

TOBEROFF & ASSOCIATES, P.C.
2049 Century Park East, Suite 3630
Los Angeles, CA 90067
Tel: 310-246-3333
Fax: 310-246-3101
MToberoff@ipwla.com

Attorneys for Defendants Lisa R. Kirby, Barbara J. Kirby, Neal L. Kirby and Susan M. Kirby

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

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

Defendants.

Civil Action No. 10-141 (CM) (KF)

**DEFENDANTS' REPLY
STATEMENT OF MATERIAL
FACTS PURSUANT TO LOCAL
RULE 56.1 IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

[Hon. Colleen McMahon]

[ECF Case]

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

Pursuant to Local Civil Rule 56.1 of the Local Rules of the United States District Court for the Southern District of New York, defendants Lisa R. Kirby, Barbara J. Kirby, Neal L. Kirby and Susan M. Kirby (“Kirbys”) submit the following Reply Statement of Undisputed Facts in support of their Motion for Summary Judgment:

1. On September 16, 2009, the Kirbys served Notices of Termination (“Termination”) pursuant to 17 U.S.C. § 304(c) to recapture their father Jack Kirby’s copyrights in his works by statutorily terminating all prior grants of copyright therein, including a 1972 agreement between Jack Kirby and plaintiffs’ predecessor Magazine Management Co., Inc. Declaration of Marc Toberoff (“Tob. Dec.”), ¶ 4; Ex. A; Ex. M.

Response: Plaintiffs do not dispute that the Notices of Termination (“Termination Notices”) were served in or around mid-September 2009 or that the Termination Notices purport to exercise a right under 17 U.S.C. § 304(c) to recapture certain copyrights to various publications and characters (the “Works”) that Defendants allege Jack Kirby granted to Magazine Management Co, Inc. However, the 1972 Agreement between Jack Kirby and Magazine Management Co., Inc. did not constitute a “grant of copyright” from Jack Kirby to Magazine Management Co. Inc. *See* Declaration of Randi W. Singer dated February 18, 2011 (“Singer Decl.”) Exhibit (“Ex.”) 17 at ¶ 5 (“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)

Defendants’ Counter-Response: The 1972 agreement drafted by Marvel and entitled an “Assignment” speaks for itself. In several detailed paragraphs, this 1972 Assignment is primarily devoted to the assignment by Kirby of the copyrights in all the material he authored, that had been previously published by Marvel. Marvel admitted

that this is the first written agreement it had with Kirby. *See* Plaintiffs Reply 56.1 Statement (Docket No. 108) at ¶ 147. The one-line belt and suspenders “acknowledgement” as to “work for hire” is of little significance under *Marvel v. Simon*, 310 F.3d 280, 292 (2002), where the Second Circuit unequivocally held that Marvel cannot avoid section 304’s inalienable termination right by re-characterizing a work as “for hire” years after its creation.

2. On January 8, 2010, plaintiffs Marvel Worldwide, Inc., Marvel Characters, Inc. and MVL Rights LLC (including predecessors, “Marvel”) sued the Kirbys, seeking a declaratory judgment that the Termination is invalid on the purported ground that the subject works, published from 1958-1963, were all “works made for hire.” *See* Complaint at 2 (Docket No. 1).

Response: Undisputed.

Defendants’ Counter-Response: No response necessary.

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

Response: Plaintiffs do not dispute that Fredric Wertham’s book, *Seduction of the Innocent*, was published in 1954 and critiqued the effect of comic books on children. However, these facts are not material to the motion for summary judgment because they will not “affect the outcome of the suit under the governing law.” *Kinsella v. Rumsfeld*, 320 F.3d 309, 311 (2d Cir.2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Further, Plaintiffs object to the statements in Paragraph 3 to the

extent they rely on testimony from Mark Evanier and John Morrow, as their testimony is inadmissible. *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* Plaintiffs’ And Counterclaim-Defendants’ Motion To Exclude The Expert Report And Testimony Of Mark Evanier [Docket No. 67]; Motion By Plaintiffs And Counterclaim- Defendants To Exclude The Expert Report And Testimony Of John Morrow [Docket No. 70]. The facts stated in Paragraph 3 are also irrelevant because, among other things, they refer to events outside the 1958-1963 time period at issue in this case (“the Time Period”). Fed. R. Evid.402.

Defendants’ Counter-Response: Marvel admits the essential facts set forth in paragraph 3. Marvel erroneously attempts to limit the court’s review solely to determinative facts that “affect the outcome of the suit under government law.” While an *issue* of fact must be material to the outcome to bar summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), that does not mean that on summary judgment a Court is limited to only considering dispositive facts or evidence. As “work for hire” turns on the “mutual intent of the parties,” *Playboy Enterprises, Inc. v. Dumas*, 53 F.3d 549, 556-57 (2d Cir. 1995), this fact is probative of why Marvel in 1957, right before the Time Period, fired its staff writers and artists, and decided to simply buy material from freelancers, without any contractual obligations, to limit its financial risk and to keep its options open. Ev. Dec., Ex A at 7-8; Mor. Dec., Ex. A at 5-6; Tob. Dec., Ex. F at 200:4-201:20; Reply Declaration of Marc Toberoff (“Tob. Rep. Dec.”), Ex. 1 at 78-80; Ex. 2 at 367:15-373:13; Declaration of Richard Ayers (“Ayers Dec.”) ¶¶ 6-13; Declaration of Gene Colan (“Colan Dec.”) ¶¶ 8-9; Declaration of Joe Sinnott (“Sinn.

Dec.”) ¶¶ 9-11; Declaration of Neal Adams (“Adams Dec.”) ¶¶ 7-12; Declaration of James Steranko (“Ster. Dec.”) ¶¶ 8-14. Moreover, the testimony of Evanier and Morrow is clearly admissible. *See* Docket Nos. 84-88. That this paragraph refers to events outside the Time Period does not mean it has no probative value. Marvel itself relies on testimony from the individuals John Romita and Roy Thomas, who did not work with Marvel during the Time Period. Tob. Dec., Ex. 4 at 219:6-220:11; Ex. 5 at 112:3-6; 214:11-13.

4. 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: Plaintiffs 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, these facts are not relevant and 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; *see also* Fed. R. Evid. 402. Further, Plaintiffs 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.

Defendants’ Counter-Response: Marvel admits the essential facts set forth in paragraph 4. Marvel erroneously attempts to limit the court’s review solely to determinative facts that “affect the outcome of the suit under government law.” While an *issue* of fact must be material to the outcome to bar summary judgment, *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), that does not mean that on summary judgment a Court is limited to only considering dispositive facts or evidence. As “work for hire” turns on the “mutual intent of the parties,” *Playboy*, 53 F.3d at 556-57, this fact is probative of why Marvel in 1957, right before the Time Period, fired its staff writers and artists, and decided to simply buy material from freelancers, without any contractual obligations, to limit its financial risk and to keep its options open. Ev. Dec., Ex A at 7-8; Mor. Dec., Ex. A at 5-6; Tob. Dec., Ex. F at 200:4-201:20; Tob. Rep. Dec., Ex. 1 at 78-80; Ex. 2 at 367:15-373:13; Ayers Dec. ¶¶ 6-13; Colan Dec. ¶¶ 8-9; Sinn. Dec. ¶¶ 9-11; Adams Dec. ¶¶ 9-13; Ster. Dec. ¶¶ 8-14. Moreover, the testimony of Evanier and Morrow is admissible. *See* Docket Nos. 84-88. That this paragraph refers to events outside the Time Period does not mean it has no probative value. Marvel itself relies on testimony from the individuals John Romita and Roy Thomas, who did not work with Marvel during the Time Period. Tob. Dec., Ex. 4 at 219:6-220:11; Ex. 5 at 112:3-6; 214:11-13.

5. In or about 1957, Marvel fired most of its staff artists and writers that it had employed. Ev. Dec., Ex. A at 8; Mor. Dec., Ex. A at 5, 8-9; Tob. Dec., Ex. F. at 123:18-125:9; 200:4-201:20; Ex. U at 80.

Response: Plaintiffs do not dispute that Marvel reduced its staff size in the late 1950s. However, this fact is not relevant and 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; *see also* Fed. R. Evid. 402. Further, Plaintiffs object to the statement in Paragraph 5 to the extent it relies on the inadmissible testimony of

Evanier and Morrow as well as inadmissible hearsay in Ex. U to the Declaration of Marc Toberoff (“Toberoff Decl.”). *Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70.

Defendants’ Counter-Response: Marvel admits the essential facts set forth in paragraph 5. Marvel erroneously attempts to limit the court’s review solely to determinative facts that “affect the outcome of the suit under government law.” While an *issue* of fact must be material to the outcome to bar summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), that does not mean that on summary judgment a Court is limited to only considering dispositive facts or evidence. As “work for hire” turns on the “mutual intent of the parties” *Playboy*, 53 F.3d at 556-57, this fact is probative of why Marvel in 1957, right before the Time Period, fired its staff writers and artists, and decided to simply buy material from freelancers, without any contractual obligations, to limit its financial risk and to keep its options open. Ev. Dec., Ex A at 7-8; Mor. Dec., Ex. A at 5-6; Tob. Dec., Ex. F at 200:4-201:20; Tob. Rep. Dec., Ex. 1 at 78-80; Ex. 2 at 367:15-373:13; Ayers Dec. ¶¶ 6-13; Colan Dec. ¶¶ 8-9; Sinn. Dec. ¶¶ 9-11; Adams Dec. ¶¶ 9-13; Ster. Dec. ¶¶ 8-14. Moreover, the testimony of Evanier and Morrow is admissible. *See* Docket Nos. 84-88. That this paragraph refers to events outside the Time Period does not mean it has no probative value. Marvel itself relies on testimony from the individuals John Romita and Roy Thomas, who did not work with Marvel during the Time Period. Tob. Dec., Ex. 4 at 219:6-220:11; Ex. 5 at 112:3-6; 214:11-13.

6. In or around 1956, Kirby began submitting freelance material to Marvel. Ev. Dec., Ex. A at 9; Mor. Dec., Ex. A at 7.

Response: Plaintiffs 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 6. Further, Plaintiffs 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.

Defendants' Counter-Response: Marvel admits the essential facts set forth in paragraph 6. Moreover, the testimony of Evanier and Morrow is admissible. *See* Docket Nos. 84-88.

7. Between 1958-1963, Marvel purchased material from freelance artists. Ev. Dec., Ex. A at 9, 11-14; Mor. Dec., Ex. A at 5-6; Tob. Dec., Ex. C at 23:4-24:4; Ex. E at 71:17-72:7; 72:22-73:8; 100:21-101:9; Ex. F at 194:11-21; 200:4-201:13; Ex. J at 396:1-4; Ex. K at 232:5-10.

Response: Disputed. Although Plaintiffs 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* 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.

Moreover, Marvel bore the entire financial risk associated with the Works since Marvel hired all contributors to the Works, such as inkers, letterers and colorists, and paid them on an agreed per-page basis. Singer Decl. Ex. 1 at 15:9-20, 30:11-23, 58:13-21; *id.* Ex. 5 at 81:8-13, 91:22-92:6; *id.* Ex. 41 at MARVEL0017230; *see also id.* Ex. 1 at 31:20-33:7; *id.* Ex. 3 at 28:5-15, 50:5-53:20; *id.* Ex. 11, Track 4. All contributors to Marvel's comic books were paid at or near the time their completed assignments were submitted, well in advance of publication, and regardless of whether the completed assignment was changed, published, or successful. Singer Decl. Ex. 1 at 18:6-16, 30:19-31:5, 42:21-43:2, 376:3-22; *id.* Ex. 4 at 30:10-12; *see also id.* Ex. 2 at 16:13-21; 32:2-5; *id.* Ex. 3 at 68:24-69:6, 74:19-25; Supplemental Declaration of Randi W. Singer dated March 25, 2011 ("Supp. Singer Decl.") Ex. 58 at 240:10-241:8; *id.* Ex. 59 at 73:8-74:2. Further, Marvel scheduled the printer time well in advance, so if Marvel's comic books were not ready to be printed at the designated time, Marvel bore the entire loss. Singer Decl. Ex. 1 at 42:10-20, 384:22-385:11; *see also id.* Ex. 3 at 59:22-60:9; *id.* Ex. 4 at 14:9-15:4. If a comic book was not successful, Marvel lost money; thus, as publisher and owner of Marvel, Martin Goodman had the final authority to decide whether to publish or cancel a comic book if it were not profitable. Singer Decl. Ex. 1 at 19:15-17, 43:3-44:2, 97:8-20; *see also id.* Ex. 2 at 204:6-19, 242:14-243:8; *id.* Ex. 3 at 60:22-61:4. Additionally, Defendants' citations to Toberoff Decl. Exhibits C, F, and J do not support the stated fact in Paragraph 7. Further, Plaintiffs object to the statement in Paragraph 7 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.

Defendants' Counter-Response: Marvel admits the essential facts set forth in paragraph 7, but then proceeds to reargue its entire cross-motion for summary judgment. Whether Marvel had financial risk in connection with the assembly, printing and publication of comic books after it decided to purchase material from Kirby in its sole discretion is irrelevant to the issue of whether Kirby bore the financial risk of his creations. *See Twentieth Century Fox Film Corp. v. Entertainment Distrib.*, 429 F.3d 869, 881 (9th Cir. 2005) (“expense” test met if that party takes on “all the financial risk” of the work’s creation) (cited by Marvel); *Estate of Hogarth v. Edgar Rice Burroughs, Inc.*, 2002 U.S. Dist. LEXIS 4219, at *57 (S.D.N.Y. Mar. 15, 2002); 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* (“Nimmer”) § 5.03[B][2][d] at 5-56.9 n.171c (“Plainly, it is the expense of creation, rather than publication, that is relevant” to the expense test.). Marvel admitted that the crux of the “expense” prong is who “b[ears] the entire financial risk associated with the creation of the Works.” Plaintiffs’ Motion for Summary Judgment (Docket No. 62) at 17. It is axiomatic that, as Marvel had no pre-existing legal obligation to pay Kirby for the creation of his material, Kirby, who invested his own time, overhead and materials in the creation of his work with no financial guarantee from Marvel, shouldered the financial risk of creating his material. *See* Undisputed Fact Nos. 11-16, *infra*. *See* Reply Memorandum (“Reply”) at 5-9. *See also* Ayers Dec. ¶¶ 6-13; Colan Dec. ¶¶ 8-9; Sinn. Dec. ¶¶ 9-11. The Kirbys’ exhibits C, F, and J do support the statement in paragraph 7, and the testimony of Evanier and Morrow is clearly admissible. *See* Docket Nos. 84-88.

8. Between 1958-1963, Kirby produced and sold artwork to Marvel on a

freelance basis only, and was not employed by Marvel. Ev. Dec., Ex. A at 9, 11-12; Morrow Dec., Ex A at 7-10; Tob. Dec., Ex. C at 23:4-24:4; Ex. E at 71:17-72:7; 72:22-73:8; Ex. F at 194:11-21; Ex. J at 256:25-257:25; 396:1-14; Ex. L at ¶¶ 1-4, 10, 11, 13.

Response: Disputed. Plaintiffs 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. 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. Moreover, Marvel bore the entire financial risk associated with the Works since Marvel hired all contributors to the Works, such as inkers, letterers and colorists, and paid them on an agreed per-page basis. Singer Decl. Ex. 1 at 15:9-20, 30:11-23, 58:13-21; *id.* Ex. 5 at 81:8-13, 91:22-92:6; *id.* Ex. 41 at MARVEL0017230; *see also id.* Ex. 1 at 31:20-33:7; *id.* Ex. 3 at 28:5-15, 50:5-53:20; *id.* Ex. 11, Track 4. All contributors to Marvel's comic books were paid at or near the time their completed assignments were submitted, well in advance of publication, and regardless of whether the completed assignment was changed, published, or successful. Singer Decl. Ex. 1 at 18:6-16, 30:19-31:5, 42:21-43:2, 376:3-22; *id.* Ex. 4 at 30:10-12; *see also id.* Ex. 2 at 16:13-21; 32:2-5; *id.* Ex. 3 at 68:24-69:6, 74:19-25; Supp. Singer Decl. Ex. 58 at 240:10-241:8; *id.* Ex. 59 at 73:8-74:2. Further, Marvel scheduled the printer time well in advance, so if Marvel's comic books

were not ready to be printed at the designated time, Marvel bore the entire loss. Singer Decl. Ex. 1 at 42:10-20, 384:22-385:11; *see also id.* Ex. 3 at 59:22- 60:9; *id.* Ex. 4 at 14:9-15:4. If a comic book was not successful, Marvel lost money; thus, as publisher and owner of Marvel, Martin Goodman had the final authority to decide whether to publish or cancel a comic book if it were not profitable. Singer Decl. Ex. 1 at 19:15-17, 43:3-44:2, 97:8-20; *see also id.* Ex. 2 at 204:6-19, 242:14-243:8; *id.* Ex. 3 at 60:22-61:4. Further, Plaintiffs object to the statement in Paragraph 8 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.

Defendants' Counter-Response: Marvel admits the essential facts set forth in paragraph 8, but then proceeds to reargue its entire cross-motion for summary judgment. Whether Marvel had financial risk in connection with the assembly, printing and publication of comic books after it decided to purchase material from Kirby in its sole discretion is irrelevant to the issue of whether Kirby bore the financial risk of his creations. *See Twentieth Century*, 429 F.3d at 881; *Estate of Hogarth v. Edgar Rice Burroughs, Inc.*, 2002 U.S. Dist. LEXIS 4219, at *57; 1 *Nimmer* § 5.03[B][2][d] at 5-56.9 n.171c. Marvel admitted that the crux of the “expense” prong is who “b[ears] the entire financial risk associated with the creation of the Works.” Plaintiffs’ Motion for Summary Judgment (Docket No. 62) at 17. It is axiomatic that, as Marvel had no pre-existing legal obligation to pay Kirby for the creation of his material, Kirby, who invested his own time, overhead and materials in the creation of his work with no financial guarantee from Marvel, shouldered the financial risk of creating his material. *See* Undisputed Fact Nos. 11-16, *infra*. *See* Reply at 5-9. *See also* Ayers Dec. ¶¶ 6-13; Colan

Dec. ¶¶ 8-9; Sinn. Dec. ¶¶ 9-11. The testimony of Evanier and Morrow is clearly admissible. *See* Docket Nos. 84-88.

9. 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.

Response: Undisputed. However, Plaintiffs object to this statement to the extent it relies on inadmissible testimony of Evanier and Morrow.

Defendants' Counter-Response: Plaintiffs admit the essential facts set forth in paragraph 9. The testimony of Evanier and Morrow is admissible. *See* Docket Nos. 84-88.

10. 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.

Defendants' Counter-Response: No response necessary.

11. Between 1958-1963, Kirby 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; 92:24-93:11; Ex. H at 9:15-10:9; Ex. CC at K860-61.

Response: Disputed. Although Plaintiffs 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. 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 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 fail to identify any admissible evidence in the record for its claim that Jack Kirby paid his own "overhead and insurance." Further, the facts in Paragraph 11 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 also object to the statements in Paragraph 11 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.

Defendants' Counter-Response: Marvel admits the essential facts set forth in paragraph 11, but then proceeds to reargue its cross-motion for summary judgment. The facts in paragraph 11 are relevant to the "expense" prong of the "work for hire" analysis as they show that Kirby, not Marvel, bore the financial risk of creation. *See also* Colan Dec. at ¶ 8-9; Adams Dec. at ¶ 7; Ster. Dec. at ¶ 10; Sinn. Dec. at ¶ 9-11; Ayers Dec. at ¶ 6-13. Marvel erroneously attempts to limit the court's review solely to determinative facts that "affect the outcome of the suit under government law." While an *issue* of fact must be material to the outcome to bar summary judgment, *Liberty*

Lobby, Inc., 477 U.S. at 248, that does not mean that on summary judgment a Court is limited to only considering dispositive facts or evidence. Plaintiffs' proposition that "Kirby often performed work while in Marvel's offices" is not supported by the evidence they cite, and contradicts the record evidence. Tob. Dec., Ex. G at 90:12-15, 92:24-93:11; Ex. H at 9:15-10:9; Ex. CC at K860-61. Moreover, Plaintiffs have admitted that they did not provide any insurance to Kirby during the Time Period. Tob. Dec., Ex. L at ¶¶ 10-11. The testimony of Evanier and Morrow is admissible. *See* Docket Nos. 84-88.

12. 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.

Response: Disputed. 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. 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. Moreover, Marvel bore the entire financial risk associated with the Works since Marvel hired all contributors to the Works, such as inkers, letterers and colorists, and paid them on an agreed per page basis. Singer Decl. Ex. 1 at 15:9-20, 30:11-23, 58:13-21; *id.* Ex. 5 at 81:8-13, 91:22-92:6; *id.* Ex. 41 at MARVEL0017230; *see also id.* Ex. 1 at 31:20-33:7; *id.* Ex. 3 at 28:5-15, 50:5-53:20; *id.* Ex. 11, Track 4. All contributors to Marvel's comic books were paid at or near the time their completed assignments were submitted, well in advance of publication, and regardless of whether the completed assignment was changed, published, or successful. Singer Decl. Ex. 1 at 18:6-16, 30:19-31:5, 42:21-43:2, 376:3-22; *id.* Ex. 4 at 30:10-12; *see also id.* Ex. 2 at 16:13-21; 32:2-5; *id.* Ex. 3 at 68:24-69:6, 74:19-25; Supp. Singer Decl. Ex. 58 at 240:10-241:8; *id.* Ex. 59 at 73:8-74:2. Further, Marvel scheduled the printer time well in advance, so if Marvel's comic books were not ready to be printed at the designated time, Marvel bore the entire loss. Singer Decl. Ex. 1 at 42:10-20, 384:22-385:11; *see also id.* Ex. 3 at 59:22-60:9; *id.* Ex. 4 at 14:9-15:4. If a comic book was not successful, Marvel lost money; thus, as publisher and owner of Marvel, Martin Goodman had the final authority to decide whether to publish or cancel a comic book if it were not profitable. Singer Decl. Ex. 1 at 19:15-17, 43:3-44:2, 97:8-20; *see also id.* Ex. 2 at 204:6-19, 242:14-243:8; *id.* Ex. 3 at 60:22-61:4. Additionally, facts relating to Marvel's withholding of taxes 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 also object to the statement in Paragraph 12 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.

Defendants' Counter-Response: Marvel admits the essential facts set forth in paragraph 12, but then proceeds to reargues its entire cross-motion for summary judgment. Whether Marvel had financial risk in connection with the assembly, printing and publication of comic books after it decided to purchase material from Kirby in its sole discretion is irrelevant to the issue of whether Kirby bore the financial risk of his creations. *See Twentieth Century*, 429 F.3d at 881; *Estate of Hogarth v. Edgar Rice Burroughs, Inc.*, 2002 U.S. Dist. LEXIS 4219, at *57; 1 *Nimmer* § 5.03[B][2][d] at 5-56.9 n.171c. Marvel admitted that the crux of the “expense” prong is who “b[ears] the entire financial risk associated with the creation of the Works.” Plaintiffs’ Motion for Summary Judgment (Docket No. 62) at 17. It is axiomatic that, as Marvel had no pre-existing legal obligation to pay Kirby for the creation of his material, Kirby, who invested his own time, overhead and materials in the creation of his work with no financial guarantee from Marvel, shouldered the financial risk of creating his material. *See* Undisputed Fact Nos. 11-16; Reply at 5-9. *See also* Ayers Dec. ¶¶ 6-12; Colan Dec. ¶¶ 8-9; Sinn. Dec. ¶ 9-11. The testimony of Evanier and Morrow is clearly admissible. *See* Docket Nos. 84-88.

13. 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.

Response: Plaintiffs do not dispute that Jack Kirby did not receive health benefits or health insurance from Marvel between 1958-1963. However, 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 also object to the statement in Paragraph 13 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.

Defendants’ Counter-Response: Marvel admits the essential facts set forth in paragraph 13, but then proceeds to reargues its cross-motion for summary judgment. The facts in paragraph 13 are relevant to the “expense” prong of the “work for hire” analysis as they show that Kirby, not Marvel, bore the financial risk of creation. *See also* Colan Dec. at ¶ 8; Adams Dec. at ¶ 10; Ster. Dec. at ¶ 10; Sinn. Dec. at ¶ 9; Ayers Dec. at ¶ 10. Moreover, Plaintiffs have admitted that they did not provide any insurance or health benefits to Kirby during the Time Period. Tob. Dec., Ex. L at ¶¶ 10-11. The testimony of Evanier and Morrow is admissible. *See* Docket Nos. 84-88.

14. 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 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. N, Ex. O at 71-74; Ex. P, Ex. Q; Ex. R; Ex. S.

Response: Disputed. 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. 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 and the record actually shows the opposite to be true. *Compare* Toberoff Decl. Ex. E at 76:25-77:6 *with* Singer Decl. Ex. 4 at 30:10-12 ("Q. Did you get paid for all the work you did for Marvel? A. Yes. Yes.") *and* Toberoff Decl. Ex. E at 77:20-79:4 ("Finally, you know, he did like it and I was allowed to write the script and I got paid for the script."); Supp. Singer Decl. Ex. 60 at 110:7-18 (stating that the work previously discussed was completed outside of the Time Period); *compare* Toberoff Decl. Ex. F at 123:18-125:9 *with* Singer Decl. Ex. 2 at 32:2-5. Plaintiffs also object to the statement in Paragraph 14 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 and S to the Toberoff Decl. *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. Defendants also object to the statements in Paragraph 14 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.

Defendants’ Counter-Response: Marvel’s statement that it paid for Kirby artwork it decided to purchase, even if it ultimately did not publish some of the material for one reason or another, is a *red herring*. Marvel consistently skirts the relevant issue of whether it was legally obligated to pay for Kirbys’ submissions in the first place. The record evidence is overwhelming that Marvel did not pay for freelance material it did not like and similarly it did not pay for material it wanted Kirby or other freelancers to redraw. *See* 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 136:7-138:15; 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; Colan Dec. at ¶ 9; Adams Dec. at ¶ 11-12; Ster. Dec. at ¶ 14; Sinn. Dec. at ¶ 13; Ayers Dec. at ¶ 11. Marvel’s statement that the Kirbys’ evidence of rejected artwork is from outside the Time Period is not supported by its citations. For instance, the Kirbys cited to rejected *Incredible Hulk* drawings created by Kirby during the Time Period. Tob. Dec. Exs. D at 89:13-91:4; N, O. Additional Kirby artwork that was rejected close to the Time Period is probative of Marvel’s practices in the Time Period, a fact Marvel has acknowledged by citing to the testimony of its witnesses, Roy Thomas and John Romita, who did not work with Marvel during the Time Period. Tob. Dec., Ex. 4 at 219:6-220:11; Ex. 5 at 112:3-6; 214:11-13. *See also* Colan Dec. at ¶¶ 8, 9; Adams Dec. at ¶¶ 8-12; Ster. Dec. at ¶¶ 8-14; Sinn. Dec. at ¶ 11; Ayers Dec. at ¶ 11. The testimony of Evanier and Morrow is admissible. *See* Docket Nos. 84-88. Both Susan and Neal Kirby have personal

knowledge about works by their father that were rejected by Marvel. Tob. Dec., 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.

15. 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 136:7-138:15; 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.

Response: Disputed. 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. 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 and in fact, the record shows the opposite to be true.

Compare Toberoff Decl. Ex. E at 76:25-77:6 *with* Singer Decl. Ex. 4 at 30:10-12 *and* Toberoff Decl. Ex. E at 77:20-79:4. Plaintiffs object to the statements in Paragraph 15 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. *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. Defendants also object to the statements in Paragraph 15 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.

Defendants' Counter-Response: Marvel once again skirts the relevant issue. The issue is not whether Marvel paid for material once it was redrawn to its liking, the issue is whether Marvel paid for the material it wanted redrawn, *i.e.*, rejected. The record evidence is clear that it did not. *See* Tob. Dec., Ex. E at 76:25-77:6, 77:20-79:4; Sinn. Dec., ¶ 13; Colan Dec. at ¶ 9; Ster. Dec. at ¶ 14; Adams Dec. at ¶¶ 11-12; Ayers Dec. at ¶ 11; Singer Dec, Ex. 46 at ¶ 3. Marvel's erroneous interpretation of the "expense" prong as the mere payment for material leads to absurd results. Under Marvel's "instance and expense" test, the "work for hire" status of material purportedly owned by Marvel upon creation as its "author" would be undetermined until Marvel decided to buy the material and Marvel would not own as its "author" those Kirby pages it did not pay for, but asked Kirby to redraw. Whether or not Defendants' experts Morrow and Evanier have percipient knowledge of "Marvel's payments to Kirby" is irrelevant. *See* Docket Nos. 84-88. Both Susan and Neal Kirby have personal knowledge about works by their father that were rejected by Marvel. Tob. Dec., 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.

16. 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; Ex. C at 23:4-24:4; 105:15-17; 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; Ex. V at 396, 407, 428; Ex. L at ¶¶ 1-4, 10, 11, 13.

Response: Plaintiffs object to the statement in Paragraph 16 to the extent it states a legal conclusion and not a statement of undisputed fact. 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 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. *Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70. 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. 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. Moreover, Marvel bore the entire financial risk associated with the Works since Marvel hired all contributors to the Works, such as inkers, letterers and colorists, and paid them on an agreed per page basis. Singer Decl.

Ex. 1 at 15:9-20, 30:11-23, 58:13-21; *id.* Ex. 5 at 81:8-13, 91:22-92:6; *id.* Ex. 41 at MARVEL0017230; *see also id.* Ex. 1 at 31:20-33:7; *id.* Ex. 3 at 28:5-15, 50:5-53:20; *id.* Ex. 11, Track 4. All contributors to Marvel’s comic books were paid at or near the time their completed assignments were submitted, well in advance of publication, and regardless of whether the completed assignment was changed, published, or successful. Singer Decl. Ex. 1 at 18:6-16, 30:19-31:5, 42:21-43:2, 376:3-22; *id.* Ex. 4 at 30:10-12; *see also id.* Ex. 2 at 16:13-21; 32:2-5; *id.* Ex. 3 at 68:24-69:6, 74:19-25; Supp. Singer Decl. Ex. 58 at 240:10-241:8; *id.* Ex. 59 at 73:8-74:2. Further, Marvel scheduled the printer time well in advance, so if Marvel’s comic books were not ready to be printed at the designated time, Marvel bore the entire loss. Singer Decl. Ex. 1 at 42:10-20, 384:22-385:11; *see also id.* Ex. 3 at 59:22-60:9; *id.* Ex. 4 at 14:9-15:4. If a comic book was not successful, Marvel lost money; thus, as publisher and owner of Marvel, Martin Goodman had the final authority to decide whether to publish or cancel a comic book if it were not profitable. Singer Decl. Ex. 1 at 19:15-17, 43:3-44:2, 97:8-20; *see also id.* Ex. 2 at 204:6-19, 242:14-243:8; *id.* Ex. 3 at 60:22-61:4.17. 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.

Defendants’ Counter-Response: Whether Marvel was legally obligated to pay for freelance submissions is plainly relevant to the “expense prong” of the “work for hire” analysis. But whether Marvel had financial risk in connection with the assembly, printing and publication of comic books after it decided to purchase material

from Kirby in its sole discretion is irrelevant to the issue of whether Kirby bore the financial risk of his creations. *See Twentieth Century*, 429 F.3d at 881; *Estate of Hogarth v. Edgar Rice Burroughs, Inc.*, 2002 U.S. Dist. LEXIS 4219, at *57; 1 *Nimmer* § 5.03[B][2][d] at 5-56.9 n.171c. Marvel admitted that the crux of the “expense” prong is who “b[ears] the entire financial risk associated with the creation of the Works.”

Plaintiffs’ Motion for Summary Judgment (Docket No. 62) at 17. It is axiomatic that, as Marvel had no pre-existing legal obligation to pay Kirby for the creation of his material, Kirby, who invested his own time, overhead and materials in the creation of his work with no financial guarantee from Marvel, shouldered the financial risk of creating his material. *See* Undisputed Fact Nos. 11-16; Reply at 5-9; 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. The testimony of Evanier and Morrow is admissible. *See* Docket Nos. 84-88.

17. 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.

Response: 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. 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. Moreover, Marvel bore the entire financial risk associated with the Works since Marvel hired all contributors to the Works, such as inkers, letterers and colorists, and paid them on an agreed per page basis. Singer Decl. Ex. 1 at 15:9-20, 30:11-23, 58:13-21; *id.* Ex. 5 at 81:8-13, 91:22-92:6; *id.* Ex. 41 at MARVEL0017230; *see also id.* Ex. 1 at 31:20-33:7; *id.* Ex. 3 at 28:5-15, 50:5-53:20; *id.* Ex. 11, Track 4. All contributors to Marvel’s comic books were paid at or near the time their completed assignments were submitted, well in advance of publication, and regardless of whether the completed assignment was changed, published, or successful. Singer Decl. Ex. 1 at 18:6-16, 30:19-31:5, 42:21-43:2, 376:3-22; *id.* Ex. 4 at 30:10-12; *see also id.* Ex. 2 at 16:13-21; 32:2-5; *id.* Ex. 3 at 68:24-69:6, 74:19-25; Supp. Singer Decl. Ex. 58 at 240:10-241:8; *id.* Ex. 59 at 73:8-74:2. Further, Marvel scheduled the printer time well in advance, so if Marvel’s comic books were not ready to be printed at the designated time, Marvel bore the entire loss. Singer Decl. Ex. 1 at 42:10-20, 384:22-385:11; *see also id.* Ex. 3 at 59:22-60:9; *id.* Ex. 4 at 14:9- 15:4. If a comic book was not successful, Marvel lost money; thus, as publisher and owner of Marvel, Martin Goodman had the final authority to decide whether to publish or cancel a comic book if it were not profitable. Singer Decl. Ex. 1 at 19:15-17, 43:3-44:2, 97:8-20; *see also id.* Ex. 2 at 204:6-19, 242:14-243:8; *id.* Ex. 3 at 60:22-61:4. 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, and Defendants have cited no admissible evidence to support the statement that Kirby was free to “sell” artwork to other publishers. Further, Defendants’ citations do not support the statement that other freelance artists were free to “sell” artwork to other publishers. Plaintiffs also 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. *Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70. Finally, Plaintiffs 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 v. EVCITCI Coll. Admin.*, No. 08 Civ. 5226(HB), 2009 WL 1404325, at*1 n.4 (S.D.N.Y., May 20, 2009), *aff'd*, 374 F. App'x 150 (2d Cir. 2010).¹⁸ 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.

Defendants' Counter-Response: Marvel admits that Kirby was free to sell work to other publishers during the Time Period, which is probative of his legal relationship with Marvel, and weighs against "work for hire." *See Donaldson Publishing Co. v. Bregman, Vocco, & Conn, Inc.*, 375 F.2d 639, 643 (2nd Cir. 1967); 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. Whether Marvel had financial risk in connection with the assembly, printing and publication of comic books after it decided to purchase material from Kirby in its sole discretion is irrelevant to the issue of whether Kirby bore the financial risk of his creations. *See Twentieth Century*, 429 F.3d at 881; *Estate of Hogarth v. Edgar Rice Burroughs, Inc.*, 2002 U.S. Dist. LEXIS 4219, at *57; 1 *Nimmer* § 5.03[B][2][d] at 5-56.9 n.171c. Marvel admitted that the crux of the "expense" prong is who "b[ears] the entire financial risk associated with the creation of the Works." Plaintiffs' Motion for Summary Judgment (Docket No. 62) at 17. It is axiomatic that, as Marvel had no pre-

existing legal obligation to pay Kirby for the creation of his material, Kirby, who invested his own time, overhead and materials in the creation of his work with no financial guarantee from Marvel, shouldered the financial risk of creating his material. *See* Undisputed Fact Nos. 11-16; Reply at 5-9; 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. The testimony of Evanier and Morrow is admissible. *See* Docket Nos. 84-88. Marvel’s hearsay objections to Exhibits W, X, and Y are baseless.

18. 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.

Defendants’ Counter-Response: No response necessary.

19. The earliest checks to a freelancer with a legend on the back, produced by Marvel in this action, are from 1974, and the legend on such checks 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. E at 100:21-101:9; Ex. J at 396:1-14; Ex. K at 232:5-10; Ex. L at ¶¶ 2, 4; Ex. AA at 14603; Ex. T.

Response: Plaintiffs do not dispute that the earliest checks produced by Marvel in this action are from 1974 and include the language quoted in Paragraph 19. 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. In any event, this fact is not relevant and is not material to the motion for summary judgment because the cited checks are 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. 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. 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.

Defendants’ Counter-Response: Marvel admits the essential facts set forth in paragraph 19. *See also* Colan Dec. at ¶ 12; Adams Dec. at ¶ 14; Ster. Dec. at ¶ 12; Sinn. Dec. at ¶¶ 13-14; Ayers Dec. at ¶ 14. *See* Confidential Declaration of Marc Toberoff (“Tob. Conf. Dec.”), Ex. 10 at ¶ 7, Ex. 11 at ¶ 7, Ex. 12 at ¶ 7; Singer Dec., Ex. 46 at 7. Events close to the Time Period are obviously probative of Marvel’s practices and intent within the Time Period. Plaintiffs themselves have relied on testimony from their witnesses, John Romita and Roy Thomas, who did not work with Marvel during the Time Period. Tob. Dec., Ex. 4 at 219:6-220:11; Ex. 5 at 112:3-6; 214:11-13. Marvel bears the burden of proof on its “work for hire” defense, and it has provided no evidence that its practices or intent changed between the early 1960’s and the mid-to-late 1960’s or even 1970’s. The only reasonable inference is that if Marvel freelance checks/contracts

in the mid-1970's, when it was far more prosperous and organized, still had express language of purchase and assignment, with no mention whatsoever of "work for hire," that Marvel, in the far more haphazard Time Period (1958-1963), did not intend or implement a "work for hire" relationship with freelancers such as Kirby. Moreover, contrary to Marvel's claims, its own witnesses, Stan Lee, Roy Thomas and Larry Lieber, all admitted that Marvel simply purchased their freelance work. Tob. Dec., Ex. E at 100:21-101:9; Ex. J at 396:1-14; Ex. K at 232:5-10. This concurs with the testimony of numerous other witnesses who worked with Marvel both in and close to the Time Period. *See* Ayers Dec. ¶¶ 11-14 ("The reality was that Marvel and other comic book publishers bought our freelance artwork once it had been submitted and accepted by the publisher. I believed that Marvel owned all rights to the artwork because they bought it from me."); Colan Dec. ¶ 9, 12 ("I understood that Marvel would own the artwork I submitted once they accepted it because I was selling it to Marvel."); Ster. Dec. ¶¶ 8-14; Sinn. Dec. ¶¶ 10-11; Adams Dec. ¶¶ 7-15.

20. 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. Tob Dec., Ex. BB.

Response: 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 phrase “explicit new work for hire provisions” to the extent that that such terminology states a legal conclusion regarding the Copyright Act of 1976 and not a statement of undisputed fact. 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. 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.

Defendants’ Counter-Response: Marvel admits the essential facts set forth in paragraph 20. However, Marvel again tries to sidestep the issue with its carefully worded statement that Marvel’s witnesses testified that the legends on the back of their checks bore a legend they “retained no rights in the work for which they were being paid.” This is thoroughly consistent with the fact that Marvel’s checks in the Time Period had a legend stating that Marvel was purchasing and the freelancer was assigning all rights in their material as testified to by numerous witnesses both from and shortly after the Time Period, as further supported by the 1970’s checks Marvel produced, which still contained such “purchase and assignment” legends. *See* Colan Dec. at ¶ 12; Adams Dec. at ¶ 14; Ster. Dec. at ¶ 12; Sinn. Dec. at ¶¶ 13-14; Ayers Dec. at ¶ 14; Tob. Dec., Ex. AA. *See also* Tob. Conf. Dec., Ex. 10 at ¶ 7, Ex. 11 at ¶ 7, Ex. 12 at ¶ 7; Singer Dec., Ex. 46 at 7. Moreover, contrary to Marvel’s claims, Stan Lee, Roy Thomas and Larry Lieber all agreed that Marvel simply purchased their freelance work, as did the Kirbys’

numerous witnesses. Tob. Dec., Ex. E at 100:21-101:9; Ex. J at 396:1-14; Ex. K at 232:5-10. See Ayers Dec. ¶¶ 11-14; Colan Dec. ¶ 9, 12; Ster. Dec. ¶¶ 8-14; Sinn. Dec. ¶¶ 10-11; Adams Dec. ¶¶ 7-15. Evidence close to the Time Period is obviously probative of Marvel's practices and intent within the Time Period. In its response, Marvel, itself, relies on testimony from their witnesses, John Romita and Roy Thomas, who did not work with Marvel during the Time Period. Tob. Dec., Ex. 4 at 219:6-220:11; Ex. 5 at 112:3-6; 214:11-13. The fact that the legend on the back of Marvel checks issued to freelancers changed, after the 1976 Copyright Act, which became effective on January 1, 1978, to include "work for hire" provisions explicitly applicable to independent contractors is probative indeed of how Marvel viewed its relationship with freelancers at the time and in contrast to the Time Period.

21. Between 2006-2008, Marvel entered into a number of separate agreements with the Kirbys 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: 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 21 to the extent Defendants’ citations are to the testimony and report of John 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 Declaration Ex. B. This document may not be considered on summary judgment. *Melie*, 2009 WL 1404325, at *1 n. 4. Moreover, this fact is not relevant and is not material to the motion for summary judgment because the artwork was drawn 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. 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 Nos. 67, 70.

Defendants’ Counter-Response: Marvel admits the essential facts set forth in paragraph 21 and does not dispute that if Marvel had owned these rejected Kirby works at inception as “works made for hire,” it would have had no reason to license the works in 2008 from Kirby’s estate and pay it for the right to publish such works. Marvel’s objection to the *Fantastic Four: The Lost Adventure* comic book is unfounded as Morrow discussed it in his expert report and deposition, and Marvel licensed and sold it in 2008. Mor. Dec., Ex. A at 3-4; Ex. B; Tob. Dec., Ex. D at 91:13-92:5; 138:11-139:4; Ex. S. Such events, even though outside the Time Period, have important probative value as to Marvel’s relationship with Kirby in the Time Period. Marvel itself has relied on testimony from its witnesses John Romita and Roy Thomas, who did not work with

Marvel during the Time Period. Tob. Dec., Ex. 4 at 219:6-220:11; Ex. 5 at 112:3-6;
214:11-13.

Dated: April 8, 2011

Respectfully submitted,
TOBEROFF & ASSOCIATES, P.C.

/s/ Marc Toberoff

Marc Toberoff
2049 Century Park East, Suite 3630
Los Angeles, California 90067
Tel. (310) 246-3333
Facsimile: (310) 246-3101
E-mail: mtoberoff@ipwla.com

Attorneys for defendants
Lisa R. Kirby, Barbara J. Kirby, Neal L.
Kirby and Susan M. Kirby

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served electronically by the Court's ECF system and by first class mail on those parties not registered for ECF pursuant to the rules of this court.

Dated: April 8, 2011

Respectfully submitted,
TOBEROFF & ASSOCIATES, P.C.

/s/ Marc Toberoff

Marc Toberoff
2049 Century Park East, Suite 3630
Los Angeles, California 90067
Tel. (310) 246-3333
Facsimile: (310) 246-3101
E-mail: mtoberoff@ipwla.com

Attorneys for defendants
Lisa R. Kirby, Barbara J. Kirby, Neal L.
Kirby and Susan M. Kirby