Decl. are also inadmissible for the additional reason that they are outside the scope of Evanier's expert report, and therefore cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); <i>see also Highland Capital Mgmt.</i>, 551 F. Supp. 2d at 182.</p> <p>Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Finally, neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p>
<p>44. Except for certain instances in which Lee continued to use detailed scripts in advance of assigning an artist to draw the pencil artwork for a comic book issue, Lee used the Marvel Method for the creation of comic books</p>	<p>Disputed. The Marvel Method evolved in the late 1950s, early 1960s and Jack Kirby was not provided scripts by Stan Lee, Larry Lieber or anyone else. Ev. Dec., Ex. A at 7-8; Mor Dec., Ex. A at 8; Tob. Dec., Ex. MM at 151 (<i>Stan Lee</i>:</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 44 as required by Local Rule 56.1(c). Therefore, Paragraph 44 is deemed admitted in its entirety for the</p>

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<p>published by Marvel from the early 1960s on, until he became publisher of Marvel in the early 1970s. Lee Dep. at 22:2-10; Lieber Dep. at 47:20-48:21; <i>see also</i> Evanier Dep. (12/6/10) at 56:7-57:13; Morrow Dep. at 59:2-23, 60:5-17.</p>	<p>“Certainly 90 percent of the ‘Tales of Asgard’ stories were Jack’s plots, and they were great! He certainly knew more about Norse mythology than I ever did (or at least he enjoyed making it up!)”, at 6 (<i>Stan Lee</i>: “Some artists, such as Jack Kirby, need no plot at all. I mean I’ll just say to Jack, ‘Let’s let the next villain be Dr. Doom’ ... or I may not even say that. He may tell me. And then he goes home and does it. He’s so good at plots, I’m sure he’s a thousand times better than I. He just about makes up the plots for these stories.”); Ex. HH at 45 (“<i>Kirby</i>: the artists were doing the plotting- Stan was just coordinating the books, which was his job. Stan was production coordinator. But the artists were the ones that were handling both story and art. We had to- there was no time not to!”); Ex. II (“According to statistics, I’ve done one quarter of Marvel’s entire output. There’s a lot of hard work behind it. It’s something that’s highly individual, highly creative and above all, it sold very well.”); Ex. OO (“<i>Q</i>: A lot of people don’t know that you actually scripted a lot of these stories-most of them. Even the Marvel stuff. <i>Kirby</i>: I did.”); Ex. JJ at 45, 49 (<i>Kirby</i>: “And I did that with the Marvel books. I wrote the stories. I wrote the plots, I did the drawings- I did the entire thing...”); Ex. KK (“<i>Q</i>: You have written your own stories, text and drawings? <i>Kirby</i>: Yes, that’s what I always did and that’s what I am doing now.”); Ex. NN at K1759 (“[Jack Kirby] was a virtually inexhaustible</p>	<p>purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶¶ Nos. 79-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107, <i>infra</i>.</p> <p>Defendants’ citations do not support Defendants’ response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citation to Toberoff Decl. Ex. MM at 151 refers to work created outside the Time Period and is therefore irrelevant. Fed. R. Evid. 402.</p> <p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Exs. HH, II, JJ, KK and OO the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither</p>

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	wellspring of fantastic new ideas, concepts and designs.”); Singer Dec., Ex. 53 at 36-37 (“Jack is certainly one of the most talented, if not the most talented guy that the comic book industry has ever produced. He is the most imaginative, the most creative guy I have ever known in this business. His mind is an endless source of stories, concepts and ideas.”); Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14. <i>See also</i> responses to ¶¶ 79-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107, <i>infra</i> .	<p>declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Exs. JJ and OO as these cited documents were not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>

Payment of Artists and Writers

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<p>45. During the Time Period, Marvel’s freelance artists and writers were paid flat rates for work they performed on a per-page basis. Lee Dep. at 17:22-25, 30:11-14, 58:13-21, 396:1-10; <i>see also</i> Thomas Dep. at 28:5-15 (freelancers paid per-page rates in 1960s); Romita Dep. at 16:13-21 (same in 1950s and 1960s).</p>	<p>Admitted only to the extent that freelance artists and writers were paid by the page for those pages accepted and purchased by Marvel for publication, otherwise disputed. Mor. Dec., Ex. A at 8-10; Ev. Dec., Ex. A at 12; Tob. Dec., Ex. C at 105:15-17; Ex. D at 89:13-92:5; 178:5-13; 180:4-182:12; Ex. E at 29:4-8; 73:11-74:5 100:21-101:9; <i>see also</i> Ex. E at 71:17-72:7, 76:25-77:6; Ex. F at 65:17-66:4; 123:18-125:9; Ex. I at 17:17-25; Ex. J at 367:15-369:16; 371:3-</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 45 as required by Local Rule 56.1(c). Therefore, Paragraph 45 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ citations do not support</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
	<p>18; 372:8-10; 396:1-14; Ex. K at 232:5-10; Ex. LL ¶ 6, Ex. C (Stephen Gerber Check); Ex. T; Ex. AA at 14603; Ex. BB; Ex. L at ¶ 15; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.</p>	<p>Defendants' response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Further, Toberoff Decl. Exs. T, AA, BB, and LL are irrelevant as they refer to circumstances outside of the Time Period. Fed. R. Evid. 402.</p> <p>Defendants' citations to the inadmissible testimony of Evanier and Morrow also may not be used to dispute facts. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Dockets, 67, 70.</p> <p>Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts as neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Finally, neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible and cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p>
<p>46. Marvel did not purchase artwork from artists on speculation during the Time Period. Lee Dep. at 41:20-42:9; <i>see also</i> Thomas Dep. at 58:14-23 (same in 1960s and 1970s).</p>	<p>Disputed. Lee actually testified that he cannot "remember" whether any works may have been purchased "on spec". Singer Decl, Ex. 1 at 41:25-42:2. Moreover, Thomas did not work for</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 46 as required by Local Rule 56.1(c). Therefore, Paragraph 46 is</p>

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	<p>Marvel during the Time Period. Tob. Dec., Ex. K at 22:22-24; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.</p>	<p>deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts as neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Finally, neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible and cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p>
<p>47. During the Time Period, Marvel's artists were paid for work they were assigned by Marvel and submitted for publication, even if Marvel did not ultimately publish the artwork. Lee Dep. at 18:6-16, 30:11-31:5, 376:16-22; <i>see also Romita Dep.</i> at 32:2-5 (in 1950s, if an artist did the work, he would be paid for it).</p>	<p>Disputed. Marvel did not pay for rejected artwork. Ev. Dec., Ex. A at 12; Mor. Dec., Ex. A at 3, 8-10; Ex. B; Tob. Dec., Ex. B at 50:20-51:25; 61:24-62:9; Ex. C 105:15-17; 136:7-138:22; 140:19-142:21; Ex. D at 89:13-92:5; 138:11-139:4; 178:5-13; 179:5-13; 180:4-182:12; Ex. E at 76:25-77:6; 77:20-79:4; 103:7-105:17; Ex. F at 123:18-125:9; Ex. G at 57:18-58:21; 62:19-63:6; 234:12-236:1; Ex. H at 37:6-19; Ex. I at 17:17-25; Ex. J at 275:17-276:1; 376:3-22; 396:1-14; Ex. N; Ex. O at 71-74; Ex. P; Ex. Q; Ex. R; Ex. S; Ex. V at 396; Ex. Z; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 47 as required by Local Rule 56.1(c). Therefore, Paragraph 47 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' citations do not support Defendants' response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
	<p>6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.</p>	<p>56.1(b)-(d).</p> <p>Defendants' citations to Toberoff Decl. Exs. E-F and P-R are irrelevant as they refer to material produced outside of the Time Period and/or as to which no information has been provided regarding the timing of their creation or whether they were even submitted to Marvel for publication. Fed. R. Evid. 402.</p> <p>Defendants' citations to the inadmissible testimony of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Dockets, 67, 70.</p> <p>Defendants' citations to inadmissible hearsay in Ex. B to the Declaration of John Morrow, dated March 25, 2011 ("Morrow Decl.") and Exs. O, S, V and Z to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants' citations to the testimony of Neal and Susan Kirby are also inadmissible as neither defendant has personal knowledge of whether Jack Kirby was paid for pages he submitted to Marvel during the Time Period. <i>Id.</i></p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
		<p>Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Morrow Decl. Ex. B as the cited document was not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
<p>48. Marvel's artists and writers also were paid their agreed per-page rate for work submitted for publication during the Time Period, even if Lee required changes to be made to the work after submission. Lee Dep. at 376:16-22; Lieber Dep. at 30:10-12; <i>see also</i> Thomas Dep. at 68:24-69:6, 74:19-25 (during 1960s and 1970s, artists were paid for work even if changes were required).</p>	<p>Disputed. Marvel did not pay freelancers for work it asked them to be redraw. Ev. Dec., Ex. A at 12; Mor. Dec., Ex. A at 8-9; Tob. Dec., Ex. B at 61:24-62:9; Ex. C at 136:7-138:22; Ex. E at 76:25-77:6; 77:20-79:4; Ex. G at 57:18-58:21; 62:19-63:6; 234:12-235:5; 235:6-236:1; Ex. H at 37:6-19; Ex. Z; Ex. LL ¶ 3, Ex. E; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 48 as required by Local Rule 56.1(c). Therefore, Paragraph 48 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' citations do not support Defendants' response and therefore do not</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
		<p>dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants' citation to Toberoff Decl. Ex. LL refers to material produced outside of the Time Period, and is therefore irrelevant. Fed. R. Evid. 402.</p> <p>Defendants' citations to the inadmissible testimony of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Dockets, 67, 70.</p> <p>Defendants' citation to inadmissible hearsay in Ex. Z to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants' citations to the testimony of Neal and Susan Kirby are also inadmissible as neither defendant has personal knowledge of whether Jack Kirby was paid for pages he submitted to Marvel during the Time Period. <i>Id.</i></p> <p>Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
		<p>Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Finally, neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p>
<p>49. During the Time Period, writers and artists at Marvel and other major comic book publishers did not receive royalties or other profit participation based on the work they submitted that was published. Lee Dep. at 45:4-9; Singer Decl. Ex. 33 at MARVEL0017691 (noting that in comic books, "unlike most other forms of writing, there were no royalty payments at the end of the road . . . no residuals . . . no copyright ownership. You wrote your pages, got your check, and that was that."); <i>see also</i> Evanier Dep. (11/9/10) at 164:18-165:18, 165:21-166:11.</p>	<p>Admitted only to the extent that Kirby did not receive royalties during the Time Period in connection with the material that Marvel purchased from Kirby, otherwise disputed.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 49 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 49 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>

Marvel's Artists and Writers Understood and Acknowledged That Their Work Created for Marvel Was Work-Made-For-Hire

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>50. On numerous occasions, Lee has expressly acknowledged and asserted that all works to which he contributed while working for Marvel were works made for hire. Singer</p>	<p>Disputed. Lee testified, consistent with other freelance artists, that his freelance work was purchased by Marvel. Tob. Dec., Ex. J at 367:15-369:16; 371:3-18; 372:8-10; 396:1-14;</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 50 as required by Local Rule 56.1(c). Therefore, Paragraph 50 is</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>Decl. Ex. 11, Track 8 (“I never owned these characters. I did them as a work for hire. So the company owned the characters.”); Lee Dep. at 26:22-28:6, 100:25-101:17, 396:11-14; Singer Decl. Ex. 34 at ¶¶ 4, 11; <i>id.</i> Ex. 23 at ¶ 4, <i>id.</i> Ex. 24 at ¶ 4, <i>id.</i> Ex. 35 at ¶ 2.</p>	<p>Ex. E at 100:21-101:9; Ex. F at 65:17-66:4; Ex. K at 232:5-10; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14. In Lee’s November 1, 1998 agreement with Marvel, Lee agreed to “assign, convey and grant ... all right, title and interest,” and “any copyrights” in his alleged material. Singer Dec. Ex. 25 at ¶ 5(a). The agreement nowhere mentions “work for hire,” and if Marvel fails to pay the monies due in the agreement, Lee can revoke the assignment. <i>Id.</i> Ex. 25 at ¶ 5(f).</p>	<p>deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants’ citations do not support Defendants’ response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Finally, neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p>
<p>51. Marvel’s policy that it owned all works submitted for publication as works made for hire was well known among its artists and writers in</p>	<p>Disputed as it implies that Marvel owned the rights to these submissions as “work for hire,” when Stan Lee, Larry Lieber, Roy Thomas, Stan</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 51 as required by Local Rule</p>

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<p>the 1950s and 1960s. Lee Dep. at 27:21-28:11; Thomas Dep. at 85:12-86:19. For example, while working both at Marvel and DC Comics, artist John V. Romita understood that the company always owned the works to which he contributed that were published under the company's name. Romita Dep. at 68:7-10, 86:7-8, 86:13-20; Singer Decl. Ex. 36. Similarly, writer Roy Thomas also understood that the copyrights to the materials he submitted for publication were owned by Marvel. Thomas Dep. at 84:16-85:19; Singer Decl. Ex. 37; <i>see also</i> Lieber Dep. at 32:6-16 (“I didn’t think much about [Marvel’s work-for-hire policy] because I felt the only reason I was doing it was to get paid, you know.”); Singer Decl. Ex. 38 (“In the narrow field of comic art, one either worked ‘for hire’ or didn’t work!”); <i>id.</i> Ex. 39 at MARVEL0018273 (Kirby stating, “[e]verybody was ‘work-for-hire’ . . . It was the traditional way that artists got jobs”).</p>	<p>Lee, Dick Ayers, Gene Colan, Joe Sinnott, Jim Steranko and Neal Adams each testified that it was their understanding that Marvel owned the rights to their pages because Marvel had purchased such pages from them. Tob. Dec., Ex. E at 100:21-101:9; Ex. F at 65:17-66:4; Ex. J at 396:1-14; Ex. K at 232:5-10. <i>See also</i> Tob. Dec., Ex. C at 215:14-216:23; Ex. L at ¶¶ 2, 4, 15; Ex. AA at 14603; Ex. LL at Ex. C ; Ex. T; Mor. Dec., Ex. A at 9; Ev. Dec., Ex. A at 12-13. Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8- 14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14. Further disputed to the extent Larry Lieber testified he had never heard the phrase “work for hire” until last year. Tob. Dec., Ex. E at 101:10-102:8.</p>	<p>56.1(c). Therefore, Paragraph 51 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ citations do not support Defendants’ response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citations to Toberoff Decl. Exs. T, AA, and LL refer to circumstances outside of the Time Period and are therefore irrelevant. Fed. R. Evid. 402.</p> <p>Defendants’ citations to the inadmissible testimony of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Dockets, 67, 70.</p> <p>Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Finally, neither Steranko nor Sinnott was</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
		identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i> , 469 F.3d at 284.
<p>52. Likewise, Marvel's artists and writers understood that Marvel had the right to introduce existing characters into a different comic book series being drawn and/or written by a different artist and/or writer without consulting the original writer or artist. Thomas Dep. at 65:13-17, 65:23-66:7, 67:3-14; <i>see also</i> Lee Dep. at 79:3-19.</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel. <i>See</i> Opp. at 13-20.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 52 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 52 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>53. Marvel artist John Romita, writer Larry Lieber and writer-turned-editor Roy Thomas all testified that they recall that the payroll checks by which they were paid for their freelance work bore a legend on the back stating that they retained no rights in the work for which they were being paid. Thomas Dep. at 71:17-72:19, 229:4-25; Romita Dep. at 64:14-65:19, 65:24-66:4, 66:24-67:14, 67:17-20, 273:24-274:11; Lieber Dep. at 31:17-21, 32:4-33:8. Stan Lee recalls endorsing paychecks from Timely Comics and its various successors for his writing that bore such an acknowledgement, which was the "standard practice" for all writers and artists who worked for Marvel on a freelance basis. Lee testified that he never thought anything of this practice because he always assumed that</p>	<p>Disputed as it implies that Marvel owned the rights to these submissions as "work for hire," when Stan Lee, Larry Lieber, Roy Thomas, Stan Lee, Dick Ayers, Gene Colan, Joe Sinnott, Jim Steranko and Neal Adams each testified that it was their understanding that Marvel owned the rights to their pages because Marvel had purchased such pages from them. Tob. Dec., Ex. E at 100:21-101:9; Ex. F at 65:17-66:4; Ex. J at 396:1-14; Ex. K at 232:5-10. <i>See also</i> Tob. Dec., Ex. L at ¶¶ 2, 4, 15; Ex. AA at 14603; Ex. LL at Ex. C; Ex. T; Mor. Dec., Ex. A at 9; Ev. Dec., Ex. A at 12-13; Colan Dec. at ¶¶ 12, 14; Adams Dec. at ¶ 14; Ster. Dec. at ¶ 12; Sinn. Dec. at ¶¶ 13-14; Ayers Dec. at ¶ 14.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 53 as required by Local Rule 56.1(c). Therefore, Paragraph 53 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' citations do not support Defendants' response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants' citations to Toberoff Decl. Exs. T, AA, and LL refer to circumstances</p>

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<p>Marvel owned the rights to the works he created or co-created. Lee Dep. at 28:20-29:11.</p>		<p>outside of the Time Period and are therefore irrelevant. Fed. R. Evid. 402.</p> <p>Defendants' citations to the inadmissible testimony of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos., 67, 70.</p> <p>Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Finally, neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p>

KIRBY'S WORKS WERE WORKS-MADE-FOR-HIRE

Stan Lee's Authority To Review and Edit Kirby's Work

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>54. During the Time Period, some assignments were given to Kirby to draw based on a detailed script, and others were given to him pursuant to the Marvel Method. Under</p>	<p>Disputed. Neither Romita nor Thomas are testifying about the Time Period as they did not work for Marvel during that period. Tob. Dec., Ex. F at 219:6-220:11; Ex. K at 22:22-24. Jack</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 54 as required by Local Rule 56.1(c). Therefore, Paragraph 54 is</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>either process, Kirby was assigned to draw a particular comic book issue based on Stan Lee's initial concept and plot outline. When working under the Marvel Method, after Kirby was given the assignment and initial concept, Lee and Kirby discussed the plot in a plotting conference, and only then did Kirby draw the complete story based on the plot and his discussion with Lee. Lee Dep. at 39:25-41:19, 47:21-25, 94:24-95:12, 383:18-21; Lieber Dep. at 47:20-48:8; <i>see also</i> Evanier Dep. (11/9/10) at 91:9-18, 92:22-93:4, 111:4-14, 168:4-169:24; Thomas Dep. at 111:12-14, 112:8-17; Romita Dep. at 80:19-25; Singer Decl. Ex. 40.</p>	<p>Kirby provided his own initial plots and concepts during the Time Period. Ev. Dec., Ex. A at 14-17; Mor. Dec., Ex. A at 10-13. Tob. Dec., Ex. HH at 45 (“<i>Kirby</i>: the artists were doing the plotting- Stan was just coordinating the books, which was his job. Stan was production coordinator. But the artists were the ones that were handling both story and art. We had to- there was no time not to!”); Ex. II (“According to statistics, I’ve done one quarter of Marvel’s entire output. There’s a lot of hard work behind it. It’s something that’s highly individual, highly creative and above all, it sold very well.”); Ex. OO (“<i>Q</i>: A lot of people don’t know that you actually scripted a lot of these stories-most of them. Even the Marvel stuff. <i>Kirby</i>: I did.”); Ex. JJ at 45, 49 (<i>Kirby</i>: “And I did that with the Marvel books. I wrote the stories. I wrote the plots, I did the drawings- I did the entire thing...”); Ex. KK at 122 (“<i>Q</i>: You have written your own stories, text and drawings? <i>Kirby</i>: Yes, that’s what I always did and that’s what I am doing now.”); Ex. NN at K1759 (“[Jack Kirby] was a virtually inexhaustible wellspring of fantastic new ideas, concepts and designs.”); Ex. MM at 6 (“Some artists, such as Jack Kirby, need no plot at all. I mean I’ll just say to Jack, ‘Let’s let the next villain be Dr. Doom’ ... or I may not even say that. He may tell me. And then he goes home and does it. He’s so good at plots, I’m sure he’s a thousand times better than I. He just about</p>	<p>deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶¶ Nos. 79-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107, <i>infra</i>.</p> <p>Defendants’ citations do not support Defendants’ response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citation to Toberoff Decl. Ex. MM at 151 refers to work created outside the Time Period and is therefore irrelevant. Fed. R. Evid. 402.</p> <p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579, 542 F.3d at 311; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Exs. GG, HH, II, JJ, KK and OO the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Finally, Defendants cannot create a factual</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
	<p>makes up the plots for these stories.”), 151; Ex. GG at 193; Ex. I at 23:4-13 (“Do you recall creating any new characters for Marvel after 1970? There was a time in the –maybe in the 90s when I started to create a new line of comics for Marvel... We never published them...I was working with new people and it just-they didn’t turn out right. But aside from that, no.”). Singer Dec., Ex, 53 at 36-37 (“Jack is certainly one of the most talented, if not the most talented guy that the comic book industry has ever produced. He is the most imaginative, the most creative guy I have ever known in this business. His mind is an endless source of stories, concepts and ideas.”). <i>See also</i> responses to ¶¶ 79-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107, <i>infra</i>.</p>	<p>dispute through their reliance on Toberoff Decl. Exs. GG, JJ and OO as these cited documents were not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
<p>55. Kirby did not begin work on any artwork for a book published by Marvel during the Time Period before he had been assigned to that project by Lee. Lee Dep. at 383:18-21, 384:18-21; <i>see also</i> Evanier Dep. (11/9/10) at 92:22-93:4; Evanier Dep. (12/6/10) at 225:5-8.</p>	<p>Disputed. Jack Kirby provided his own initial plots and concepts during the Time Period. Ev. Dec., Ex. A at 14-17; Mor. Dec., Ex. A at 10-13. Tob. Dec., Ex. HH at 45 (“<i>Kirby</i>: the artists were doing the plotting- Stan was just coordinating the books, which was his job. Stan was production coordinator. But the artists were the ones that were handling both story and art. We had to- there was no time not to!”); Ex. II (“According to statistics, I’ve done one quarter of Marvel’s entire output. There’s a lot of hard work behind it. It’s something that’s highly individual, highly creative and above all, it sold very well.”); Ex. OO (“<i>Q</i>: A lot of people don’t know that you actually scripted a lot of these</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 55 as required by Local Rule 56.1(c). Therefore, Paragraph 55 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶¶ Nos. 79-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107, <i>infra</i>.</p> <p>Defendants’ citations do not support Defendants’ response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule</p>

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	<p>stories-most of them. Even the Marvel stuff. <i>Kirby</i>: I did."); Ex. JJ at 45, 49 (<i>Kirby</i>: "And I did that with the Marvel books. I wrote the stories. I wrote the plots, I did the drawings- I did the entire thing..."); Ex. KK at 122 ("Q: You have written your own stories, text and drawings? <i>Kirby</i>: Yes, that's what I always did and that's what I am doing now."); Ex. NN at K1759 ("[Jack Kirby] was a virtually inexhaustible wellspring of fantastic new ideas, concepts and designs."); Ex. MM at 6 ("Some artists, such as Jack Kirby, need no plot at all. I mean I'll just say to Jack, 'Let's let the next villain be Dr. Doom' ... or I may not even say that. He may tell me. And then he goes home and does it. He's so good at plots, I'm sure he's a thousand times better than I. He just about makes up the plots for these stories."), 151; Ex. GG at 193; Ex. I at 23:4-13 ("Do you recall creating any new characters for Marvel after 1970? There was a time in the -maybe in the 90s when I started to create a new line of comics for Marvel... We never published them... I was working with new people and it just-they didn't turn out right. But aside from that, no."). Singer Dec., Ex, 53 at 36-37 ("Jack is certainly one of the most talented, if not the most talented guy that the comic book industry has ever produced. He is the most imaginative, the most creative guy I have ever known in this business. His mind is an endless source of stories, concepts and ideas."). See also responses to ¶¶ 79-83; 85;</p>	<p>56.1(b)-(d).</p> <p>Defendants' citation to Toberoff Decl. Ex. MM at 151 refers to work created outside the Time Period and is therefore irrelevant. Fed. R. Evid. 402.</p> <p>Defendants' citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. See <i>Daubert</i>, 509 U.S. at 579; see also Docket Nos. 67, 70.</p> <p>Defendants' citations to inadmissible hearsay in Exs. GG, HH, II, JJ, KK and OO the Toberoff Decl. also may not be used to dispute facts. See <i>Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Exs. GG, JJ and OO as these cited documents were not produced in discovery in this action and thus may not be considered on summary judgment. See <i>Melie</i>, 2009 WL 1404325, at *1 n.4.</p>

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	88; 90-91; 94-95; 97; 99; 101;103; 105; 107, <i>infra</i> .	
<p>56. In plotting conferences during the Time Period, if Kirby and Lee ever had differing views on an element of an upcoming comic book issue, Lee always had the final say as to what would go into the book. Lee Dep. at 52:3-5, 73:17-23, 111:2-17; <i>see also</i> Romita Dep. at 81:18-83:21 (describing plotting conferences in 1960s); Singer Decl. Ex. 11, Track 3.</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 56 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 56 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>57. In the course of fleshing out the outlines into complete comic book stories during the Time Period, Kirby from time to time introduced new characters into the story. This introduction of new elements was part of his assignment, and was always done within the context of the work Lee had assigned him and the script or the plot that Lee provided to him. Lee Dep. at 54:16-56:9, 377:12-19.</p>	<p>Disputed. Kirby could create characters while working on stories intended to be submitted to Marvel, but refuse to provide them to Marvel. Ev. Dec. ¶ 17, 19, 20; Ex. B at 355-56 (Captain Glory); Ex. C (<i>Jack Kirby’s Gods</i> portfolio), D (<i>New Gods</i> presentation pieces). Kirby was not legally “required to report to Lee and to abide by his ‘marching orders’” as he had no contract with Marvel. Mor. Dec., Ex. A at 8-10; Ev. Dec., Ex. A at 11-12; Tob. Dec., Ex. E at 71:17-72:7; 72:22-73:8; 73:11- 74:5; 76:25-77:6; Ex. F at 194:11-21; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L at ¶ 1, 3. Kirby had no legal obligation to provide work to Marvel, finish artwork he had started with the intention to sell to Marvel, nor did Marvel have the legal right to demand revisions by Kirby of his artwork. Kirby was free to reject any of Marvel’s requests or to submit material that</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 57 as required by Local Rule 56.1(c). Therefore, Paragraph 57 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants’ citations do not support Defendants’ response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p>

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	<p>Marvel did not request. Ev. Dec. ¶ 17, 19, 20; Ex. B at 355-56 (Captain Glory); Ex. C (<i>Jack Kirby's Gods</i> portfolio), D (<i>New Gods</i> presentation pieces). Tob. Dec., Ex. MM at 6 (“Some artists, such as Jack Kirby, need no plot at all. I mean I’ll just say to Jack, ‘Let’s let the next villain be Dr. Doom’ ... or I may not even say that. He may tell me. And then he goes home and does it. He’s so good at plots, I’m sure he’s a thousand times better than I. He just about makes up the plots for these stories.”), 151; Ex. GG at 193; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15.</p>	<p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay Exs. B, C, and D to the Evanier Decl. and Ex. GG to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citations to the Evanier Decl. are also inadmissible for the additional reason that they are outside the scope of Evanier’s expert report, and therefore cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); <i>see also Highland Capital Mgmt.</i>, 551 F. Supp. 2d at 182.</p> <p>Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Additionally, neither Steranko nor Sinnott</p>

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		<p>was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Ex. GG as this document was not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
<p>58. During the Time Period, Stan Lee had the right to direct and supervise Kirby's work and had the ability to review all of Kirby's artwork prior to publication. In reviewing artwork that Kirby submitted for publication, Lee had the authority to determine whether the artwork would be published, or to require changes or edits prior to approval or prior to publication. Lee Dep. at 22:11-23:19, 47:15-25; <i>see also</i> Thomas Dep. at 113:18-114:11; Evanier Dep. (12/6/10) at 105:6-14, 105:18-23.</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel. Kirby was not legally "required to report to Lee and to abide by his 'marching orders'" as he had no contract with Marvel. Mor. Dec., Ex. A at 8-10; Ev. Dec., Ex. A at 11-12; Tob. Dec., Ex. E at 71:17-72:7; 72:22-73:8; 73:11- 74:5; 76:25-77:6; Ex. F at 194:11-21; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L at ¶ 1, 3. Kirby had no legal obligation to provide work to Marvel, finish artwork he had started with the intention to sell to Marvel, nor did Marvel have the legal right to demand revisions by Kirby of his artwork.. Kirby was free to reject any of Marvel's requests or to submit material that Marvel did not request. Ev. Dec. ¶ 17, 19, 20; Ex. B at 355-56 (Captain Glory); Ex. C (<i>Jack</i></p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 58 as required by Local Rule 56.1(c). Therefore, Paragraph 58 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants' citations do not support Defendants' response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p>

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	<p><i>Kirby's Gods</i> portfolio), D (<i>New Gods</i> presentation pieces). Tob. Dec., Ex. MM at 6 (“Some artists, such as Jack Kirby, need no plot at all. I mean I’ll just say to Jack, ‘Let’s let the next villain be Dr. Doom’ ... or I may not even say that. He may tell me. And then he goes home and does it. He’s so good at plots, I’m sure he’s a thousand times better than I. He just about makes up the plots for these stories.”), 151; Ex. GG at 193; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8- 14.</p>	<p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Exs. B, C, and D to the Evanier Decl. and Ex. GG to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citations to the Evanier Decl. are also inadmissible for the additional reason that they are outside the scope of Evanier’s expert report, and therefore cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); <i>see also Highland Capital Mgmt.</i>, 551 F. Supp. 2d at 182.</p> <p>Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Additionally, neither Steranko nor Sinnott was identified as a potential witness by</p>

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		<p>Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Ex. GG as this document was not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
<p>59. At Lee's discretion, Kirby was sometimes instructed to make changes and revisions to artwork he submitted to Marvel for publication. Lee Dep. at 22:11-19, 23:13-19; Thomas Dep. at 113:25-114:11; <i>see also</i> Evanier Dep. (11/9/10) at 59:22-60:4, 60:23-61:8, 61:20-23; Evanier Dep. (12/6/10) at 105:6-14, 105:18-23, 106:5-7; N. Kirby Dep. at 170:23-171:4; October 25, 2010 Deposition of Susan Kirby ("S. Kirby Dep.") annexed as Ex. 7 to the Singer Decl. at 37:23-25; Morrow Dep. at 205:13-19, 206:5-207:10, 264:11-18. Lee does not recall any instance when Kirby ever refused to make any of the edits or changes that Lee directed. Lee Dep. at 48:10-13.</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel. Kirby was not legally "required to report to Lee and to abide by his 'marching orders'" as he had no contract with Marvel. Mor. Dec., Ex. A at 8-10; Ev. Dec., Ex. A at 11-12; Tob. Dec., Ex. E at 71:17-72:7; 72:22-73:8; 73:11- 74:5; 76:25-77:6; Ex. F at 194:11-21; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L at ¶ 1, 3. Kirby had no legal obligation to provide work to Marvel, finish artwork he had started with the intention to sell to Marvel, nor did Marvel have the legal right to demand revisions by Kirby of his artwork.. Kirby was free to reject any of Marvel's requests or to submit material that Marvel did not request. Ev. Dec. ¶ 17, 19, 20; Ex. B at 355-56 (Captain Glory); Ex. C (<i>Jack Kirby's Gods</i> portfolio), D (<i>New Gods</i></p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 59 as required by Local Rule 56.1(c). Therefore, Paragraph 59 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants' citations do not support Defendants' response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants' citations to the inadmissible</p>

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	<p>presentation pieces). Tob. Dec., Ex. MM at 6 (“Some artists, such as Jack Kirby, need no plot at all. I mean I’ll just say to Jack, ‘Let’s let the next villain be Dr. Doom’ ... or I may not even say that. He may tell me. And then he goes home and does it. He’s so good at plots, I’m sure he’s a thousand times better than I. He just about makes up the plots for these stories.”),151; Ex. GG at 193; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.</p>	<p>testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Exs. B, C, and D to the Evanier Decl. and Ex. GG to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citations to the Evanier Decl. are also inadmissible for the additional reason that they are outside the scope of Evanier’s expert report, and therefore cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); <i>see also Highland Capital Mgmt.</i>, 551 F. Supp. 2d at 182.</p> <p>Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Additionally, neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is</p>

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		<p>inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Ex. GG as this document was not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
<p>60. Lee sometimes requested that an artist make changes to another artist's work. <i>See</i> Thomas Dep. at 114:13-115:9; <i>see also</i> Evanier Dep. (12/6/10) at 197:17-24. For example, John Romita recalled that when he first met Kirby, Kirby was sitting in Marvel's bullpen making changes to a cover that had been penciled originally by artist Steve Ditko. Romita Dep. at 74:23-76:7. Additionally, from time to time, Lee asked John Romita to make changes to artwork that Kirby had submitted for publication. For example, Lee asked Romita to change certain facial features on Kirby's characters. Romita found this difficult because he idolized Kirby's work, but he "did it because [he] had no choice. Stan asked [him] to do it." <i>Id.</i> at 76:8-78:21. Romita recalls that Kirby rarely read any comic book in its final published format, and for that reason may have been unaware of the changes that were made to his artwork after its submission. <i>Id.</i> at 88:16-24.</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel. Kirby was not legally "required to report to Lee and to abide by his 'marching orders'" as he had no contract with Marvel. Mor. Dec., Ex. A at 8-10; Ev. Dec., Ex. A at 11-12; Tob. Dec., Ex. E at 71:17-72:7; 72:22-73:8; 73:11- 74:5; 76:25-77:6; Ex. F at 194:11-21; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L at ¶ 1, 3. Kirby had no legal obligation to provide work to Marvel, finish artwork he had started with the intention to sell to Marvel, nor did Marvel have the legal right to demand revisions by Kirby of his artwork.. Kirby was free to reject any of Marvel's requests or to submit material that Marvel did not request. Ev. Dec. ¶ 17, 19, 20; Ex. B at 355-56 (Captain Glory); Ex. C (<i>Jack Kirby's Gods</i> portfolio), D (<i>New Gods</i> presentation pieces). Tob. Dec., Ex. MM at 6</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 60 as required by Local Rule 56.1(c). Therefore, Paragraph 60 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants' citations do not support Defendants' response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants' citations to the inadmissible testimony and reports of Evanier and</p>

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	<p>(“Some artists, such as Jack Kirby, need no plot at all. I mean I’ll just say to Jack, ‘Let’s let the next villain be Dr. Doom’ ... or I may not even say that. He may tell me. And then he goes home and does it. He’s so good at plots, I’m sure he’s a thousand times better than I. He just about makes up the plots for these stories.”),151; Ex. GG at 193; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.</p>	<p>Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Exs. B, C, and D to the Evanier Decl. and Ex. GG to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citations to the Evanier Decl. are also inadmissible for the additional reason that they are outside the scope of Evanier’s expert report, and therefore cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); <i>see also Highland Capital Mgmt.</i>, 551 F. Supp. 2d at 182.</p> <p>Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Additionally, neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see</i></p>

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		<p><i>also Design Strategy, Inc.</i>, 469 F.3d at 284.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Ex. GG as this document was not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
<p>61. Kirby was paid for all the artwork pages that he submitted to Marvel during the Time Period, even if it was not used for publication and even if Lee required that changes be made to it prior to publication. Lee Dep. at 30:24-31:5, 376:3-22 (“Any artists that drew anything that I had asked him or her to draw at my behest, I paid them for it. If it wasn’t good, we wouldn’t use it. But I asked them to draw it, so I did pay them.”); <i>see also</i> Evanier Dep. (11/9/10) at 61:24-62:1, 62:10-24; Evanier Dep. (12/6/10) at 138:19-22. Lee sometimes later used these inventory pages as tests for new inkers. Lee Dep. at 22:11-23:19.</p>	<p>Disputed. Marvel only paid for completed work by Kirby it accepted from Kirby, regardless of whether or not it subsequently published the work, and Marvel had no legal obligation to pay for work it did not accept. Ev. Dec., Ex. A at 12; Mor. Dec., Ex. A at 8-10; Tob. Dec., Ex. D at 89:13-92:5; 180:4-182:12; Ex. E at 103:7-105:17; Ex. F at 123:18-125:9; Ex. V at 396; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers ¶¶ 11-14. If a page(s) or story was rejected by Marvel, Kirby was not compensated, and personally took the financial loss. <i>Id.</i> Kirby was also not paid for work Marvel asked him to redraw. <i>Id.</i>, Ev. Dec., Ex. A at 12; Mor. Dec., Ex. A at 8-9; Tob. Dec., Ex. B at 61:20-62:9; Ex. C at 136:7-38:22; 140:19-141:3; Ex. D at 89:13-92:5; Ex. E at 77:20-79:4; Ex. G at 57:18-58:21, 234:12-236:1; Ex. H at 37:6-19. Marvel did not have any written agreement with Kirby during the 1958-1963 Time Period. Mor. Dec., Ex. A at 9, 11-12; Ev. Dec., Ex. A at 11; Tob. Dec., Ex. E at 71:17-72:7; 72:22-73:8; 73:11-</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 61 as required by Local Rule 56.1(c). Therefore, Paragraph 61 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants’ citations do not support Defendants’ response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citations to Toberoff Decl. Exs. E-F refer to artists/writers other than Kirby or refer to circumstances outside of</p>

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	<p>74:5; 76:25-77:6; Ex. F at 194:11-21; 200:4-201:13; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L, ¶¶ 1, 3. The first written agreement with Kirby produced by Marvel was executed on June 5, 1972 and is aptly titled: "Assignment." Tob. Dec., Ex. M.</p>	<p>the Time Period and are therefore irrelevant. Fed. R. Evid. 402.</p> <p>Defendants' citations to the inadmissible testimony of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Dockets, 67, 70.</p> <p>Defendants' citation to inadmissible hearsay in Ex. V to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants' citations to the testimony of Neal and Susan Kirby are also inadmissible as neither defendant has personal knowledge of whether Jack Kirby was paid for pages he submitted to Marvel during the Time Period. <i>Id.</i></p> <p>Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Finally, neither Steranko nor Sinnott was identified as a potential witness by</p>

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		Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i> , 469 F.3d at 284.
<p>62. Like all freelance artists at Marvel during the Time Period, Kirby was paid an agreed per-page rate for his artwork. Lee Dep. at 58:13-21; Singer Decl. Ex. 41 at MARVEL0017230; N. Kirby Dep. at 72:20-22, 73:1-4, 81:8-13; <i>see also</i> Evanier Dep. (12/6/10) at 105:15-17. Kirby was paid the highest per-page rate offered by Marvel because Lee considered him to be Marvel's best artist. Lee Dep. at 30:15-23.</p>	<p>Admitted, except denied that Kirby was "Marvel's artist," as Marvel was not obligated to Kirby and Kirby was not obligated to Marvel during the Time Period; Kirby could and did sell his artwork to companies other than Marvel during the Time Period. Ev. Dec., ¶ 18; Tob. Dec., Ex. D at 177:11-15; Ex. W at 5-6, 18, 19, 21, 25, 55, 80-81, 84-85; Ex. X at 18462-18466; Ex. Y at 129; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 62 as required by Local Rule 56.1(c). Therefore, Paragraph 62 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants' citations do not support Defendants' response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants' citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants' citations to inadmissible hearsay in Exs. W, X and Y to the Toberoff Decl. also may not be used to dispute facts.</p>

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		<p><i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants' citations to the Evanier Decl. are also inadmissible for the additional reason that they are outside the scope of Evanier's expert report, and therefore cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); <i>see also Highland Capital Mgmt.</i>, 551 F. Supp. 2d at 182.</p> <p>Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Additionally, neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Ex. Y as this document was not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325,</p>

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<p>63. When Kirby submitted his artwork for Lee's review, he sometimes included notes in the margins of the pages to describe his ideas for a plot or dialogue being depicted. Lee had discretion as to whether to use any of those notes, and he almost always ignored them and inserted his own dialogue instead. Lee Dep. at 48:24-52:20; Thomas Dep. at 117:11-22; Singer Decl. Ex. 42 at MARVEL0017976; <i>see also</i> Evanier Dep. (12/6/10) at 193:13-17, 193:25-195:3.</p>	<p>Admitted on to the extent that Kirby included detailed "notes in the margins of [his] pages to describe his ideas for a plot or dialogue being depicted," but otherwise disputed as the story was already plotted by Kirby in his illustrated panels, and in addition Lee would consult and use the margins notes routinely provided by Kirby. Ev. Dec., Ex. A at 9-10; Tob. Dec., Ex. D at 66:8-22; Ex. FF; Ex. GG at 192-199. <i>See also</i> Ev. Dec., Ex. A at 14-17; Mor. Dec., Ex. A at 10-13; Tob. Dec., Ex. HH at 45 ("Kirby: the artists were doing the plotting- Stan was just coordinating the books, which was his job. Stan was production coordinator. But the artists were the ones that were handling both story and art. We had to- there was no time not to!"); Ex. II ("According to statistics, I've done one quarter of Marvel's entire output. There's a lot of hard work behind it. It's something that's highly individual, highly creative and above all, it sold very well."); Ex. OO ("Q: A lot of people don't know that you actually scripted a lot of these stories-most of them. Even the Marvel stuff. Kirby: I did."); Ex. JJ at 45, 49 (Kirby: "And I did that with the Marvel books. I wrote the stories. I wrote the plots, I did the drawings- I did the entire thing..."); Ex. KK at 122 ("Q: You have written your own stories, text and drawings? Kirby: Yes, that's what I always did and that's what I am doing now."); Ex. NN at K1759 ("[Jack Kirby] was a virtually</p>	<p>at *1 n.4.</p> <p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 63 as required by Local Rule 56.1(c). Therefore, Paragraph 63 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶¶ Nos. 79-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107.</p> <p>Defendants' citations do not support Defendants' response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants' citation to Toberoff Decl. Ex. MM at 151 refers to work created outside the Time Period and is therefore irrelevant. Fed. R. Evid. 402.</p> <p>Defendants' citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants' citations to inadmissible hearsay in Exs. FF, GG, HH, II, JJ, KK and OO the Toberoff Decl. also may not be</p>

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	<p>inexhaustible wellspring of fantastic new ideas, concepts and designs.”); Ex. MM at 6 (“Some artists, such as Jack Kirby, need no plot at all. I mean I’ll just say to Jack, ‘Let’s let the next villain be Dr. Doom’ ... or I may not even say that. He may tell me. And then he goes home and does it. He’s so good at plots, I’m sure he’s a thousand times better than I. He just about makes up the plots for these stories.”),151; Singer Dec. Ex. 53 at 36-37 (“Jack is certainly one of the most talented, if not the most talented guy that the comic book industry has ever produced. He is the most imaginative, the most creative guy I have ever known in this business. His mind is an endless source of stories, concepts and ideas.”). <i>See also</i> responses to ¶¶ 79-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107.</p>	<p>used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Exs. GG, JJ and OO as these cited documents were not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
<p>64. Kirby never did any artwork for publication by Marvel without having been assigned to do so by Marvel, and Kirby never submitted artwork to Marvel on spec. N. Kirby Dep. at 127:19-24 (“Q: Was it your understanding that your father would begin working on a book without any discussion with Stan before doing so? A: I would say it was my understanding if my father had an idea for a book or a character to create he would bring it up and get a yea or nay.”); <i>id.</i> at 127:25-128:5 (“Q: Was it your understanding that [Kirby] would begin working; that is, drawing panels prior to getting a go ahead from Marvel or Stan</p>	<p>Disputed. Lee actually testified that he cannot “remember” whether any works may have been purchased “on spec”. Singer Decl, Ex. 1 at 41:25-42:2; 48:2-4. Moreover, Thomas did not work for Marvel during the Time Period. Tob. Dec., Ex. K at 22:22-24. Neal Kirby testified that his father did pitch ideas on spec to Marvel: “Q: You have indicated very clearly that your father never did work on Marvel on spec, correct? <i>Neal Kirby</i>: In terms of – maybe I need to qualify that, okay? In terms of would my father have pitched an idea , if you don’t mind my using the word ‘pitch,’ you know, met with somebody else saying gee, I have this good idea</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 64 as required by Local Rule 56.1(c). Therefore, Paragraph 64 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Moreover, Defendants’ citations do not support Defendants’ response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p>

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<p>Lee? A: I don't believe – that is not my understanding. My father didn't do work on spec, he was getting paid by the page.”); <i>id.</i> at 168:24-169:7; Lee Dep. at 48:2-4, 56:10-16, 57:12-18; Thomas Dep. at 112:19-23.</p>	<p>for a character, you know, would you like to go for it, that he would have done it you know. Definitely I would consider that coming up with an idea and speculation.” Tob. Dec. Ex. G at 167:21-168:5; 233:15-234:5 (“Q: ...[I]n the instances where Marvel said it liked the idea and [Kirby] proceeded to do work, did you consider that work to be on spec or not on spec? Neal Kirby: Well...in respect to even if they liked the idea and you would go back and let's say pencil, come up with either character concepts or full pages, I believe he had the understanding that they still might not purchase that work, he would still be out the time.”). Kirby did do drawings of re-imagined <i>Captain America</i> and <i>Thor</i> characters on “spec” that were submitted to Marvel. Ev. Dec. ¶¶ 17, 19, 20; Ex. B at 355-56 (Captain Glory); Ex. C (<i>Jack Kirby's Gods</i> portfolio), D (<i>New Gods</i> presentation pieces); Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.</p>	<p>Defendants' citations to the inadmissible testimony and report of Evanier may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket No. 67.</p> <p>Defendants' citations to inadmissible hearsay in Exs. B, C, and D to the Evanier Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants' citations to the Evanier Decl. are also inadmissible for the additional reason that they are outside the scope of Evanier's expert report, and therefore cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); <i>see also Highland Capital Mgmt.</i>, 551 F. Supp. 2d at 182.</p> <p>Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Finally, neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is</p>

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		inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i> , 469 F.3d at 284.
<p>65. Throughout their working relationship, Lee had (and continues to have) an extremely high opinion of Kirby. Lee would have preferred to have used Kirby as the pencil artist on all of Marvel's comic books during the Time Period, but he was not able to do so because Kirby was "just one guy," and did not have the time. Lee Dep. at 36:19-23, 46:25-47:8; Singer Decl. Ex. 27 at THOM0002629.</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 65 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 65 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>

Kirby Acknowledged Marvel's Authority and Editorial Control

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<p>66. In an interview with Mike O'Dell on WBAI-FM NY radio, conducted on March 3, 1967, when asked whether, "now that Captain America is back in the fight, has there been any talk about sending him to Vietnam?" Kirby replied: "Well, that's Stan Lee's department and he can answer that. The editor always has the last word on that." <i>Id.</i> Ex. 11, Track 3.</p>	<p>Disputed, to the extent the statements is out of context, not keyed to the Time Period and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 66 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 66 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>67. In an interview with Mark Herbert of <i>The Nostalgia Journal</i> in 1969, Kirby stated: "My job is what the policy of the organization</p>	<p>Disputed, to the extent the statement is out of context, not keyed to the Time Period, and not relevant to determining whether the subject</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 67 as required by Local Rule</p>

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[i.e., Marvel] calls for.” <i>Id.</i> Ex. 43 at MARVEL0017197.	works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel.	56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 67 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i> , 472 F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140.

Kirby Acknowledged the Work-For-Hire Nature of His Works for Marvel On Numerous Occasions

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68. Kirby has been quoted as saying: “Everybody was ‘work-for-hire’ . . . It was the traditional way that artists got jobs. The publishers made certain that they owned the rights to everything. When you came in for work, everything you did was owned by the guy giving you a paycheck.” <i>Id.</i> Ex. 39 at MARVEL0018273.	Disputed, to the extent the statement is out of context, not keyed to the Time Period, and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel.	Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 68 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 68 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i> , 472 F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140.
69. In an affidavit signed on July 12, 1966, Kirby averred that with respect to the creation of the Captain America character with writer Joe Simon, he “felt that whatever [he] did for Timely belonged to Timely as was the practice in those days.” <i>Id.</i> Ex. 44 at MARVEL0000354.	Disputed, to the extent the statement is out of context, pertains to <i>Captain America</i> which was created over a decade before the Time Period and because it is not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel.	Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 69 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 69 is deemed admitted in its entirety for the purposes of

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		this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i> , 472 F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140.
<p>70. In 1968 and 1969, Kirby signed Applications for Registration of a Claim to Renewal Copyright for certain <i>Captain America</i> comic books, in which Marvel Comics Group claimed a renewal copyright as a “[p]roprietor of copyright in a work made for hire.” Kirby certified that the statements made in the applications were correct to the best of his knowledge. <i>Id.</i> Ex. 45.</p>	<p>Disputed, to the extent the statement omits the circumstances under which Marvel required Kirby to sign this registration form drafted by Marvel, pertains to <i>Captain America</i> which was created over a decade before the Time Period, and because it is not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 70 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 70 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>71. In an agreement signed in 1972, Kirby “acknowledge[d] and agree[d] that all his works on the MATERIALS, and all his work which was created or related to the RIGHTS,” that were the subject of the Agreements “was done as an employee for hire of” Marvel. <i>Id.</i> Ex. 17 at ¶¶ 4-5.</p>	<p>Disputed in that the 1972 Assignment speaks for itself, and that this selective quote omits that the document is entitled as “Assignment,” and that the bulk of its terms are devoted to a detailed transfer and assignment of specified rights in the Kirby material published by Marvel – the antithesis of ownership at inception as “work for hire.” <i>Singer Decl. Ex. 17 ¶¶ 1-4.</i></p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 71 as required by Local Rule 56.1(c). Therefore, Paragraph 71 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>72. In a Writers and Artists Agreement dated March 24, 1975, Kirby agreed that Marvel had, among other things, the exclusive right to secure copyrights in all material delivered to Marvel under the agreement. <i>Id.</i> Ex. 46 at ¶ 7.</p>	<p>Disputed to the extent that this 1975 employment agreement is well outside the Time Period (1958-1963) in question; the agreement speaks for itself, and the statement is, in any event, not relevant to whether Marvel owned pre-March 24, 1975 material created by Kirby on a freelance basis at inception as “work for hire,” or owned it pursuant to Marvel’s purchase of such material upon acceptance.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 72 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 72 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d);</p>

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		<i>see also Parks Real Estate</i> , 472 F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140.
<p>73. In an Acknowledgement of Copyright Ownership dated June 16, 1986, Kirby acknowledged: "I have no copyright rights and no claim to copyright, or to the renewal or extension of copyright, or any other rights (except only for my ownership of the original physical artwork being returned to me by Marvel) in any artwork, characters, publications or other material . . . created or prepared by me for or on behalf of, or which was published by or under the authority of, Marvel Comics Group or any predecessor company." <i>Id.</i> Ex. 47 at ¶ 1.</p>	<p>Disputed to the extent that this Acknowledgement is well outside the Time Period (1958-1963) in question, is quoted out of context of the entire document, omits the circumstances under which Kirby was required by Marvel to sign such self-serving Acknowledgements drafted by Marvel as a condition to Marvel returning his original artwork to him, and, in any event, the statement is not relevant to whether Marvel owned the copyright to Kirby's material as "work for hire" or via the purchase and assignment (e.g., 1972 Assignment) of the copyright in such work .</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 73 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 73 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>74. In an Artwork Release dated June 16, 1987, Kirby acknowledged that the artwork subject to the release "was specially commissioned by and prepared for Marvel, . . . and is a work made for hire pursuant to all applicable copyright laws." The Artwork Release further provides that Kirby was "fully compensated for all [his] work in preparation of the Artwork," that "Marvel is the exclusive worldwide owner of all copyrights in and to the Artwork," and that the agreement "shall be binding upon the Artist, and [his] heirs." <i>Id.</i> Ex. 48 at MARVEL0013635, at ¶¶ 1-3, 7.</p>	<p>Disputed to the extent that this Artwork Release is well outside the Time Period (1958-1963) in question, is quoted out of context of the entire document and omits the circumstances under which Kirby and other freelance artists were required by Marvel to sign such self-serving Releases drafted by Marvel as a condition to Marvel returning their original artwork to them. Ev. Dec., Ex. A at 17-20, 22; Mor. Dec., Ex. A at 13, 15; Tob. Dec., Ex. K at 267:14-19; Ex. PP at 89-95; Ex. QQ; Ex. KKK. <i>Marvel v. Simon</i>, 310 F.3d 280 (2002) unequivocally held that Marvel cannot avoid section 304's inalienable termination right by re-characterizing a work as "for hire" years after its creation; and that such is void under 17 U.S.C. § 304(c)(5) as an "agreement to the contrary." 310 F.3d at 292</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 74 as required by Local Rule 56.1(c). Therefore, Paragraph 74 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants' citations do not support Defendants' response and so</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
	<p>("Termination of [a] grant may be effected notwithstanding any agreement to the contrary....").</p>	<p>cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants' citation to Toberoff Decl. Ex. QQ is irrelevant as it refers to a different publisher. Fed. R. Evid. 402.</p> <p>Defendants' citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants' citations to inadmissible hearsay in Exs. PP and KKK to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p>
<p>75. Kirby signed a letter from Marvel, dated May 12, 1987, in which he acknowledged that "notwithstanding [his] execution of the Marvel Artwork Release . . . Marvel has given [Kirby] special permission to arrange for the public exhibition of artwork originally drawn by [him] for Marvel." <i>Id.</i> Ex. 49.</p>	<p>Disputed to the extent that this 1987 letter is well outside the Time Period (1958-1963) in question, is quoted out of context of the entire document, omits the circumstances under which Kirby was required by Marvel to sign such self-serving documents drafted by Marvel as a condition to Marvel returning his original artwork to him, and, in any event, the statement is not relevant to whether Marvel owned the copyright to Kirby's material as "work for hire" or via the purchase and assignment (e.g., 1972 Assignment) of the copyright in such work. Ev. Dec., Ex. A at 17-20, 22; Mor. Dec., Ex. A at 13, 15; Tob. Dec., Ex. K at 267:14-19; Ex. PP at</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 75 as required by Local Rule 56.1(c). Therefore, Paragraph 75 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' citations do not support Defendants' response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
	89-95; Ex. QQ; Ex. KKK.	<p>Defendants' citation to Toberoff Decl. Ex. QQ is irrelevant as it refers to a different publisher. Fed. R. Evid. 402.</p> <p>Defendants' citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants' citations to inadmissible hearsay in Exs. PP and KKK to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p>

Kirby Was Concerned With Receiving Credit For His Work, Not With Copyright Ownership

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>76. In a statement to the <i>Comic Buyer's Guide</i>, published on October 3, 1986, Kirby stated: "I feel I'm entitled to receive proper credit for my role in the creation of The Fantastic Four, Spider-Man, The Hulk, Silver Surfer, etc. . . . This has nothing to do with copyright ownership." <i>Id.</i> Ex. 50.</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 76 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 76 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>77. In a letter to Marvel dated November 19, 1997, written on behalf of Roz Kirby and the Estate of Jack Kirby, attorney Stephen Rohde wrote: "At the outset, let me assure you that Roz is not challenging Marvel's rights in the various characters which Jack created. Any issues regarding ownership have long since been put to rest." <i>Id.</i> Ex. 51 at ME0170.</p>	<p>Disputed and not relevant to determining whether the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 77 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 77 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>78. Defendants have acknowledged that the central dispute with respect to Kirby's works created for Marvel involves Marvel's alleged failure to give proper credit to Kirby for his work. N. Kirby Dep. at 80:10-19; July 1, 2010 Deposition of Lisa Kirby ("L. Kirby Dep.") annexed as Ex. 6 to the Singer Decl. at 66:18-67:5.</p>	<p>Disputed as the central dispute in this action is the validity of defendants' termination notices. <i>See</i> Defendants' Counterclaims at ¶¶ 29-32.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 78 as required by Local Rule 56.1(c). Therefore, Paragraph 78 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>

CREATION OF SPECIFIC CHARACTERS AT ISSUE

Statement of Undisputed Fact	Defendants' Response	Plaintiffs and Counterclaim-Defendants' Reply
<p>79. Stan Lee has identified over 150 characters that he has attested under oath were created or co-created by him for Marvel and that were created for Marvel as works made for hire. These characters include the main and subsidiary characters in <i>The Fantastic Four</i>, <i>The Mighty Thor</i>, <i>The Incredible Hulk</i>, <i>The Amazing Spider-Man</i>, <i>The X-Men</i>, <i>Iron Man</i>, <i>The</i></p>	<p>Disputed. Stan Lee testified that he solely created the iconic characters listed. Lee Dep. at 145, 377:-379. Kirby created or co-created most of these major Marvel's characters. Ev. Dec., Ex. A at 7-8; Mor Dec., Ex. A at 8; Tob. Dec., Ex. MM at 151 (<i>Stan Lee</i>: "Certainly 90 percent of the 'Tales of Asgard' stories were Jack's plots, and they were great! He certainly knew</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 79 as required by Local Rule 56.1(c). Therefore, Paragraph 79 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140;</p>

<p><i>Avengers</i> and <i>Ant-Man</i>, among others. Singer Decl. Ex. 34; <i>see also</i> Lee Dep. at 145:7-21, 377:20-379:3.</p>	<p>more about Norse mythology that I ever did (or at least he enjoyed making it up!”), at 6 (<i>Stan Lee</i>: “Some artists, such as Jack Kirby, need no plot at all. I mean I’ll just say to Jack, ‘Let’s let the next villain be Dr. Doom’ ... or I may not even say that. He may tell me. And then he goes home and does it. He’s so good at plots, I’m sure he’s a thousand times better than I. He just about makes up the plots for these stories.”); Ex. HH at 45 (“<i>Kirby</i>: the artists were doing the plotting- Stan was just coordinating the books, which was his job. Stan was production coordinator. But the artists were the ones that were handling both story and art. We had to- there was no time not to!”); Ex. II (“According to statistics, I’ve done one quarter of Marvel’s entire output. There’s a lot of hard work behind it. It’s something that’s highly individual, highly creative and above all, it sold very well.”); Ex. OO at 174 (“<i>Q</i>: A lot of people don’t know that you actually scripted a lot of these stories-most of them. Even the Marvel stuff. <i>Kirby</i>: I did.”); Ex. JJ at 45, 49 (<i>Kirby</i>: “And I did that with the Marvel books. I wrote the stories. I wrote the plots ,I did the drawings- I did the entire thing...”); Ex. KK at 122 (“<i>Q</i>: You have written your own stories, text and drawings? <i>Kirby</i>: Yes, that’s what I always did and that’s what I am doing now.”); Ex. NN at K1759 (“[Jack Kirby] was a virtually inexhaustible wellspring of fantastic new ideas, concepts and designs.”). Tob. Dec., Ex. I at 23:4-13 (“<i>Q</i>: Do you recall creating any new characters for Marvel after 1970? <i>Stan Lee</i>: There was a time in the –maybe</p>	<p>Reply to ¶¶ Nos. 80-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107, <i>infra</i>.</p> <p>Defendants’ citations do not support Defendants’ response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citation to Toberoff Decl. Ex. MM at 151 refers to work created outside the Time Period and is therefore irrelevant. Fed. R. Evid. 402.</p> <p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Exs. HH, II, JJ, KK and OO the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Additionally, Sinnott was not identified as a potential witness by Defendants and therefore his testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff</p>
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	<p>in the 90s when I started to create a new line of comics for Marvel... We never published them... I was working with new people and it just-they didn't turn out right. But aside from that, no."); Singer Dec., Ex. 53 at 36-37 ("Jack is certainly one of the most talented, if not the most talented guy that the comic book industry has ever produced. He is the most imaginative, the most creative guy I have ever known in this business. His mind is an endless source of stories, concepts and ideas."); Sinn Dec., ¶ 6 ("There is no question in my mind that Jack Kirby was the driving creative force behind most of Marvel's top characters today including 'The Fantastic Four,' 'The Mighty Thor,' 'The Incredible Hulk,' 'X-Men' and 'The Avengers.'") See also responses to ¶¶ 80-83; 85; 88; 90-91; 94-95; 97; 99; 101;103; 105; 107, <i>infra</i>.</p>	<p>Decl. Exs. JJ and OO as these cited documents were not produced in discovery in this action and thus may not be considered on summary judgment. See <i>Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
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Creation of *Fantastic Four*

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>80. In 1961, Martin Goodman instructed Stan Lee to create a new team of superheroes to compete with National Comics's <i>The Justice League of America</i>. Singer Decl. Ex. 52 at MARVEL0017498 ("I worked for [Goodman] and I had to do what he wanted, so I was willing to put out a team of superheroes."); Lee Dep. at 36:7-18, 59:16-60:16; see also Evanier Dep. (11/9/10) at 87:21-88:19.</p>	<p>Disputed. Stan Lee did not solely create the concept of <i>The Fantastic Four</i> nor was Kirby ever given a "synopsis" by Stan Lee. (¶82). Ev. Dec. Ex. A at 14-15; Mor. Dec. Ex. A at 11; Tob. Dec., Ex. D at 192:14-193:3; 230:22-232:20; Ex. B at 49:23- 50:10; Ex. C at 91:24-92:21;110:21-113:3; Ex. G at 117:23-118:17; Ex. J at 307:7-25; 338:16-339:19; 340:20-341:1); Ex. RR; Ex. SS at 188 ("Was the concept of the Fantastic Four your idea or Stan</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 80 as required by Local Rule 56.1(c). Therefore, Paragraph 80 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); see also <i>Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' citations do not support</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
	<p>Lee's?" Kirby: "It was my idea. It was my idea to do it the way it was; my idea to develop it the way it was..." ; Ex. TT at 181 ("In many ways [<i>The Challengers of the Unknown</i>] were the predecessors of the FF"); Sinn Dec., ¶ 6 ("There is no question in my mind that Jack Kirby was the driving creative force behind most of Marvel's top characters today including 'The Fantastic Four,' 'The Mighty Thor,' 'The Incredible Hulk,' 'X-Men' and 'The Avengers.'"). Lee has admitted he co-created the Fantastic Four with Jack Kirby. Tob. Dec. Ex. UU at 57 ("Let me tell you right up front why I'm still frankly fascinated by the concept of the stunning Ms. Storm. At the time that Jack Kirby and I put our noggins together and decided to come up with a new team of super do-gooders, there wasn't much happening in those circles."); Ex. VV at 6 (<i>Lee</i>: "I co-created The Fantastic Four and the Hulk with Kirby."); Ex. J (12/8/10 Stan Lee depo) at 307:11-25; 338:16-339:19; 340:20-341:1); Ex. WW at 13 ("When such fabulous features as the Fantastic Four, the Mighty Thor, and the Incredible Hulk were just a-borning, it was good ol' Jack[] with whom I huddled, harangued and hassled until the characters were designed..."). Lee also co-created the Fantastic Four nemesis Galactus with Jack Kirby. Tob. Dec., Ex. WW at 205 ("Both Jack and I were wracking our brains for some opponent who would be able to offer a still greater challenge than any of those the FF had</p>	<p>Defendants' response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants' citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants' citations to inadmissible hearsay in Exs. RR, SS, TT and ZZ to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants' citation to the deposition testimony of Neal Kirby is also inadmissible as his testimony is based on hearsay. <i>Id.</i></p> <p>Finally, Sinnott was not identified as a potential witness by Defendants and therefore his testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
	<p>yet encountered... Suffice it to say that we came up with just what we had been looking for.”); Ex. XX at 39 (“After hours of head scratching, gazing at the ceiling, stretching, yawning, bending paper clips, staring into space, then staring out of space, we finally got it. It suddenly all came together. “Galactus!” we shouted.”). Kirby also developed his own characters, including creating the famous Silver Surfer, without any input from Stan Lee or anyone else at Marvel. Tob. Dec. Ex. I at 71:11-24; Ex. YY at 30 (““Actually, we’re stuck with the name [the Silver Surfer], because when he first appeared, he appeared as an incidental character in a Fantastic Four story. Jack Kirby just threw him in – I think the name was Jack’s – and called him the Silver Surfer. I thought it sounded good and used him. Had I known that we would end up doing with him what we’re doing today, I would have taken more pains to get a name that was more applicable. But actually, nobody else seems to mind the name. It’s easy to remember and it’s almost a put-on. And I haven’t had any complaints about it.”); Ex. ZZ at 132; Ex. AAA (“When I got the story from Jack to write copy, he had drawn this fellow on the surfboard, and I think he called him the Surfer or the Silver Surfer, and the name was certainly euphonious and we decided to keep it.”); Ex. G at 124:4-9.</p>	
<p>81. Lee developed the concept behind Marvel’s new team of heroes, <i>The Fantastic</i></p>	<p>Disputed. <i>See</i> Response to Statement No. 80.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p><i>Four</i>, including the genesis of their superpowers, their realistic personalities and their relationships with one another. Lee Dep. at 59:16-60:16, 61:10-62:15; Singer Decl. Ex. 11, Track 9; <i>id.</i> Ex. 33 at MARVEL0017694. While Lee conceived of the main characters Mr. Fantastic, Invisible Girl and The Thing, his idea for the Human Torch was borrowed from one of Timely Comics's first comic books from the early 1940s. Lee Dep. at 61:23-62:3.</p>		<p>in Paragraph 81 as required by Local Rule 56.1(c). Therefore, Paragraph 81 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶ No. 80.</p>
<p>82. Lee typed up a synopsis laying out the plot of the first issue of <i>The Fantastic Four</i> comic book and then assigned Kirby to draw the story. Lee and Kirby discussed Lee's ideas in a plotting conference, after which Kirby proceeded to produce the pencil drawings for the first issue of <i>The Fantastic Four</i> based on Lee's synopsis and their discussion. Singer Decl. Ex. 30; Lee Dep. at 36:15-18, 60:17-61:2, 65:5-10, 384:18-21.</p>	<p>Disputed. <i>See</i> Response to Statement No. 80.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 82 as required by Local Rule 56.1(c). Therefore, Paragraph 82 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶ No. 80.</p>
<p>83. Throughout the process of creating the first issue of <i>The Fantastic Four</i>, and even after several issues had already been published, Lee continued to make changes to the characters and story, for example to the personalities, abilities or appearances of the characters. Lee Dep. at 67:6-70:2, 81:21-82:5; Singer Decl. Ex. 53 at 36.</p>	<p>Disputed. <i>See</i> Response to Statement No. 80.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 83 as required by Local Rule 56.1(c). Therefore, Paragraph 83 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶ No. 80.</p>
<p>84. The Fantastic Four was originally published in its own comic book, <i>The Fantastic</i></p>	<p>Admitted.</p>	<p>No reply is necessary.</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<i>Four</i> , Vol. 1, No. 1, with a cover date of November 1961. <i>See</i> Bard Decl. Ex. 1 at MARVEL0001026.		

Creation of *The Incredible Hulk*

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>85. In 1962, Lee conceived of the story of The Incredible Hulk, a sympathetic monster who was also a hero. Lee was inspired by the story of the misunderstood monster in the Boris Karloff film <i>Frankenstein</i>, as well as with the story of Dr. Jekyll and Mr. Hyde. Lee Dep. at 80:10-81:19, 83:14-84:14; Singer Decl. Ex. 33 at MARVEL0017749. Lee assigned Kirby to draw the first issue. Lee Dep. at 83:5-13, 84:18-23.</p>	<p>Disputed. Stan Lee co-created <i>The Incredible Hulk</i> with Jack Kirby. Tob. Dec., Ex. C at 56:7-21; Ex. VV at 6 (I co-created The Fantastic Four and the Hulk with Kirby.”); Ex. WW at 13 (“When such fabulous features as the Fantastic Four, the Mighty Thor, and the Incredible Hulk were just a-borning, it was good ol’ Jack[] with whom I huddled, harangued and hassled until the characters were designed...”); Ex. RR; Ex. BBB at 1; Ex. YY at 23 (“When I created Hulk with Artist Jack Kirby, we had the feeling that people love a guy who isn’t perfect.”); Ex. U at 88 (“For their second superhero, Lee and Kirby came up with a monstrous figure...the result was The Incredible Hulk.”); Singer Dec., Ex. 41 at MARVEL17226 (“The Hulk I created when I saw a woman lift a car. Her baby was caught under the running board of this car.”); Sinn Dec., ¶ 6 (“There is no question in my mind that Jack Kirby was the driving creative force behind most of Marvel’s top characters today including ‘The Fantastic Four,’ ‘The Mighty Thor,’ ‘The Incredible Hulk,’ ‘X-Men’ and ‘The Avengers.’”); Ev. Dec. Ex. A at 15; Mor. Dec. Ex. A at 10.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 85 as required by Local Rule 56.1(c). Therefore, Paragraph 85 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ citations do not support Defendants’ response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Exs. U and RR to the Toberoff Decl. may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>,</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
		<p>241 F. Supp. 2d at 270.</p> <p>For the purposes of Defendants' response, the cited statements in Singer Decl. Ex. 41 are inadmissible hearsay and also may not be used to dispute facts. <i>Id.</i></p> <p>Finally, Sinnott was not identified as a potential witness by Defendants and therefore his testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p>
<p>86. The first issue of <i>The Incredible Hulk</i>, Vol. 1, No. 1 was published with a cover date of May 1962. Bard Decl. Ex. 1 at MARVEL0001100.</p>	<p>Admitted.</p>	<p>No reply is necessary.</p>
<p>87. The Hulk was originally gray-skinned, but after the printer had trouble printing the color consistently throughout the book, Lee decided to change the coloration of the hero's skin to green after the first issue was published. Lee Dep. at 81:20-83:4; Singer Decl. Ex. 33 at MARVEL0017750; <i>see also id.</i> Ex. 11, Track 12.</p>	<p>Disputed to the extent Stan Goldberg claimed he chose the color green for the Hulk character. Tob. Dec., Ex. UUU at 16.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 87 as required by Local Rule 56.1(c). Therefore, Paragraph 87 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' citation to Toberoff Decl. Ex. UUU is presumably a clerical error and actually refers to Toberoff Decl. Ex. CCC.</p> <p>Defendants' citation to inadmissible hearsay in Ex. CCC to the Toberoff Decl. may not be used to dispute facts. <i>See</i></p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
		<i>Sarno</i> , 183 F.3d at 160; <i>Hidden Brook Air</i> , 241 F. Supp. 2d at 270.

Creation of *The Mighty Thor*

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>88. In 1962, Lee decided to introduce a new comic book story centered on Thor, the Norse god of thunder. Lee gave a synopsis of the plot to his brother Larry Lieber, who wrote a full panel-by-panel script for the first Thor issue based on Lee's outline and made up the name of Thor's alter ego Don Blake and his enchanted Uru hammer. Because Kirby had an interest in mythology, he was given the script that Lieber had written and assigned to draw the first issue to feature Thor and the subsidiary characters of the Asgaardian realm. Singer Decl. Ex. 11, Track 14; Lee Dep. at 87:11-89:8, 89:13-90:19, 91:2-3; Lieber Dep. at 19:9-19, 20:8-21:17, 48:25-49:4; Singer Decl. Ex. 33 at MARVEL0017848 (Lee notes that he provided an outline to Lieber; explaining that "[e]ven though [he] wouldn't be writing the script, [Lee] always tried to ensure that the basic concepts would be [his]"); <i>see also</i> Evanier Dep. (12/6/10) at 190:2-9, 190:15-22, 238:6-21.</p>	<p>Disputed. The record shows that Lee and his brother did not create Thor and then present it to Kirby to draw. (¶ 88) Kirby's well documented love of Norse mythology and drawing of an earlier incarnation of Thor in 1942 indicates at a minimum that Thor was a collaboration between Kirby and Lee. Even Lieber admitted he had no idea whether Kirby and Lee discussed Thor <i>before</i> he was assigned to write the first script. Tob. Dec., Ex. E at 80:23-81:4; 81:14-82:25; WW at 13 ("When such fabulous features as the Fantastic Four, the Mighty Thor, and the incredible Hulk were just a-borning, it was good ol' Jack[] with whom I huddled, harangued and hassled until the characters were designed..."); Ex. RR; Ex. DDD at 4; Ex. MM at 151 ("Certainly 90 percent of the 'Tales of Asgard' stories were Jack's plots, and they were great! He certainly knew more about Norse mythology than I ever did (or at least he enjoyed making it up!")); Ex. C at 56:7-21; 57:14-58:10; Ex. EEE at 95 ("What prompted you to reinvent Thor for the comics in 1962? <i>Jack Kirby</i>: Well, I knew the Thor legends very well, but I wanted to modernize them."); Ex. D at 203:18-204:14; 233:13-234:9; Ex. G at 50:14-52:14; 83:21-</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 88 as required by Local Rule 56.1(c). Therefore, Paragraph 88 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' citations do not support Defendants' response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants' citation to Toberoff Decl. Ex. MM at 151 refers to work created outside the Time Period and is therefore irrelevant. Fed. R. Evid. 402.</p> <p>Defendants' citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
	84:25; Sinn Dec., ¶ 6 (“There is no question in my mind that Jack Kirby was the driving creative force behind most of Marvel’s top characters today including ‘The Fantastic Four,’ ‘The Mighty Thor,’ ‘The Incredible Hulk,’ ‘X-Men’ and ‘The Avengers.’”); Ev. Dec. Ex. A at 16; Mor. Dec. Ex. A at 11-12.	<p>Defendants’ citation to inadmissible hearsay in Exs. RR, DDD and EEE to the Toberoff Decl. may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citation to the deposition testimony of Neal Kirby is also inadmissible as his testimony is based on hearsay. <i>Id.</i></p> <p>Finally, Sinnott was not identified as a potential witness by Defendants and therefore his testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p>
89. Thor first appeared in <i>Journey Into Mystery</i> , Vol. 1, No. 83, published with a cover date of August 1962. Bard Decl. Ex. 1 at MARVEL0001182.	Admitted.	No reply is necessary.

Creation of Spider-Man

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
90. In 1962, Lee came up with the idea and name for Spider-Man, a realistic and nerdy teenage hero who had the power to stick to walls and ceilings like an insect. Initially, Lee assigned the artwork for the Spider-Man story to Kirby. However, when Lee saw that Kirby’s initial pencil drawings depicted an overly	Disputed. Jack Kirby was involved in the original creation of Spiderman, which was based upon a character called <i>The Fly</i> that Kirby and Joe Simon had developed in the late 1950s. This character was based on an earlier Kirby character called the Silver Spider. Ev. Dec. Ex. A at 16-17; Mor. Dec., Ex. A at 12; Tob Dec.,	Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 90 as required by Local Rule 56.1(c). Therefore, Paragraph 90 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i> , 472

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>muscular and heroic-looking character and did not capture his expectations for the appearance of the hero, Lee paid Kirby for his work, took him off the comic book and replaced him with artist Steve Ditko. Singer Decl. Ex. 11, Track 11; Lee Dep. at 37:3-38:3, 74:6-75:5, 75:9-23, 376:3-15; <i>see also</i> Evanier Dep. (11/9/10) at 133:13-20; Morrow Dep. at 236:11-16, 237:5-19; Singer Decl. Ex. 33 at MARVEL0017803-04 (“But alas and alack, when I saw the first few pages that Jack had drawn, I realized we had a problem. They were too good. Try as he might, he had been apparently unable to deglamorize Spidey enough. . . I realized it might be better to let someone else try Spider-Man . . . I asked Steve [Ditko] to draw Spider-Man. And he did. And the rest is history.”).</p>	<p>Ex. J at 320:4-322:1; Ex. D at 198:7-199:13; Ex. C at 62:8-23; 234:22-235:19. Jack Kirby drew the cover of <i>Amazing Fantasy</i> No. 15. Ev. Dec., Ex. B at 126-127. In the past Stan Lee repeatedly stated he was unsure of whether Ditko or Kirby came up with Spider-Man’s iconic costume. Tob. Dec., Ex. J at 320:4-325:7; Ex. G at 97:18-98:13; 103:9-19; 140:14-23; Ex. RR; Singer Dec., Ex. 53 at 36 (“To this day, I don’t know who made up the Spider-Man costume. It might have been Kirby who did those first few pages and Ditko might have copied Kirby’s costume. Or Ditko might have just made up the costume and disregarded what Kirby did. I can’t remember.”).</p>	<p>F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ citations do not support Defendants’ response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citation to inadmissible hearsay in Ex. B to the Evanier Decl. and Ex. RR to the Toberoff Decl. may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citation to the deposition testimony of Neal Kirby is also inadmissible as his testimony is based on hearsay. <i>Id.</i></p>
<p>91. Lee assigned Kirby to draw the cover of the first appearance of Spider-Man in <i>Amazing Fantasy</i>. Kirby drew the cover for the first appearance of Spider-Man after the comic book art was completed. Lee Dep. at 38:23-39:5.</p>	<p>Disputed. <i>See</i> Response to Statement No. 90.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 91 as required by Local Rule 56.1(c). Therefore, Paragraph 91 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
		F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140; Reply to ¶ No. 90.
92. The first appearance of Spider-Man was in <i>Amazing Fantasy</i> , Vol. 1, No. 15, published with a cover date of September 1962. Bard Decl. Ex. 1 at MARVEL0000988.	Admitted.	No reply is necessary.
93. The Spider-Man character was so successful that Goodman later decided to give the character its own comic book. See Lee Dep. at 77:21-25. The new book, <i>The Amazing Spider-Man</i> , was first published with a cover date of March 1963. Bard Decl. Ex. 1 at MARVEL0000992.	Admitted.	No reply is necessary.

Creation of Iron Man

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
94. In early 1963, Lee came up with the idea for the character Iron Man, who was a hero in an incredibly powerful suit of metal armor; he was a millionaire playboy but was also tragically vulnerable due to an injury to his heart. After conceiving of the plot and characters, Lee assigned Larry Lieber to write a detailed panel-by-panel script for the first comic book to feature Iron Man; Larry Lieber conceived of the hero's "civilian name," Anthony Stark. Singer Decl. Ex. 11, Track 13; Lee Dep. at 84:24-85:24, 86:6-87:8; Lieber Dep. at 23:22-24:7, 24:19-25:25, 48:25-49:4; see also Evanier Dep. (12/6/10) at 190:2-9, 190:15-22, 246:5-7;	Disputed. Kirby was the first to design Iron Man's costume, which he did for the cover of <i>Tales of Suspense</i> No. 39. Tob. Dec., Ex. U at 99 ("'[Kirby] designed the costume,' says [Don] Heck, 'because he was doing the cover. The covers were always always done first...'"); Ex. RR ; Ex. B at 74:15-75:1; Ex. C at 245:12-15; 246:11-248:7; Ex. D at 259:24-260:6; 260:16-261:7; 277:23-278:15; Ex. E at 88:6-89:2; 92:4-9; Ex. G at 108:13-18; Ex. TT at 181 (<i>Jack Kirby</i> : "Anyway, I laid out the first Iron Man and plotted it and Don Heck finished it up.").	Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 94 as required by Local Rule 56.1(c). Therefore, Paragraph 94 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); see also <i>Parks Real Estate</i> , 472 F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140. Defendants' citations do not support Defendants' response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). See Local Rule 56.1(b)-(d).

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
Morrow Dep. at 260:16-261:7.		<p>Defendants' citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants' citations to inadmissible hearsay in Exs. U, RR and TT to the Toberoff Decl. may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants' citation to the deposition testimony of Neal Kirby is also inadmissible as his testimony is based on hearsay. <i>Id.</i></p>
<p>95. Lee then assigned artist Don Heck to do the artwork based on Lieber's script. Lee Dep. at 36:19-23, 85:21-86:5; Lieber Dep. at 26:2-11. Lee assigned Kirby to draw the cover of the first issue to feature the Iron Man character. Lee Dep. at 36:25-37:2, 85:25-86:5.</p>	Disputed. <i>See</i> Response to Statement No. 94.	Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 95 as required by Local Rule 56.1(c). Therefore, Paragraph 95 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i> , 472 F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140; Reply to ¶ No. 94.
<p>96. The Iron Man character first appeared in <i>Tales of Suspense</i>, Vol. 1, No. 39, published with a cover date of March 1963. Bard Decl. Ex. 1 at MARVEL0001452.</p>	Admitted.	No reply is necessary.

Creation of *The X-Men*

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>97. In 1963, Martin Goodman asked Lee to create another team of superheroes. Lee conceived of The X-Men, a team of mutants who were born with their superpowers. After Goodman directed Lee to revise the original name he had made up – The Mutants – Lee decided on the name The X-Men, based on the main character Professor Xavier and the fact that the heroes had “extra” powers. With the new name, Goodman approved of the project. Singer Decl. Ex. 11, Track 15; Lee Dep. at 92:25-94:23. Lee assigned the artwork for the new book to Kirby. Lee Dep. at 94:24-95:4.</p>	<p>Disputed. Jack Kirby co-created the X-men with Stan Lee. Mor. Dec., Ex. A at 10; Ev. Dec., Ex. A at 15; Tob. Dec. Ex. WW at 14 (“No sooner did I discuss the basic premise with Jack than we were off and running. We decided to create two groups of mutants, one evil and the other good. One would be eternally striving to subjugate mankind, and the other would be ceaselessly battling to protect the human race.”); Ex. U at 111-112 (“Once again, Jack Kirby joined Lee as co-creator of the comic book. ‘Jack was the best guy to work with you could imagine,’ says Lee. ‘Any idea I would give him, he could make it better. When Jack brought in the first story, it opened with all the X-men fighting in the place they called The Danger Room, where they were trained. That was Jack’s idea. And it was the most brilliant opening because it started with action and showed all their abilities immediately.”); Ex. J at 316:22-317:22; 317:25-319:5.; Ex. G at 129:9-131:19; Sinn Dec., ¶ 6 (“There is no question in my mind that Jack Kirby was the driving creative force behind most of Marvel’s top characters today including ‘The Fantastic Four,’ ‘The Mighty Thor,’ ‘The Incredible Hulk,’ ‘XMen’ and ‘The Avengers.’”).</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 97 as required by Local Rule 56.1(c). Therefore, Paragraph 97 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ citations do not support Defendants’ response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citation to inadmissible hearsay in Ex. U to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citation to the deposition testimony of Neal Kirby is also inadmissible as his testimony is based on</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
		<p>hearsay. <i>Id.</i></p> <p>Finally, Sinnott was not identified as a potential witness by Defendants and therefore his testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p>
<p>98. The first issue of <i>The X-Men</i>, Vol. 1, No. 1 was published with a cover date of September 1963. Bard Decl. Ex. 1 at MARVEL0001654.</p>	<p>Admitted.</p>	<p>No reply is necessary.</p>

Creation of *The Avengers*

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>99. In 1963, Lee created yet another team of superheroes, in which existing popular superheroes on Marvel's roster would gather together to become a fighting team called The Avengers. After he had conceived of the initial plot and had obtained Goodman's approval, Lee assigned the first issue of <i>The Avengers</i> to Kirby to draw. Lee Dep. at 96:19-98:9.</p>	<p>Disputed. Jack Kirby co-created the Avengers with Stan Lee. Mor. Dec., Ex. A at 10; Ev. Dec., Ex. A at 15; Ex. U (Five decades) at 108; Ev. Dec., Ex. B at 131; Sinn Dec., ¶ 6 ("There is no question in my mind that Jack Kirby was the driving creative force behind most of Marvel's top characters today including 'The Fantastic Four,' 'The Mighty Thor,' 'The Incredible Hulk,' 'X-Men' and 'The Avengers.'").</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 99 as required by Local Rule 56.1(c). Therefore, Paragraph 99 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' citations do not support Defendants' response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants' citations to the inadmissible testimony and reports of Evanier and</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
		<p>Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants' citations to inadmissible hearsay in Ex. B to the Evanier Decl. and Ex. U to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Finally, Sinnott was not identified as a potential witness by Defendants and therefore his testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p>
<p>100. The first issue of <i>The Avengers</i>, Vol. 1, No. 1, was published with a cover date of September 1963. Bard Decl. Ex. 1 at MARVEL0001020.</p>	<p>Admitted.</p>	<p>No reply is necessary.</p>

Creation of Ant-Man

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>101. Lee initially conceived of the idea of Ant-Man as a miniature hero. After Goodman "okayed" the project, Lee assigned the story to Larry Lieber, who wrote a detailed panel-by-panel script for the first comic book to feature Ant-Man, and also named the hero's alter ego, Henry Pym. After the script was completed, it</p>	<p>Disputed. Jack Kirby co-created the Ant-Man with Stan Lee. Ev. Dec., Ex. A at 15; Tob. Dec., Ex. E at 91:23-92:3; Ex. G at 68:23-69:14; Ex. U at 97-98; Ex. GGG at 139; Ex. RR; Ev. Dec., Ex. B at 128 ("...Tales to Astonish got its first super hero feature in 1962: Ant-Man, a shrinking super-hero...Kirby drew the first</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 101 as required by Local Rule 56.1(c). Therefore, Paragraph 101 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>was assigned to Jack Kirby, who drew the pencil artwork for the first issue. Lee Dep. at 98:14-99:15, 99:21-24; Lieber Dep. at 27:11-28:9, 28:13-23, 48:25-49:4.</p>	<p>stories...); Sinn Dec., ¶ 6 (“There is no question in my mind that Jack Kirby was the driving creative force behind most of Marvel’s top characters today including ‘The Fantastic Four,’ ‘The Mighty Thor,’ ‘The Incredible Hulk,’ ‘X-Men’ and ‘The Avengers.’”)</p>	<p>F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ citations do not support Defendants’ response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citations to the inadmissible testimony and report of Evanier may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67.</p> <p>Defendants’ citations to inadmissible hearsay in Ex. B to the Evanier Decl. and Exs. U, RR and GGG to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citation to the deposition testimony of Neal Kirby is also inadmissible as his testimony is based on hearsay. <i>Id.</i></p> <p>Finally, Sinnott was not identified as a potential witness by Defendants and therefore his testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
102. The first appearance of Ant-Man and his cast of subsidiary characters was in <i>Tales to Astonish</i> , Vol. 1, No. 27, published with a cover date of January 1962. Bard Decl. Ex. 1 at MARVEL0001966.	Admitted.	No reply is necessary.

Creation of Nick Fury

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
103. In 1963, Lee decided to reintroduce a popular Marvel character from a war series called <i>Sgt. Fury and His Howling Commandos</i> , which Marvel had discontinued years earlier. Lee assigned the artwork for the new series to Kirby because he thought it was “right up [Kirby’s] alley” and oversaw the creation of the comic book under the Marvel Method. Lee Dep. at 95:13-96:18; <i>see also</i> Morrow Dep. at 201:2-6.	Disputed. Largely based on his own combat experience in World War II, Jack Kirby brought Nick Fury to Marvel. Mor Dec. Ex. A at 12-13; Ev. Dec. Ex. A at 15; Ex. B at 127-131 (“From 1963 to 1964, Jack drew eight of the first thirteen issues, tapping into his endless cache of World War II memories and fashioning the lead character, the cigar chomping Sgt. Nick Fury, on himself...[Kirby] explained, “Nick Fury is how I wish others saw me. [The Thing] is probably closer to the way they do see me.”); Ex. RR; Ex. HHH at 31; Ex. C at 58:20-59:8; Ex. D at 199:14-200:25; Ex. G at 74:17-75:13; 124:4-12; 126:4-9.	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 103 as required by Local Rule 56.1(c). Therefore, Paragraph 103 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ citations do not support Defendants’ response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Ex. B to the Evanier Decl. and</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
		<p>Exs. RR and HHH to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants' citation to the deposition testimony of Neal Kirby is also inadmissible as his testimony is based on hearsay. <i>Id.</i></p>
<p>104. The Nick Fury character was first reintroduced to Marvel's line of comic books in <i>Sgt. Fury and His Howling Commandos</i>, Vol. 1, No. 1, published with a cover date of May 1963. Bard Decl. Ex. 1 at MARVEL0001236.</p>	<p>Admitted.</p>	<p>No reply is necessary.</p>

Creation of *The Rawhide Kid*

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>105. Lee created <i>The Rawhide Kid</i> for Goodman because Goodman loved westerns. Lee decided on the title because Goodman liked names that involved "the Kid." Lee wrote the first issue of <i>The Rawhide Kid</i>, and Kirby was assigned to draw the pencils. After Kirby moved on to drawing superhero books, the writing and artwork were reassigned to Larry Lieber. Lee Dep. at 99:25-100:24; Lieber Dep. at 33:9-18.</p>	<p>Disputed. While Kirby did not create the <i>Rawhide Kid</i> character, he substantially "revamped" it in 1960. Ev. Dec., Ex. B at 112.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 105 as required by Local Rule 56.1(c). Therefore, Paragraph 105 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants' citations do not support Defendants' response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See</i> Local Rule</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
		56.1(b)-(d). Defendants' citation to inadmissible hearsay in Ex. B to the Evanier Decl. may not be used to dispute facts. <i>See Sarno</i> , 183 F.3d at 160; <i>Hidden Brook Air</i> , 241 F. Supp. 2d at 270.
106. The first issue of <i>The Rawhide Kid</i> named in the Termination Notices is Vol. 1, No. 17, which was published with a cover date of August 1960. <i>See Bard Decl. Ex. 1 at MARVEL0001768.</i>	Admitted.	No reply is necessary.

Creation of *The Silver Surfer*

Statement of Undisputed Fact	Defendants' Response	Plaintiffs and Counterclaim-Defendants' Reply
107. In 1966, Lee conceived of a new supervillain called Galactus to be featured <i>The Fantastic Four</i> . Lee told Kirby his idea and assigned him to draw the issue. In the course of the assignment and fleshing out Lee's ideas, Kirby inserted a new character, a silver-toned figure on a flying surfboard, who would serve as Galactus's herald in space. Lee approved the addition and included the character, which he named The Silver Surfer, in the new issue of <i>The Fantastic Four</i> . Singer Decl. Ex. 11, Track 10; Lee Dep. at 70:23-73:23, 79:20-80:9, 331:2-18.	Disputed. <i>See Response to Statement No. 80</i>	Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 107 as required by Local Rule 56.1(c). Therefore, Paragraph 107 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i> , 472 F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140; Reply to ¶ No. 80.

Statement of Undisputed Fact	Defendants' Response	Plaintiffs and Counterclaim-Defendants' Reply
108. The Silver Surfer did not appear until <i>Fantastic Four</i> , Issue No. 48 in 1966, so the character is not subject to the Termination Notices. <i>See Singer Decl. Ex. 16.</i>	Admitted. <i>See also</i> Response to Statement No. 80	No reply is necessary.

DEFENDANTS LACK KNOWLEDGE AND INFORMATION SUFFICIENT TO RAISE A GENUINE ISSUE OF MATERIAL FACT

Defendants Lack Knowledge of Marvel's Work-For-Hire Practices

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
109. Susan Kirby was born on December 6, 1945 and was between the ages of approximately thirteen and eighteen during the years 1958 to 1963. <i>S. Kirby Dep. at 9:10-11.</i>	Admitted.	No reply is necessary.
110. Neal Kirby was born on May 25, 1948 and was between the ages of approximately ten and fifteen during the years 1958 to 1963. <i>N. Kirby Dep. at 7:18-19.</i>	Admitted.	No reply is necessary.
111. Barbara Kirby was born on November 26, 1952 and was between the ages of approximately six and eleven during the years 1958 to 1963. <i>Id. at 7:5-8, 7:15-17.</i> Defendants have represented that Barbara Kirby is not competent to testify in this action and that she has no personal knowledge or admissible evidence regarding this action. <i>Singer Decl. Ex. 54.</i>	Admitted.	No reply is necessary.
112. Lisa Kirby was born on September 7, 1960 and was approximately three years old in 1963. <i>L. Kirby Dep. at 6:2-3.</i>	Admitted.	No reply is necessary.
113. None of the Defendants was present	Admitted that neither Lisa Kirby nor Neal Kirby	Defendants' response does not set forth any

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<p>during any meeting between Kirby and Lee, and none of the Defendants has any personal knowledge regarding the substance of any meetings or discussions that Kirby had with Lee or any other non-family member about the Works or any of the work he did for Marvel. N. Kirby Dep. at 55:18-56:19, 57:8-17, 77:2-6, 97:5-8, 117:10-15; L. Kirby Dep. at 96:14-18; S. Kirby Dep. at 10:25-11:8.</p>	<p>personally attended a meeting between Stan Lee and Jack Kirby, otherwise disputed to the extent that this is not relevant to nor dispositive of whether or not the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel.</p>	<p>specific facts to dispute the facts set forth in Paragraph 113 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 113 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>114. Defendants have no personal knowledge as to whether any of the characters to which Kirby contributed were created pursuant to specific assignments or commissions from Marvel, or whether any of the stories to which Kirby contributed were the result of a collaboration between Kirby and Lee. N. Kirby Dep. at 72:1-6, 169:8-18; S. Kirby Dep. at 27:3-9, 76:17-23.</p>	<p>Disputed to the extent that both Susan Kirby and Neal Kirby testified to witnessing their father create characters in the basement of their home. Tob. Dec., Ex. G at 50:14-52:14; 83:21-84:25; Ex. H at 9:15-10:18. Further disputed to the extent that this is not relevant to nor dispositive of whether or not the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 114 as required by Local Rule 56.1(c). Therefore, Paragraph 114 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>115. Neal Kirby has no way of knowing whether Kirby ever worked from a script or synopsis. Defendants did, however, acknowledge that Kirby worked on deadlines and often would work 16-18 hours per day to meet those deadlines, and that he never worked on spec. N. Kirby Dep. at 91:16-25, 117:16-22, 127:25-128:5 (“My father didn’t do work on spec, he was getting paid by the page.”); S. Kirby Dep. at 52:4-14.</p>	<p>Disputed. Neal Kirby testified he “never saw a script or synopsis by his [father’s] drawing board.” Tob. Dec., Ex. G at 117:21; 118:13-17. Neal Kirby testified that his father did pitch ideas on spec to Marvel: “Q: You have indicated very clearly that your father never did work on Marvel on spec, correct? <i>Neal Kirby</i>: In terms of – maybe I need to qualify that, okay? In terms of would my father have pitched an idea, if you don’t mind my using the word ‘pitch,’ you know, met with somebody else saying gee, I have this good idea for a character, you know,</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 115 as required by Local Rule 56.1(c). Therefore, Paragraph 115 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may</p>

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	<p>would you like to go for it, that he would have done it you know. Definitely I would consider that coming up with an idea and speculation.” Tob. Dec. Ex. G at 167:21-168:5; 233:15-234:5 (“Q: ...[I]n the instances where Marvel said it liked the idea and [Kirby] proceeded to do work, did you consider that work to be on spec or not on spec? Neal Kirby: Well...in respect to even if they liked the idea and you would go back and let’s say pencil, come up with either character concepts or full pages, I believe he had the understanding that they still might not purchase that work, he would still be out the time.”). Whether Jack Kirby “worked on deadlines” is not relevant to nor dispositive of whether the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel. <i>See Opp.</i> at 13-20</p>	<p>not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants’ citations do not support Defendants’ response and so cannot be used to dispute facts. <i>See Local Rule 56.1(b)-(d).</i></p>
<p>116.Neal Kirby has no information to dispute the fact that Lee had discretion to, and routinely did, ignore the notes that Kirby would sometimes make in the margin of his pencil drawings. N. Kirby Dep. at 218:15-219:5.</p>	<p>Disputed. Neal Kirby testified that his father provided margin notes “to guide the person adding the dialogue in the balloons.” Tob. Dec., Ex. G at 218:19-25. Lee would consult and use margins notes provided by Kirby in published Marvel comic books, both of which were available to Neal Kirby. Ev. Dec., Ex. A at 9-10; Tob. Dec., Ex. D at 66:8-22; Ex. FF; Ex. GG at 192-199.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 116 as required by Local Rule 56.1(c). Therefore, Paragraph 116 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ citations do not support Defendants’ response and therefore do not dispute the facts alleged as required by Local Rule 56.1(d). <i>See Local Rule</i></p>

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		<p>56.1(b)-(d).</p> <p>Defendants' citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants' citations to inadmissible hearsay in Exs. FF and GG to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants' citation to the deposition testimony of Neal Kirby is also inadmissible as his testimony is based on hearsay. <i>Id.</i></p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Ex. GG as this cited document was not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>
<p>117.Neal Kirby acknowledged that Stan Lee was "in charge" of Kirby's submission of artwork for publication. N. Kirby Dep. at 56:10-12.</p>	<p>Disputed. This statement is not relevant to nor dispositive of whether or not the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel. Further disputed to the extent Kirby was</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 117 as required by Local Rule 56.1(c). Therefore, Paragraph 117 is deemed admitted in its entirety for the purposes of this motion. Local Rule</p>

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	<p>not legally “required to report to Lee and to abide by his ‘marching orders’” as he had no contract with Marvel. Mor. Dec., Ex. A at 8-10; Ev. Dec., Ex. A at 11-12; Tob. Dec., Ex. E at 71:17-72:7; 72:22-73:8; 73:11- 74:5; 76:25-77:6; Ex. F at 194:11-21; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L at ¶ 1, 3. Kirby had no legal obligation to provide work to Marvel, finish artwork he had started with the intention to sell to Marvel, nor to revise material requested by Marvel.. Kirby was free to reject any of Marvel’s requests or to submit material that Marvel did not request. <i>See</i> Opp. at 13-20. Ev. Dec. ¶ 17, 19, 20; Ex. B at 355-56 (Captain Glory); Ex. C (<i>Jack Kirby’s Gods</i> portfolio), D (<i>New Gods</i> presentation pieces). Tob. Dec., Ex. MM at 6 (“Some artists, such as Jack Kirby, need no plot at all. I mean I’ll just say to Jack, ‘Let’s let the next villain be Dr. Doom’ ... or I may not even say that. He may tell me. And then he goes home and does it. He’s so good at plots, I’m sure he’s a thousand times better than I. He just about makes up the plots for these stories.”),151; Ex. GG at 193; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.</p>	<p>56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Defendants’ response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Moreover, Defendants’ citations do not support Defendants’ response and so cannot be used to dispute facts. <i>See</i> Local Rule 56.1(b)-(d).</p> <p>Defendants’ citations to the inadmissible testimony and reports of Evanier and Morrow may not be considered on summary judgment. <i>See Daubert</i>, 509 U.S. at 579; <i>see also</i> Docket Nos. 67, 70.</p> <p>Defendants’ citations to inadmissible hearsay in Exs. B, C, and D to the Evanier Decl. and Ex. GG to the Toberoff Decl. also may not be used to dispute facts. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p> <p>Defendants’ citations to the Evanier Decl. are also inadmissible for the additional reason that they are outside the scope of Evanier’s expert report, and therefore cannot be used to dispute facts. Fed. R.</p>

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		<p>Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); <i>see also Highland Capital Mgmt.</i>, 551 F. Supp. 2d at 182.</p> <p>Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. cannot be used to dispute facts because neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; <i>see also Hicks</i>, 593 F.3d at 167.</p> <p>Additionally, neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1); <i>see also Design Strategy, Inc.</i>, 469 F.3d at 284.</p> <p>Finally, Defendants cannot create a factual dispute through their reliance on Toberoff Decl. Ex. GG as this document was not produced in discovery in this action and thus may not be considered on summary judgment. <i>See Melie</i>, 2009 WL 1404325, at *1 n.4.</p>

Defendants Have No Knowledge Regarding The Creation Of Specific Works Subject To The Termination Notices

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118. In their depositions, Defendants were unable to identify any specific facts regarding	Disputed. Both Neal Kirby and Susan Kirby testified about the creation of works by their	Defendants' response does not set forth any specific facts to dispute the facts set forth

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<p>the circumstances under which any of the Works were created. N. Kirby Dep. at 64:10-20, 69:15-18, 97:13-17, 99:6-22, 104:4-17, 104:25-105:7, 108:7-12, 108:25-109:2, 109:3-11, 109:21-24, 111:19-112:18, 113:9-114:14, 117:23-118:7, 120:9-121:19, 126:13-127:18, 128:14-18, 130:12-131:2, 137:17-23, 139:10-13, 141:20-142:1, 142:6-17, 194:14-195:1; L. Kirby Dep. at 34:6-11, 92:15-94:3, 94:18-95:3, 95:8-17, 99:22-23, 103:24-104:5, 107:20-108:23, 109:5-8, 113:3-6, 113:17-24; S. Kirby Dep. at 28:11-17, 43:19-22, 59:24-60:4, 64:21-25.</p>	<p>father, Jack Kirby. Tob. Dec., Ex. G at 50:14-52:14; 74:9-75:13; 83:21-84:25; 97:18-98:13; 103:9-19; 124:4-12; 126:4-9; 129:9-131:19; 140:14-23; Ex. H at 9:15-10:18.</p>	<p>in Paragraph 118 as required by Local Rule 56.1(c). Therefore, Paragraph 118 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p> <p>Moreover, any testimony by Neal or Susan Kirby with regard to the creation of the Works at issue is based on hearsay and is therefore inadmissible. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p>
<p>119. Neal Kirby did no research prior to serving the Termination Notices regarding whether any of the Works were in fact created or co-created by Kirby. N. Kirby Dep. at 194:14-195:1.</p>	<p>Disputed. Neal Kirby testified that he did research on this subject in the very testimony cited by Marvel: “Q: Did you do any research to determine whether any of the characters that were the subject of your notices were in fact created by your father or co-created by him? Neal: I did some. Q: What research did you do? Neal: Oh, just some with books that I have or a little talking with my sister and so on.” Tob. Dec., Ex. G at 194:14-195:12.</p>	<p>Defendants correctly cite the quotation from the deposition of Neal Kirby.</p> <p>However, this alleged fact is not material as it will not “affect the outcome of the suit under the governing law.” <i>Kinsella v. Rumsfeld</i>, 320 F.3d 309, 311 (2d Cir. 2003) (citing <i>Anderson v. Liberty Lobby, Inc.</i>, 477 U.S. 242, 248 (1986)).</p>
<p>120. Lisa Kirby has no personal knowledge regarding the circumstances of the creation of any characters to which Kirby contributed while working for Marvel, and she was too young at the time to have any personal knowledge of the relevant facts. L. Kirby Dep. at 34:6-11, 92:15-94:3, 94:18-95:3, 95:8-17, 99:22-23.</p>	<p>Disputed to the extent this statement is not relevant to nor dispositive of whether or not the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 120 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 120 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d);</p>

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		<i>see also Parks Real Estate</i> , 472 F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140.
121.Neal Kirby has no personal knowledge or recollection of the circumstances under Kirby created any of the Works. N. Kirby Dep. at 64:10-20. Neal Kirby's best recollection of the events concerning Kirby's work are outside the Time Period. <i>Id.</i> at 92:24-93:3.	Disputed. Neal Kirby testified about the creation of works by his father. Tob. Dec., Ex. G at 50:14-52:14; 74:9-75:13; 83:21-84:25; 97:18-98:13; 103:9-19; 124:4-12; 126:4-9; 129:9-131:19; 140:14-23.	Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 121 as required by Local Rule 56.1(c). Therefore, Paragraph 121 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i> , 472 F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140.
122.Defendants can point to no evidence to dispute Lee's testimony that he, and not Kirby, conceived of <i>The Fantastic Four</i> . N. Kirby Dep. at 117:23-118:7, 120:9-121:19; S. Kirby Dep. at 28:11-17.	Disputed. Neal Kirby testified that his father created the Fantastic Four in the very testimony cited by Marvel: "Q: What information, if any, do you have concerning the creation of the Fantastic Four? Neal: In discussions with my father The Fantastic Four basically was derivative of the, from what he told me, basically he came up with the idea just as a derivative from the Challengers of the Unknown that he had done several years earlier. Q: So your father told you that The Fantastic Four was his idea? Neal: Yes." Tob. Dec., Ex. G at 117:23-118:7. <i>See also</i> Response to Statement No. 80.	Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 122 as required by Local Rule 56.1(c). Therefore, Paragraph 122 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i> , 472 F.3d at 41; <i>Giannullo</i> , 322 F.3d at 140; Reply to ¶ No. 80. Defendants' citation to the deposition testimony of Neal Kirby is also inadmissible as his testimony is based on hearsay. <i>See Sarno</i> , 183 F.3d at 160; <i>Hidden Brook Air</i> , 241 F. Supp. 2d at 270.
123.Neal Kirby has no specific firsthand knowledge regarding the circumstances surrounding the creation of Iron Man and his only basis to dispute Stan Lee's statements in this regard is speculation. N. Kirby Dep. at	Disputed. Neal Kirby testified about his father's creation of Iron Man's costume. Tob. Dec., Ex. G at 108:13-18. <i>See also</i> Response to Statement No. 94.	Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 123 as required by Local Rule 56.1(c). Therefore, Paragraph 123 is deemed admitted in its entirety for the

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<p>108:7-12, 108:25-109:2, 109:21-24, 109:3-11, 111:19-112:4. Neal Kirby knows nothing about what other creative forces might have existed at Marvel during the Time Period and Kirby never told Neal that he (Kirby) was the sole creative force at Marvel. <i>Id.</i> at 111:25-112:18, 113:9-114:14.</p>		<p>purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶ No. 94.</p> <p>Defendants' citation to the deposition testimony of Neal Kirby is also inadmissible as his testimony is based on hearsay. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p>
<p>124. None of the Defendants has any specific information on the circumstances surrounding the creation of <i>The Incredible Hulk</i>. L. Kirby Dep. at 107:20-108:2; N. Kirby Dep. at 141:20-142:1, 142:6-17; S. Kirby Dep. at 43:19-22.</p>	<p>Disputed to the extent this statement is not relevant to nor dispositive of whether the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel. <i>See also</i> Response to Statement No. 85.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 124 as required by Local Rule 56.1(c). Therefore, Paragraph 124 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶ No. 85.</p> <p>Defendants' response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p>
<p>125. Neither Neal nor Lisa Kirby has any specific information on the circumstances surrounding the creation of Spider-Man, although Neal Kirby has acknowledged that Kirby did not contribute artwork to the published first issue of Spider-Man. L. Kirby Dep. at 103:24-104:5; N. Kirby Dep. at 97:13-</p>	<p>Disputed. Neal Kirby testified his father drew the cover to <i>Amazing Fantasy</i> No. 15, the first appearance of Spider-Man. Tob. Dec., Ex. G at 98:1-13. Further disputed to the extent these statements are not relevant to nor dispositive of whether or not the subject works by Jack Kirby were owned at inception by Marvel as "works</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 125 as required by Local Rule 56.1(c). Therefore, Paragraph 125 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472</p>

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<p>17, 99:6-22. Neal Kirby can only “guess” that Kirby conceived of Spider-Man because he was not privy to what might have been discussed between Lee and Kirby with respect to Spider-Man or any other character. N. Kirby Dep. at 104:4-17, 104:25-105:7.</p>	<p>made for hire” or purchased by Marvel upon completion, if accepted by Marvel. <i>See also</i> Response to Statement No. 90.</p>	<p>F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶ No. 90.</p> <p>Defendants’ response also states a legal conclusion rather than a statement of undisputed fact and legal conclusions may not be used to dispute facts on summary judgment. <i>Schwapp</i>, 118 F.3d at 111.</p> <p>Defendants’ citation to the deposition testimony of Neal Kirby is also inadmissible as his testimony is based on hearsay. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p>
<p>126.Lisa Kirby has admitted that Spider-Man was not drawn by Kirby, and has noted that she has “heard [her] mother correcting people if they alluded to that fact.” Singer Decl. Ex. 55 at MARVEL0017407. Defendant Susan Kirby also acknowledged that the Spider-Man character “is not [Kirby’s].” S. Kirby Dep. at 41:25-42:6.</p>	<p>Disputed to the extent this statement is not relevant to nor dispositive of whether the subject works by Jack Kirby were owned at inception by Marvel as “works made for hire” or purchased by Marvel upon completion, if accepted by Marvel, nor relevant to whether Jack Kirby is the author or co-author of material on which Spider-Man is derived and the author of the first Spider-Man cover to the first published comic book, published by Marvel, featuring Spider-Man .</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 126 as required by Local Rule 56.1(c). Further, Defendants’ response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 126 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>
<p>127.Mark Evanier, proffered as both a fact witness and an “expert,” has noted that Jack once misspoke when he said that he designed the costume for the final published version of Spider-Man. Evanier Dep. (11/9/10) at 132:22-133:7; Singer Decl. Ex. 56 at MARVEL0017065.</p>	<p>Admitted.</p>	<p>No reply is necessary.</p>

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<p>128. Evanier also has commented that Kirby had a notoriously poor memory. Evanier Dep. (11/9/10) at 130:9-131:4; Singer Decl. Ex. 57 at MARVEL0017057.</p>	<p>Disputed. Evanier did not say that Kirby had a “notoriously poor memory” but instead that his mind “wander[ed] in nineteen directions at once” and that Jack actually had “crystal clear” recollections from thirty years before. Singer Decl., Ex. 57 at MARVEL17057. Evanier further noted that “Stan Lee’s memory is also, by his own admission, poor.” <i>Id.</i></p>	<p>Defendants correctly quote a portion of Singer Decl. Ex. 57. The full quotation is “[Q:] Did Jack really have a bad memory? [A:] <i>By common definition, yes...but I think it was more a matter of his mind wandering in nineteen directions at once. Every so often, he would surprise me with some (apparently) crystal-clear recollection of thirty years before.</i>” (emphasis added)</p> <p>However, this alleged fact is not material as it will not “affect the outcome of the suit under the governing law.” <i>Kinsella</i>, 320 F.3d at 311.</p>
<p>129. Neither Neal nor Lisa Kirby has any knowledge regarding the circumstances of the creation of the Thor character. N. Kirby Dep. at 126:25-127:18; L. Kirby Dep. at 108:3-23.</p>	<p>Disputed. Neal Kirby testified about his father’s involvement in the creation of the Thor character. Ex. G at 50:14-52:14; 83:21-84:25. <i>See also</i> Response to Statement No. 88.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 129 as required by Local Rule 56.1(c). Therefore, Paragraph 129 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶ No. 88.</p>
<p>130. Lisa Kirby has no specific information on the circumstances surrounding the creation of <i>The X-Men</i>. L. Kirby Dep. at 109:5-8. Neal Kirby’s only basis to dispute Stan Lee’s testimony regarding the creation of <i>The X-Men</i> is that he has no reason to disbelieve his father. N. Kirby Dep. at 130:12-131:2.</p>	<p>Disputed. Neal Kirby testified that he witnessed his father drawing X-Men No. 1 as well as talked to jim about it. Tob. Dec., Ex. G at 129:9-131:19. <i>See also</i> Response to Statement No. 97.</p>	<p>Defendants’ response does not set forth any specific facts to dispute the facts set forth in Paragraph 130 as required by Local Rule 56.1(c). Therefore, Paragraph 130 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶ No. 97.</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
		<p>Defendants' citation to the deposition testimony of Neal Kirby is also inadmissible as his testimony is based on hearsay. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p>
<p>131. Neither Lisa nor Neal Kirby has any specific information on the circumstances surrounding the creation of Nick Fury. L. Kirby Dep. at 113:3-6; N. Kirby Dep. at 126:13-24.</p>	<p>Disputed. Neal Kirby testified about his father's creation of Nick Fury. Tob. Dec., Ex. G at 74:9-75:13; 124:4-12; 126:4-9. <i>See also</i> Response to Statement No. 103.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 131 as required by Local Rule 56.1(c). Therefore, Paragraph 131 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶ No. 103.</p> <p>Defendants' citation to the deposition testimony of Neal Kirby is also inadmissible as his testimony is based on hearsay. <i>See Sarno</i>, 183 F.3d at 160; <i>Hidden Brook Air</i>, 241 F. Supp. 2d at 270.</p>
<p>132. None of the Defendants has any specific information on the circumstances surrounding the creation of <i>The Rawhide Kid</i>. L. Kirby Dep. at 113:17-24; N. Kirby Dep. at 137:17-23; 139:10-13; S. Kirby Dep. at 64:21-25.</p>	<p>Disputed to the extent this statement is not relevant to nor dispositive of whether or not the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 132 as required by Local Rule 56.1(c). Further, Defendants' response does not contain any citation to the record evidence as required by Local Rule 56.1(d). Therefore, Paragraph 132 is deemed admitted in its entirety for the purposes of this motion. <i>See</i> Local Rule 56.1(b)-(d); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140.</p>

Statement of Undisputed Fact	Defendants' Response	Plaintiffs' and Counterclaim-Defendants' Reply
<p>133. None of the Defendants has any specific information regarding the timing or circumstances under which Ant-Man was created, and neither Neal nor Susan Kirby even knows that Ant-Man was a character published by Marvel. N. Kirby Dep. at 69:15-18, 128:14-18; L. Kirby Dep. at 108:24-109:4; S. Kirby Dep. at 59:24-60:4.</p>	<p>Disputed to the extent this statement is not relevant to nor dispositive of whether or not the subject works by Jack Kirby were owned at inception by Marvel as "works made for hire" or purchased by Marvel upon completion, if accepted by Marvel. <i>See also</i> Response to Statement No. 10.</p>	<p>Defendants' response does not set forth any specific facts to dispute the facts set forth in Paragraph 133 as required by Local Rule 56.1(c). Therefore, Paragraph 133 is deemed admitted in its entirety for the purposes of this motion. Local Rule 56.1(c); <i>see also Parks Real Estate</i>, 472 F.3d at 41; <i>Giannullo</i>, 322 F.3d at 140; Reply to ¶ No. 10.</p>

**PLAINTIFFS' AND COUNTERCLAIM DEFENDANTS' RESPONSE TO
DEFENDANTS' ADDITIONAL MATERIAL FACTS**

134. From its beginnings to the 1960s, the comic book business was “a fly-by-night industry” with little to no attention paid to copyright ownership by the publishers or artists. Ev. Dec., Ex. A at 4-5; Mor. Dec., Ex. A at 4, 9-10; Tob. Dec., Ex. C at 31:1-33:17; 35:16-36:20 Ex. D at 143:24-145:7; 145:24-146:7; Adams Dec. at ¶ 13.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. These alleged facts are not material as they will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Further, Plaintiffs and Counterclaim-Defendants object to the statement alleged in Paragraph 134 to the extent it relies on the inadmissible testimony of Evanier and Morrow. *See Spiegel v. Schulmann*, 604 F.3d 72, 81 (2d Cir. 2010) (all evidence in support of a summary judgment motion must be admissible); *see also* Docket Nos. 67, 70. Plaintiffs and Counterclaim-Defendants further object to the statement in Paragraph 134 to the extent it relies on the irrelevant testimony in the Adams Decl. as the declarant does not have any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167.

135. In the 1930s-40s, some artists worked as employees to write and draw stories, under “sweat shop” conditions, while others worked as freelancers out of their homes, setting their own hours, and paying for their own supplies. Ev. Dec., Ex. A at 5, 11; Mor. Dec., Ex. A at 8; Tob. Dec., Ex. E at 72:22-73:8; 76:4-24; Ex. F at 194:11-21; 199:8-200:2; 204:6-207:11; 210:3-8; Ex. V at 407. Such freelancers were not paid for rejected work or for revising their work as a condition to its acceptance. Ev. Dec., Ex. A at 12; Mor. Dec., Ex. A at 8-9; Tob. Dec., Ex. B at 61:20-62:9; Ex. C at 136:7-137:18; Ex. D at 89:13-92:5; Ex. E at 71:17-72:7; 76:25-79:4; Ex. F at 123:18-125:9; Ex. G at 57:18-58:21; 62:19-63:6; 234:12-236:1; Ex. H at 37:6-19; Ex. V at 396; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. Additionally, the facts in Paragraph 135 are not material to the motion for summary judgment

because they will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Defendants’ citations fail to support their alleged fact as required by Local Rule 56.1(d). Defendants’ have not provided any evidence for their proposition that freelancers were not paid for rejected work or for revisions to their work during the 1930s-40s time period as Defendants’ citations do not refer to that time period. Further, Plaintiffs and Counterclaim-Defendants object to the statements in Paragraph 135 to the extent they rely on the inadmissible testimony of Evanier and Morrow as well as inadmissible hearsay in Ex. V to the Toberoff Decl. *See Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70. Plaintiffs and Counterclaim-Defendants also object to the statement in Paragraph 135 to the extent it relies on the irrelevant testimony in the Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 135 to the extent it relies on testimony from Steranko and Sinnott, as neither was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1). Plaintiffs and Counterclaim-Defendants further state that during the Time Period, freelance artists and writers were paid an agreed per-page rate for all completed assignments submitted to Marvel, even if the pages were not used for publication or if the freelancer had to make changes to the pages. *See* Plaintiffs and Counterclaim-Defendants Local Rule 56.1 Statement (“56.1 Stmt.”) ¶¶ 45, 47-48, 61-62; Singer Decl. Ex. 1 at 18:6-16, 30:11-31:5, 376:3-22; *id.* Ex. 4 at 30:10-12; *see also id.* Ex. 2 at 32:2-5; *id.* Ex. 3 at 68:24-69:6, 74:19-25; *id.* Ex. 4 at 30:10-12.

136. In 1939, Martin Goodman founded Marvel’s predecessor, Timely Comics. Mor. Dec., Ex. A at 4, Ev. Dec., Ex. A at 5. In the mid-1940s, Timely had a “bullpen” of salaried staff artists and writers. Mor. Dec., Ex. A at 5. However, in 1949, Goodman discovered surplus artwork, and decided it was financially beneficial to fire its employees until the art was used up.

Mor. Dec., Ex. A at 4; Tob. Dec., Ex. D at 169:4-18; Tob. Dec. Ex. J at 368:2-369:16; 371:3-18; 372:8-10.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. Moreover, this fact is not material to the motion for summary judgment because it will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Plaintiffs and Counterclaim-Defendants do not dispute that Martin Goodman founded Marvel’s predecessor, Timely Comics in or about 1939 or that in the 1950s’ Goodman reduced Timely’s staff size; however, Defendants’ citations do not support the stated fact in Paragraph 136. Further, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 136 to the extent it relies on the inadmissible testimony of Evanier and Morrow. *See Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70.

137. In 1954 Fredric Wertham’s book *Seduction of the Innocent* accused comic books of “poisoning the minds” of America’s youth. Mor. Dec., Ex. A at 4; Ev. Dec., Ex. A at 7; Ex. F at 200:4-201:20.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. This fact is not material to the motion for summary judgment because it will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Further, Plaintiffs and Counterclaim-Defendants object to this statement to the extent it relies on the inadmissible testimony of Evanier and Morrow. *See Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70.

138. The resulting public backlash led to Senate hearings on the corrupting influence of comics, and nearly bankrupted the struggling comic book “industry.” Ev. Dec., Ex. A at 7; Mor. Dec., Ex. A at 5; Tob. Dec., Ex. F at 200:4-201:20.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402.

This fact is not material to the motion for summary judgment because it will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Plaintiffs and Counterclaim-Defendants do not dispute that public backlash in the 1950s, among other things, led to the topic of comic books being included in congressional hearings being held by the Senate Subcommittee on Juvenile Delinquency, which contributed to financial difficulties for the comic book industry. However, Plaintiffs and Counterclaim-Defendants object to these statements to the extent they rely on the inadmissible testimony of Evanier and Morrow. *See Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70.

139. In or about 1957, Marvel fired most of its staff artists and writers that it had employed, except Goodman’s relative, Stan Lee, and his assistant, and was reduced to two small offices. Ev. Dec., Ex. A at 8; Mor. Dec., Ex. A at 5, 8-9; Tob. Dec., Ex. J at 372:16-373:13; Ex. F. at 123:18-125:9; 200:4-201:20; Ex. U at 80.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. This fact is not material to the motion for summary judgment because it will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Plaintiffs and Counterclaim-Defendants do not dispute that Marvel reduced its staff size in the late 1950s. However, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 139 to the extent it relies on the inadmissible testimony of Evanier and Morrow as well as inadmissible hearsay in Ex. U to the Toberoff Decl. *See Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70.

140. In the late 1950s, Timely slowly resumed buying freelance material on a per-page basis. Mor. Dec., Ex. A at 6-8; Ev. Dec., Ex. A at 8-10; Tob. Dec., Ex. C at 105:15-17; Ex. E at 29:4-8; Ex. F at 15:20-16:24; Ex. I at 17:22-25.

RESPONSE: Although Plaintiffs and Counterclaim-Defendants do not dispute that Marvel hired freelance artists and writers during the Time Period, Marvel did not “buy” material from freelance artists or writers. Rather, Marvel engaged freelance artists and writers to contribute to

Marvel's comic books pursuant to assignments from Stan Lee, who directed their creation, and Marvel compensated the artists and writers for their work on an agreed per-page basis for all completed assignments that were submitted. *See* 56.1 Stmt. ¶¶ 20, 22-27, 30-27, 39-43, 45, 47-48, 54-64, 66; Singer Decl. Ex. 1 at 15:9-20, 15:22-16:10, 16:14-19, 17:17-25, 18:6-16, 20:11-21:25, 22:11-16, 30:11-14, 41:20-42:9, 52:3-5, 73:17-23, 111:2-17, 396:1-10; *id.* Ex. 4 at 14:5-15:15, 23:18-21; *id.* Ex. 11, Tracks 3, 6; *id.* Ex. 26 at MARVEL0017350; *see also id.* Ex. 2 at 16:13-21, 18:15-19:2, 39:7-13, 61:4-6, 61:12-19; *id.* Ex. 3 at 28:5-15, 28:19-29:5, 48:10-49:8, 50:5-53:20, 56:12-57:24, 58:6-59:21, 61:17-62:5, 112:25-113:23; *id.* Ex. 5 at 81:8-13. Further, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 140 to the extent it relies on the inadmissible testimony of Evanier and Morrow. *Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70.

141. Timely had no written contracts with freelancers, and no obligation to buy their material. Mor. Dec., Ex. A at 8-10; Ev. Dec., Ex. A at 9, 11-12; Tob. Dec., Ex. C at 23:4-24:4; Ex. E at 71:17-72:7; 72:22-73:8; 73:11-74:5; 76:25-77:6; Ex. F at 194:11-21; 199:8-200:3; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L at ¶ 1, 3; Ex. M; Colan Dec. at ¶¶ 5, 8, 9, 12, 14; Sinn. Dec. at ¶¶ 3, 4, 10; Ayers Dec. at ¶¶ 8-12.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. Further, this statement is not material to the motion for summary judgment because it will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Plaintiffs and Counterclaim-Defendants do not dispute that Marvel did not have written contracts with freelancers during the Time Period. However, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 141 to the extent it states a legal conclusion and not a statement of undisputed fact. *Schwapp*, 118 F.3d at 111. Plaintiffs and Counterclaim-Defendants also object to this statement to the extent it relies on the inadmissible testimony of Evanier and Morrow. *See*

Spiegel, 604 F.3d at 81; *see also* Docket Nos. 67, 70. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 141 to the extent it relies on testimony from Sinnott as he was not identified as a potential witness by Defendants and therefore his testimony is inadmissible. Fed. R. Civ. P. 37(c)(1).

142. Between 1958-1963, Marvel purchased material from freelance artists. Ev. Dec. Ex. A at 9, 11-14; Mor. Dec. Ex. A at 5-10; Tob. Dec., Ex. C at 23:4-24:4; Ex. E at 71:17-72:7; 72:22-74:5; 100:21-101:9; Ex. F at 65:17-66:4; 194:11-21; 200:4-201:13; Ex. J at 367:15-369:16; 371:3-18; 372:8-10; 396:1-14; Ex. K at 232:5-10. Colan Dec. at ¶¶ 8, 9, 12, 14; Sinn. Dec. at ¶¶ 9-13; Ayers Dec. at ¶¶ 8-14.

RESPONSE: Although Plaintiffs and Counterclaim-Defendants do not dispute that Marvel hired freelance artists and writers during the Time Period, Marvel did not “purchase” material from freelance artists or writers. Rather, Marvel engaged freelance artists and writers to contribute to Marvel’s comic books pursuant to assignments from Stan Lee, who directed their creation, and Marvel compensated the artists and writers for their work on an agreed per-page basis for all completed assignments that were submitted. *See* 56.1 Stmt. ¶¶ 20, 22-27, 30-27, 39-43, 45, 47-48, 54-64, 66; Singer Decl. Ex. 1 at 15:9-20, 15:22-16:10, 16:14-19, 17:17-25, 18:6-16, 20:11-21:25, 22:11-23:19, 30:11-31:5, 41:20-42:9, 47:15-48:4, 52:3-5, 58:13-21, 73:17-23, 111:2-17, 383:18-21, 384:18-21, 396:1-10; *id.* Ex. 4 at 14:5-15:15, 23:18-21; *id.* Ex. 11, Tracks 3, 6; *id.* Ex. 26 at MARVEL0017350; *id.* Ex. 41 at MARVEL0017230; *see also id.* Ex. 2 at 16:13-21, 18:15-19:2, 39:7-13, 61:4-6, 61:12-19, 76:8-78:17, 80:19-25; *id.* Ex. 3 at 28:5-15, 28:19-29:5, 48:10-49:8, 50:5-53:20, 56:12-57:24, 58:6-59:21, 61:17-62:5, 111:12-14, 112:8-114:11; *id.* Ex. 5 at 81:8-13, 91:22-92:6, 127:19-128:5, 170:23-171:4; Supplemental Declaration of Randi W. Singer dated March 25, 2011 (“Supp. Singer Decl.”) Ex. 59 at 109:3-10. Plaintiffs and Counterclaim-Defendants also object to this statement to the extent it relies on the inadmissible testimony of Evanier and Morrow. *See Spiegel*, 604 F.3d at 81; *see also* Docket

Nos. 67, 70. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 142 to the extent it relies on testimony from Sinnott, as he was not identified as a potential witness by Defendants and therefore his testimony is inadmissible. Fed. R. Civ. P. 37(c)(1).

143. During the 1930's through the 1950's, Jack Kirby worked as both a staff artist and freelancer, and formed a famous partnership with Joe Simon that sold work to many different publishers, including Timely, until it disbanded in 1955. Mor. Dec., Ex. A at 6-7; Ev. Dec., Ex. A at 6-8.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. Further, this statement is not material to the motion for summary judgment because it will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Plaintiffs and Counterclaim-Defendants object to this statement to the extent it relies on the inadmissible testimony of Evanier and Morrow. *See Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70.

144. In 1956, Kirby began to submit freelance work to Timely/Marvel. Ev. Dec., Ex. A at 9; Mor. Dec., Ex. A at 7.

RESPONSE: Plaintiffs and Counterclaim-Defendants do not dispute that Jack Kirby's contributions to Marvel's comic books were done on a freelance basis during the late 1950s and 1960s; however, Defendants' citations do not support the stated fact in Paragraph 144. Further, Plaintiffs and Counterclaim-Defendants object to this statement to the extent it relies on the inadmissible testimony of Evanier and Morrow. *Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70.

145. Between 1958-1963, Kirby produced and sold artwork to Marvel on a freelance basis only, and was not employed by Marvel. Kirby sold his pages on a per-page basis. Ev. Dec., Ex. A at 8-12; Morrow Dec., Ex. A at 6-10; Tob. Dec., Ex. C at 23:4-24:4; 105:15-17; Ex. E at 29:4-8; 71:17-72:7; 72:22-73:8; Ex. F at 15:20-16:24; Ex. I at 17:22-25; 194:11-21; Ex. J at

256:25-257:25; 396:1-14; Ex. L at ¶¶ 1-4, 10, 11, 13; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.

RESPONSE: Plaintiffs and Counterclaim-Defendants do not dispute that Jack Kirby submitted artwork to Marvel on a freelance basis; however, Jack Kirby’s artwork was not “sold” to Marvel, as Jack Kirby contributed to Marvel’s comic books pursuant to assignments from Stan Lee, who directed the creation of the works, and was then compensated by Marvel for his work on an agreed per-page basis for all completed assignments that were submitted. *See* 56.1 Stmt. ¶¶ 20, 22-27, 30-27, 39-43, 45, 47-48, 54-64, 66; Singer Decl. Ex. 1 at 22:11-23:19, 30:11-31:5, 47:15-48:4, 58:13-21, 111:2-17, 383:18-21, 384:18-21; *id.* Ex. 11, Track 3; *id.* Ex. 41 at MARVEL0017230; *see also id.* Ex. 2 at 76:8-78:17, 80:19-25; *id.* Ex. 3 at 111:12-14, 112:8-114:11; *id.* Ex. 5 at 91:22-92:6, 127:19-128:5, 170:23-171:4; Supp. Singer Decl. Ex. 59 at 109:3-10. Further, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 145 to the extent it relies on the inadmissible testimony of Evanier and Morrow. *See Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70. Plaintiffs and Counterclaim-Defendants object to Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 145 to the extent it relies on testimony from Steranko and Sinnott, as neither was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1).

146. Marvel did not have a written agreement with Kirby between 1958-1963. Mor. Dec. Ex. A at 9; Ev. Dec. Ex. A 11; Tob Dec., Ex. C at 23:4-24:4; Ex. E at 71:17-72:7; 72:22-73:8; 73:11-74:5; 76:25-77:6; Ex. F at 194:11-21; 199:8-200:3; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L ¶¶ 1, 3; Ex. M; Colan Dec. at ¶¶ 8, 9, 12, 14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.

RESPONSE: Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 146 to the extent it relies on the inadmissible testimony of Evanier and Morrow. *See Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70. Plaintiffs and Counterclaim-Defendants object to Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 146 to the extent it relies on testimony from Steranko and Sinnott, as neither was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1).

147. The first written agreement between Marvel and Kirby was fully executed on June 5, 1972. Tob Dec., Ex. L ¶¶ 1, 3; Ex. M.

RESPONSE: Undisputed.

148. Kirby would conceive, draw and plot the stories, and use margin notes to explain the story and suggest dialogue. Tob. Dec., Ex. FF; Ex. GG at 193; Ex. HH at 45 (“*Kirby*: the artists were doing the plotting- Stan was just coordinating the books, which was his job. Stan was production coordinator. But the artists were the ones that were handling both story and art. We had to- there was no time not to!”); Ex. II; Ex. OO at 174; Ex. JJ at 45, 49; Ex. KK at 122.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. Further, this statement is not material to the motion for summary judgment because it will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Moreover, Defendants’ citations do not support the statements alleged in Paragraph 148. Plaintiffs and Counterclaim-Defendants object to the statements in Paragraph 148 to the extent they rely on inadmissible hearsay in Exs. FF, GG, HH, II, JJ, KK and OO to the Toberoff Decl. *See Spiegel*, 604 F.3d at 81. Plaintiffs and Counterclaim-Defendants also object to Defendants’ citation to

Exs. GG, JJ and OO as the cited documents were not produced in discovery in this action and thus may not be considered on summary judgment. *See Melie*, 2009 WL 1404325, at *1 n.4.

149. Between 1958-1963, Kirby, like other freelancers worked out of the basement of his own home, set his own hours, paid his own overhead and insurance and paid all expenses associated with his creations, including for his own paper, pens, pencils and other materials, and such expenses were not reimbursed by Marvel. Ev. Dec. Ex. A at 11-12; Mor. Dec. Ex. A at 8; Tob. Ex. E at 76:4-24; Ex. F at 194:11-21; 199:8-200:3; 210:3-8; Dec., Ex. G at 90:12-91:15; Ex. H at 9:15-10:9; Ex. CC at K860-61; Colan Dec. at ¶ 8; Adams Dec. at ¶ 7; Ster. Dec. at ¶ 10; Sinn. Dec. at ¶ 9; Ayers Dec. at ¶ 10.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. Further, the facts in Paragraph 149 are not material to the motion for summary judgment because they will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Although Plaintiffs and Counterclaim-Defendants do not dispute that Kirby generally worked from his home, set his own hours and paid for art supplies such as paper and pencils, and that it was not Marvel’s practice during the Time Period to reimburse freelance artists for such expenses, Kirby did not pay “all expenses associated with his creations” as Kirby was paid an agreed per-page rate by Marvel and Marvel bore all costs associated with publishing the comic books, including hiring other staff to complete the work that Kirby submitted. *See* 56.1 Stmt. ¶¶ 19-21, 26, 30, 45, 47-48, 61-62; Singer Decl. Ex. 1 at 15:9-20, 43:3-44:2, 58:13-21; *id.* Ex. 5 at 81:8-13, 91:22-92:6; *id.* Ex. 41 at MARVEL0017230. Plaintiffs and Counterclaim-Defendants also state that Kirby often performed work while in Marvel’s offices. Singer Decl. Ex. 5 at 55:18-56:12; *see also id.* Ex. 2 at 74:23-75:9; Supp. Singer Decl. Ex. 59 at 110:9-20. Defendants also fail to identify any admissible evidence in the record for its claim that Jack Kirby paid his own “overhead and insurance.” Plaintiffs and Counterclaim-Defendants also object to the statements in Paragraph 149 to the extent they rely on the inadmissible testimony of Evanier and

Morrow as well as inadmissible hearsay in Ex. CC to the Toberoff Decl. *Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70. Plaintiffs and Counterclaim-Defendants object to Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 149 to the extent it relies on testimony from Steranko and Sinnott, as neither was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1).

150. Between 1958-1963, Marvel did not withhold payroll taxes or any other taxes from its payments for the artwork it bought from Kirby. Ev. Dec., Ex. A at 12; Mor. Dec., Ex A at 8; Tob. Dec., Ex. E at 79:5-14; Ex. F at 15:24-16:24; Ex. L, at ¶ 13; Ster. Dec., ¶ 10.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. Further, the facts in Paragraph 150 are not material to the motion for summary judgment because they will not "affect the outcome of the suit under the governing law." *Kinsella*, 320 F.3d at 311. Plaintiffs do not dispute that Marvel did not withhold any payroll or income taxes from the checks issued to Jack Kirby between 1958-1963. However, Marvel did not "buy" artwork from Jack Kirby. Freelance artists and writers, such as Jack Kirby, contributed to Marvel's comic books pursuant to assignments from Stan Lee, who directed their creation, and the artists and writers were then compensated by Marvel for their work on an agreed per-page basis for all completed assignments that were submitted. *See* 56.1 Stmt. ¶¶ 20, 22-27, 30-27, 39-43, 45, 47-48, 54-64, 66; Singer Decl. Ex. 1 at 15:9-20, 15:22-16:10, 16:14-19, 17:17-25, 18:6-16, 20:11-21:25, 22:11-23:19, 30:11-31:5, 41:20-42:9, 47:15-48:4, 52:3-5, 58:13-21, 73:17-23, 111:2-17, 383:18-21, 384:18-21, 396:1-10; *id.* Ex. 4 at 14:5-15:15, 23:18-21; *id.* Ex. 11, Tracks 3, 6; *id.*

Ex. 26 at MARVEL0017350; *id.* Ex. 41 at MARVEL0017230; *see also id.* Ex. 2 at 16:13-21, 18:15-19:2, 39:7-13, 61:4-6, 61:12-19, 76:8-78:17, 80:19-25; *id.* Ex. 3 at 28:5-15, 28:19-29:5, 48:10-49:8, 50:5-53:20, 56:12-57:24, 58:6-59:21, 61:17-62:5, 111:12-14, 112:8-114:11; *id.* Ex. 5 at 81:8-13, 91:22-92:6, 127:19-128:5, 170:23-171:4; Supp. Singer Decl. Ex. 59 at 109:3-10. Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 150 to the extent it relies on the inadmissible testimony of Evanier and Morrow. *See Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70. Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 150 to the extent it relies on the testimony of Steranko as the declarant has no personal knowledge of the time period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Plaintiffs and Counterclaim-Defendants also object to the statement in Paragraph 150 to the extent it relies on testimony from Steranko as he was not identified as a potential witness by Defendants and therefore his testimony is inadmissible. Fed. R. Civ. P. 37(c)(1).

151. Between 1958-1963, Kirby did not receive any health benefits or insurance from Marvel, nor any other employment benefits such as vacation or sick pay. Ev. Dec., Ex. A at 12; Mor. Dec. Ex. A at 8; Tob. Dec., Ex. E at 79:18-25; Ex. F at 204:6-19; 204:24-205:15; Ex. L at ¶¶ 10-11; Ex. V at 42 8; Colan Dec. at ¶ 8; Adams Dec. at ¶ 10; Ster. Dec. at ¶ 10; Sinn. Dec. at ¶ 9; Ayers Dec. at ¶ 10.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. Further, the facts in Paragraph 151 are not material to the motion for summary judgment because they will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Plaintiffs do not dispute that Jack Kirby did not receive health benefits or health insurance from Marvel between 1958-1963. However, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 151 to the extent it relies on the inadmissible testimony of Evanier and Morrow and inadmissible hearsay to Ex. V to the Toberoff Decl. *See Spiegel*, 604 F.3d at 81;

see also Docket Nos. 67, 70. Plaintiffs and Counterclaim-Defendants also object to Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 151 to the extent it relies on testimony from Steranko and Sinnott, as neither was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1).

152. Between 1958-1963, if artwork page(s) submitted by Kirby were rejected by Marvel, Kirby was not compensated for the pages and his time and expense in creating the pages. Ev. Dec., Ex. A at 1-4, 12; Mor. Dec., Ex. A at 3, 8-10; Ex. B; Tob Dec., Ex. B at 50:20-51:25; 61:24-62:9; Ex. C at 136:7-138:22; 140:19-141:3; Ex. D at 89:13-92:5; 138:11-139:4; 178:5-13; 180:4-182:12; Ex. E at 71:17-72:7; 73:11-74:5; 76:25-77:6; 77:20-79:4; 103:7-105:17; Ex. F at 123:18-125:9; Ex. G at 57:19-58:21; 62:19-63:6; 234:12-235:5; 235:6-236:1; Ex. H at 37:6-19; Ex. I at 17:17-25; Ex. J at 367:15-369:16; 371:3-18; 372:8-10; 396:1-14; Ex. N, Ex. O at 71-74; Ex. P, Ex. Q; Ex. R; Ex. S; Ex. V at 396; Colan Dec. ¶¶ at 8, 9; Adams Dec. at ¶¶ 8-12; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶ 11; Ayers Dec. at ¶ 11.

RESPONSE: As was Marvel's policy, Jack Kirby was paid his agreed per-page rate for all the completed assignments that he submitted to Marvel between 1958-1963, even if the pages were not used for publication. *See* 56.1 Stmt. ¶¶ 45, 47, 61-62; Singer Decl. Ex. 1 at 18:6-16, 30:11-31:5, 376:3-22; *id.* Ex. 4 at 30:10-12; *see also id.* Ex. 2 at 32:2-5. Further, the citations to Toberoff Decl. Exhibits E-F and P-R refer to artwork produced outside of the Time Period and/or as to which no information has been provided regarding the timing of their creation or whether they were even submitted to Marvel for publication, and are therefore irrelevant. Fed. R. Evid. 402. Additionally, Defendants' citations to Exhibits E, F, I, and N-S do not support the stated facts. Plaintiffs and Counterclaim-Defendants also object to the statement in Paragraph 152 to the extent it relies on the inadmissible testimony of Evanier and Morrow, as both Evanier and Morrow testified that they have no firsthand knowledge as to Marvel's payments to Jack Kirby

for his work and rely only on hearsay for their statements in that regard, as well as inadmissible hearsay in Exhibits N-O, S and V to the Toberoff Decl. *See Spiegel*, 604 F.3d at 81; Toberoff Decl. Ex. B at 57:20-58:4; *id.* Ex. C at 136:7-17, 140:19-141:8; *id.* Ex. D at 89:13-92:25; Singer Decl. Ex. 8 at 59:5-21; Supp. Singer Decl. Ex. 63 at 180:4-183:8, 211:3-213:25, 217:13-219:9, 222:5-224:2, 225:7-8, 225:15-227:14; *see also* Docket Nos. 67, 70. Plaintiffs and Counterclaim-Defendants also object to the statements in Paragraph 152 to the extent they rely on the testimony of Neal Kirby and Susan Kirby, neither of whom has personal knowledge of whether Jack Kirby was paid for pages he submitted to Marvel during the Time Period. Toberoff Decl. Ex. G at 58:4-7, 62:12-63:1; *id.* Ex. H at 37:6-16; Supp. Singer Decl. Ex. 61 at 65:1-5, 100:2-22 (knowledge of Marvel’s purported failure to pay Kirby for certain sketches based on “family discussion”); *id.* Ex. 62 at 38:2-9. Plaintiffs and Counterclaim-Defendants further object to Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 152 to the extent it relies on testimony from Steranko and Sinnott, as neither was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1).

153. Between 1958-1963, Kirby was not paid for submitted artwork Marvel requested him to redraw. Ev. Dec., Ex A at 12; Mor. Dec., Ex. A at 8-9; Tob Dec., Ex. B at 61:24-62:9; Ex C at 136:7-138:22; Ex. E at 76:25-77:6; 77:20-79:4; Ex. G at 57:18-58:21; 62:19-63:6; 234:12-236:1; Ex. H at 37:6-19; Ex. V at 396; Ex. Z; Sin. Dec., ¶ 13; Colan Dec. at ¶ 9; Ster. Dec. at ¶ 14; Adams Dec. at ¶¶ 11-12; Ayers Dec. at ¶ 11.

RESPONSE: As was Marvel’s policy, Jack Kirby was paid his agreed per-page rate for all the completed assignments that he submitted to Marvel between 1958-1963, even if he had to redraw or make changes to the pages. *See* 56.1 Stmt. ¶¶ 45, 48, 61-62; Singer Decl. Ex. 1 at 376:3-22;

see also id. Ex. 2 at 32:2-5; *id.* Ex. 3 at 68:24-69:6, 74:19-25; *id.* Ex. 4 at 30:10-12. Moreover, Defendants' citations to Toberoff Decl. Exhibits E, V, and Z do not support these stated facts. Plaintiffs and Counterclaim-Defendants object to the statements in Paragraph 153 to the extent they rely on the inadmissible testimony of Evanier and Morrow, as both Evanier and Morrow testified that they have no firsthand knowledge as to Marvel's payments to Jack Kirby for his work and rely only on hearsay for their statements in that regard, as well as inadmissible hearsay in Exhibits V and Z to the Toberoff Decl. *See Spiegel*, 604 F.3d at 81; Toberoff Decl. Ex. B at 57:20-25; *id.* Ex. C at 136:7-17, 140:19-141:8; *id.* Ex. D at 89:13-92:25; Singer Decl. Ex. 8 at 59:5-21; Supp. Singer Decl. Ex. 63 at 180:4-183:8, 211:3-213:25, 217:13-219:9, 222:5-224:2, 225:7-8, 225:15-227:14; *see also* Docket Nos. 67, 70. Plaintiffs and Counterclaim-Defendants also object to the statements in Paragraph 153 to the extent they rely on the testimony of Neal Kirby and Susan Kirby, neither of whom has personal knowledge of whether Jack Kirby was paid for pages he submitted to Marvel during the Time Period. Toberoff Decl. Ex. G at 58:4-7, 62:12-63:1; *id.* Ex. H at 37:6-16; Supp. Singer Decl. Ex. 61 at 65:1-5, 100:2-22; *id.* Ex. 62 at 38:2-9. Plaintiffs and Counterclaim-Defendants further object to Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 153 to the extent it relies on testimony from Steranko and Sinnott, as neither was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1).

154. Marvel was not legally obligated to purchase any of the artwork submitted by Kirby between 1958-1963. Ev. Dec., ¶¶ 17, 19-20; Ex A at 11-12; Ex. B; Ex. C; Mor. Dec., Ex. A at 8-10; Tob Dec., Ex. B at 56:2-57:19; 58:10-23; 61:24-62:9; Ex. C at 23:4-24:4; 105:15-17; 136:7-138:22; 140:19-141:3 Ex. D at 178:5-13; Ex. E at 71:17-72:7; 72:22-73:8; 73:11-74:5;

76:25-79:4; Ex. F at 194:11-21; 204:6-19; 204:24-205:15; 205:19-207:11; Ex. J at 256:25-257:25; 367:15-369:16; 371:3-18; 372:8-10; 396:1-14; Ex. V at 396, 407, 428; Ex. L at ¶¶ 1-4, 10, 11, 13; Colan Dec. at ¶¶ 8-14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. Further, the facts in Paragraph 154 are not material to the motion for summary judgment because they will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 154 to the extent it states a legal conclusion and not a statement of undisputed fact. *Schwapp*, 118 F.3d at 111. Plaintiffs and Counterclaim-Defendants also object to this statement to the extent it relies on the inadmissible testimony of Evanier and Morrow and inadmissible hearsay in Ex. V to the Toberoff Decl and Exs. B and C to the Evanier Decl. *See Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70. Plaintiffs and Counterclaim-Defendants further object to the citations to the Evanier Decl. for the additional reason that they are outside the scope of Evanier’s expert report and are therefore inadmissible and cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); *see also Highland Capital Mgmt.*, 551 F. Supp. 2d at 182. Plaintiffs and Counterclaim-Defendants further object to Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 154 to the extent it relies on testimony from Steranko and Sinnott, as neither was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1). Plaintiffs and Counterclaim-Defendants further state that freelance artists and writers, such as Jack Kirby, contributed to Marvel’s comic books pursuant to assignments from Stan Lee, who

directed their creation, and the artists and writers were then compensated by Marvel for their work on an agreed per-page basis for all completed assignments that were submitted. *See* 56.1 Stmt. ¶¶ 20, 22-27, 30-27, 39-43, 45, 47-48, 54-64, 66; Singer Decl. Ex. 1 at 15:9-20, 15:22-16:10, 16:14-19, 17:17-25, 18:6-16, 20:11-21:25, 22:11-23:19, 30:11-31:5, 41:20-42:9, 47:15-48:4, 52:3-5, 58:13-21, 73:17-23, 111:2-17, 383:18-21, 384:18-21, 396:1-10; *id.* Ex. 4 at 14:5-15:15, 23:18-21; *id.* Ex. 11, Tracks 3, 6; *id.* Ex. 26 at MARVEL0017350; *id.* Ex. 41 at MARVEL0017230; *see also id.* Ex. 2 at 16:13-21, 18:15-19:2, 39:7-13, 61:4-6, 61:12-19, 76:8-78:17, 80:19-25; *id.* Ex. 3 at 28:5-15, 28:19-29:5, 48:10-49:8, 50:5-53:20, 56:12-57:24, 58:6-59:21, 61:17-62:5, 111:12-14, 112:8-114:11; *id.* Ex. 5 at 81:8-13, 91:22-92:6, 127:19-128:5, 170:23-171:4; Supp. Singer Decl. Ex. 59 at 109:3-10.

155. Between 1958-1963, Kirby was free to, and in fact did, pitch and sell work to other publishers while he was selling work to Marvel, as did other freelance artists that worked with Marvel. Ev. Dec. ¶ 18; Mor. Dec., Ex. A at 9-10; Tob. Dec., Ex. D at 177:11-15; Ex. W at 5, 6, 18, 19, 21, 25, 55, 80-81, 84-85; Ex. X at 18462-18466; Ex. Y at 129; Colan Dec. at ¶¶ 8-14; Adams Dec. at ¶¶ 6-14; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶¶ 9-15; Ayers Dec. at ¶¶ 8-14.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. Moreover, the facts in Paragraph 155 are not material to the motion for summary judgment because they will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Defendants have cited no admissible evidence to support the statement that Kirby was free to “sell” artwork to other publishers and Defendants’ citations do not support the statement that other freelance artists were free to “sell” artwork to other publishers. Plaintiffs and Counterclaim-Defendants further object to this statement to the extent it relies on the inadmissible testimony of Evanier and Morrow as well as inadmissible hearsay in Exhibits W, X, and Y to the Toberoff Decl. *See Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70. Plaintiffs

and Counterclaim-Defendants also object to the citations to the Evanier Decl. for the additional reason that they are outside the scope of Evanier's expert report and are therefore inadmissible and cannot be used to dispute facts. Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 26(a)(2)(B); *see also Highland Capital Mgmt.*, 551 F. Supp. 2d at 182. Plaintiffs and Counterclaim-Defendants also object to Defendants' citation to Exhibit Y to the Toberoff Decl., as the cited document was not produced in discovery in this action and thus may not be considered on summary judgment. *See Melie*, 2009 WL 1404325, at *1 n.4. Plaintiffs and Counterclaim-Defendants further object to Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 155 as neither Steranko nor Sinnott was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1). Plaintiffs and Counterclaim-Defendants further state that Jack Kirby did not "sell work" to Marvel as Kirby contributed to Marvel's comic books pursuant to assignments from Stan Lee, who directed the creation of the works, and was then compensated by Marvel for his work on an agreed per-page basis for all completed assignments that were submitted. *See* 56.1 Stmt. ¶¶ 20, 22-27, 30-27, 39-43, 45, 47-48, 54-64, 66; Singer Decl. Ex. 1 at 22:11-23:19, 30:11-31:5, 47:15-48:4, 58:13-21, 111:2-17, 383:18-21, 384:18-21; *id.* Ex. 11, Track 3; *id.* Ex. 41 at MARVEL0017230; *see also id.* Ex. 2 at 76:8-78:17, 80:19-25; *id.* Ex. 3 at 111:12-14, 112:8-114:11; *id.* Ex. 5 at 91:22-92:6, 127:19-128:5, 170:23-171:4; Supp. Singer Decl. Ex. 59 at 109:3-10.

156. Marvel has no copies of any checks, dated between 1958-1963, with legends on the back that were issued by Marvel to Kirby, or to any other freelancer, for submitted work. Tob Dec., Ex. L ¶¶ 2, 4.

RESPONSE: Undisputed.

157. The earliest checks to a freelancer with a legend on the back discovered by the Kirbys, is from 1973 and was issued to freelancer Stephen Gerber. The legend states, in part, that the artist is being paid “for my assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, and including my assignment of any rights to renewal copyright,” and nowhere mentions the phrase “work for hire” or “work made for hire.” Tob. Dec., Ex. LL at Ex. C; Colan Dec. at ¶ 12; Adams Dec. at ¶¶ 14; Ster. Dec. at ¶ 12; Sinn. Dec. at ¶¶ 13-14; Ayers Dec. at ¶ 14. *See* Tob. Conf. Dec., Exs. 10-13.

RESPONSE: The facts in Paragraph 157 are not relevant and are not material to the motion for summary judgment because the cited check is from outside the Time Period and because it will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311; *see also* Fed. R. Evid. 402. Plaintiffs and Counterclaim-Defendants further object to Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Plaintiffs and Counterclaim-Defendants also object to the statement in Paragraph 157 to the extent it relies on testimony from Steranko and Sinnott, as neither was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1). Plaintiffs and Counterclaim-Defendants further state that while no paychecks from the Time Period have survived, all of Marvel’s witnesses, each of whom was a freelance artist or writer in the 1950s and 1960s, testified that during that time, Marvel’s payroll checks bore a legend stating that the freelance artists and writers retained no rights in the work for which they were being paid. *See* 56.1 Stmt. ¶ 53; Singer Decl. Ex. 1 at 28:20-29:11; *id.* Ex. 2 at 64:14-65:19, 65:24-66:4, 66:24-67:14, 67:17-20, 273:24-274:11; *id.* Ex. 3 at 71:17-72:19, 229:4-25; *id.* Ex. 4 at 31:17-21, 32:4-33:8.

158. The earliest checks to a freelancer with a legend on the back, produced by Marvel in this action, are from 1974. These checks have the same legend as the Gerber check and nowhere mention the phrase “work for hire” or “work made for hire.” Tob. Dec., Ex. E at

100:21-101:9; Ex. F at 65:17-66:4; Ex. J at 396:1-14; Ex. K at 232:5-10; Ex. L at ¶¶ 2, 4; Ex. AA at 14603; Ex. T; Colan Dec. at ¶ 12; Adams Dec. at ¶ 14; Ster. Dec. at ¶ 12; Sinn. Dec. at ¶¶ 13-14; Ayers Dec. at ¶ 14.

RESPONSE: The facts in Paragraph 158 are not relevant and are not material to the motion for summary judgment because the cited checks are from outside the Time Period and because it will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311; *see also* Fed. R. Evid. 402. Plaintiffs and Counterclaim-Defendants do not dispute that the earliest checks produced by Marvel in this action are from 1974 and include the language quoted in Paragraph 158. However, the full legend on the back of such checks states: “By endorsement of this check: I, the payee, acknowledge full payment for my employment by Magazine Management, Co., and for my assignment to it of any copyright, trademark, and any other rights in or related to the material, and, including my assignment of any rights to renewal copyright.” Toberoff Decl. Ex. AA at MARVEL0014603. Plaintiffs and Counterclaim-Defendants object to Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Plaintiffs and Counterclaim-Defendants also object to the statement in Paragraph 158 to the extent it relies on testimony from Steranko and Sinnott, as neither was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1). Plaintiffs and Counterclaim-Defendants further state that while no paychecks from the Time Period have survived, all of Marvel’s witnesses, each of whom was a freelance artist or writer in the 1950s and 1960s, testified that during that time, Marvel’s payroll checks bore a legend stating that the freelance artists and writers retained no rights in the work for which they were being paid. *See* 56.1 Stmt. ¶ 53; Singer Decl. Ex. 1 at 28:20-29:11; *id.* Ex. 2 at 64:14-65:19, 65:24-66:4, 66:24-67:14, 67:17-20, 273:24-274:11; *id.* Ex. 3 at 71:17-72:19, 229:4-25; *id.* Ex. 4 at 31:17-21, 32:4-33:8.

159. The first check produced by Marvel with a legend, mentioning “work for hire” or “work made for hire,” is from 1986, after the explicit new “work for hire” provisions in section 101 of the Copyright Act of 1976 became effective on January 1, 1978; and this check appears to be for traditional employment. Tob Dec. Ex. BB; Colan Dec. at ¶ 12; Adams Dec. at ¶ 14; Ster. Dec. at ¶ 12; Sinn. Dec. at ¶¶ 13-14; Ayers Dec. at ¶ 14.

RESPONSE: The facts in Paragraph 159 are not relevant and are not material to the motion for summary judgment because the cited check is from outside the Time Period and because it will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311; *see also* Fed. R. Evid. 402. Plaintiffs do not dispute that the first check produced by Marvel in this action containing a legend that explicitly states “work for hire” or “work made for hire” was issued in 1986. However, this fact is not relevant and is not material to the motion for summary judgment because the cited check is from outside the Time Period and because it will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311; *see also* Fed. R. Evid. 402. Further, Plaintiffs object to the use of the phrases “explicit new work for hire provisions” and “appears to be for traditional employment” to the extent that such terminology states a legal conclusion and not statements of undisputed fact. *Schwapp*, 118 F.3d at 111. Plaintiffs and Counterclaim-Defendants object to Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 154 to the extent it relies on testimony from Steranko and Sinnott, as neither was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1). Plaintiffs and Counterclaim-Defendants further state that while no paychecks from the Time Period have survived, all of Marvel’s witnesses, each of whom was a freelance artist or writer in the 1950s and 1960s, testified that during that time, Marvel’s payroll checks bore a legend stating that the freelance artists and writers retained no rights in the work for which they were

being paid. *See* 56.1 Stmt. ¶ 53; Singer Decl. Ex. 1 at 28:20-29:11; *id.* Ex. 2 at 64:14-65:19, 65:24-66:4, 66:24-67:14, 67:17-20, 273:24-274:11; *id.* Ex. 3 at 71:17-72:19, 229:4-25; *id.* Ex. 4 at 31:17-21, 32:4-33:8.

160. Between 2006-2008, Marvel entered into a number of separate agreements with the Kirby estate to purchase at a per-page rate unpublished artwork by Jack Kirby for a *Fantastic Four* story that Marvel had originally rejected, and various additional pages of rejected unpublished artwork by Kirby for *Thor*, *Fantastic Four* and *X-Men*. Mor. Dec., Ex. A at 3-4; Ex. B; Tob. Dec., Ex. D at 91:13-92:5; 138:11-139:4; Ex. P, Ex. Q; Ex. R; Ex. S.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. Moreover, the facts in Paragraph 160 are not material to the motion for summary judgment because they will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Plaintiffs do not dispute that, between 2006-2008, Marvel entered into agreements with Lisa Kirby as Administrator of the Estate of Jack Kirby regarding certain pieces of Kirby artwork that were created outside of the Time Period and/or as to which no information has been provided regarding the timing of their creation or whether they were even submitted to Marvel for publication by Kirby. Defendants’ citations do not support the statement that these pieces of artwork were “originally rejected” by Marvel. Further, Plaintiffs object to the statements in Paragraph 160 to the extent Defendants’ citations are to the testimony and report of Morrow, who has no personal knowledge of whether the pieces of artwork were “originally rejected” by Marvel, *see* Toberoff Decl. Ex. D at 89:13-92:5, and to a document that was not produced in discovery in this action. *See* Morrow Decl. Ex. B. This document may not be considered on summary judgment. *Melie*, 2009 WL 1404325, at *1 n. 4. Finally, Plaintiffs object to this statement to the extent it relies on the inadmissible testimony of Morrow as well as inadmissible hearsay in Ex. S to the Toberoff Decl. *Spiegel*, 604 F.3d at 81; *see also* Docket No. 70.

161. In 1968 Marvel was acquired by Perfect Film that later became Cadence Industries. Due to Marvel's loose practices, and the increasing value of comic book characters, Cadence sought to shore up Marvel's assets. "Work for hire" became a sudden focus of insecurity, when the 1976 Copyright Act, effective on January 1, 1978, articulated a detailed "work for hire" regime. 17 U.S.C. § 101. Cadence/Marvel embarked on a campaign to revise history by forcing the artists and writers who had supplied it with material to sign statements re-characterizing all their prior work as "for hire," decades after its creation. Ev. Dec., Ex. A at 13; Tob. Dec., Ex. J at 256:25- 257:25; Ex. III, Ex. 3 ("SUPPLIER acknowledges, agrees and confirms that any and all work...which have been or are in the future created...is expressly agreed to be considered a work made for hire."); Singer Dec., Exs. 36 (Romita Agreement)(same); 37 (Roy Thomas Agreement) (same); Colan Dec. at ¶¶ 13-15; Adams Dec. at ¶¶ 15-16; Ster. Dec. at ¶¶ 15-16; Sinn. Dec. at ¶¶ 13-14; Ayers Dec. at ¶¶ 13-15.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. Moreover, the facts in Paragraph 161 are not material to the motion for summary judgment because they will not "affect the outcome of the suit under the governing law." *Kinsella*, 320 F.3d at 311. Further, Defendants' citations do not support the statements alleged in Paragraph 161. Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 161 to the extent it states a legal conclusion and not a statement of undisputed fact. *Schwapp*, 118 F.3d at 111. Further, Plaintiffs and Counterclaim-Defendants object to the statements in Paragraph 161 to the extent they rely on the inadmissible testimony of Evanier. *See Spiegel*, 604 F.3d at 81; *see also* Docket No. 67. Plaintiffs and Counterclaim-Defendants also object to Defendants' citations to the irrelevant Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel's practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 161 to the extent it relies on testimony from Steranko and Sinnott, as neither was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1).

162. In mid-1978, Marvel began requiring its artists and writers, if they hoped to continue working, to sign agreements “that any and all work...which have been or are in the future created” by them is “to be considered a work made for hire.” Ev. Dec., Ex. A at 13; Tob. Dec., Ex. J at 256:25-257:25; Ex. III, Ex. 3 (“SUPPLIER acknowledges, agrees and confirms that any and all work...*which have been* or are in the future created...is expressly agreed to be considered a work made for hire.”): Singer Dec., Exs. 36 (Romita Agreement)(same); 37 (Roy Thomas Agreement) (same); Colan Dec. at ¶¶ 13-15; Adams Dec. at ¶¶ 15-16; Ster. Dec. at ¶¶ 15-16; Sinn. Dec. at ¶¶ 13-14. Ayers Dec. at ¶¶ 13-15.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. Moreover, the facts in Paragraph 162 are not material to the motion for summary judgment because they will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Further, Defendants’ citations do not support the statements alleged in Paragraph 162. Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 162 to the extent it states a legal conclusion and not a statement of undisputed fact. *Schwapp*, 118 F.3d at 111. Further, Plaintiffs and Counterclaim-Defendants object to the statements in Paragraph 162 to the extent they rely on the inadmissible testimony of Evanier. *See Spiegel*, 604 F.3d at 81; *see also* Docket No. 67. Plaintiffs and Counterclaim-Defendants also object to Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 162 to the extent it relies on testimony from Steranko and Sinnott, as neither was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1).

163. At or shortly after this time, many of the older freelancers, including Kirby, sought their original artwork so as to supplement their meager incomes. Marvel used this as leverage to force them to sign as a condition to the return of their artwork “artwork releases” that purported to retroactively re-characterize all their material, published by Marvel, as “work for hire,” decades after its creation. Ev. Dec., Ex. A at 13-14; Mor. Dec., Ex. A at 13-14. Tob. Dec.,

Ex. C at 215:14-216:23; Exs. DD-EE; Colan Dec. at ¶¶ 13-15; Adams Dec. at ¶¶ 15-16; Ster. Dec. at ¶¶ 15-16; Sinn. Dec. at ¶¶ 13-14; Ayers Dec. at ¶ 15.

RESPONSE: This Paragraph is irrelevant to, and has no bearing on, the motion for summary judgment and should not be considered by the Court in connection therewith. Fed. R. Evid. 402. Moreover, the facts in Paragraph 163 are not material to the motion for summary judgment because they will not “affect the outcome of the suit under the governing law.” *Kinsella*, 320 F.3d at 311. Moreover, Defendants’ citations do not support the statements alleged in Paragraph 163. Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 163 to the extent it states a legal conclusion and not a statement of undisputed fact. *Schwapp*, 118 F.3d at 111. Further, Plaintiffs and Counterclaim-Defendants object to the statements in Paragraph 163 to the extent they rely on the inadmissible testimony of Evanier and Morrow. *See Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70. Plaintiffs and Counterclaim-Defendants also object to Defendants’ citations to the irrelevant Adams Decl. and Steranko Decl. as neither declarant has any firsthand knowledge of Marvel’s practices during the Time Period. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 402; *see also Hicks*, 593 F.3d at 167. Finally, Plaintiffs and Counterclaim-Defendants object to the statement in Paragraph 163 to the extent it relies on testimony from Steranko and Sinnott, as neither was identified as a potential witness by Defendants and therefore their testimony is inadmissible. Fed. R. Civ. P. 37(c)(1).

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