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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)

[Hon. Colleen McMahon]

[ECF Case]

DEFENDANTS' OBJECTION TO THE DECLARATION OF JAMES W. QUINN

Defendants respectfully submit the following objection to the declaration of James W. Quinn filed on November 5, 2010.

1. Defendants object to Plaintiffs' use of Mr. Quinn's declaration to raise additional arguments in support of their motion to dismiss defendants' counterclaims. This Court simply asked for the parties to submit the October 31, 1986 agreement alleged in defendants' fourth claim for relief. Defendants provided this agreement to the court, with a simple explanation that they did not, at this time, have a fully executed copy of this agreement. That should have been the end of the matter. However, plaintiffs have improperly used this process as a platform to attack the merits of defendants' fourth claim, by attaching all sorts of extrinsic evidence. This is plainly improper on a motion to dismiss which focuses on the pleadings. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 127 (2d Cir. 2009). Accordingly, exhibits "A," "B" and "C" to Mr. Quinn's declaration must be stricken.

2. Plaintiffs produced over 16,000 pages of documents in this case. *See* attached Declaration of Marc Toberoff, ¶ 2. Instead of producing documents related to the "original artwork" issue together, such documents were randomly scattered throughout the production. *Id.* Pursuant to the Court's Order, defendants' counsel focused on locating a fully executed copy of the October 31, 1986 artwork agreement alleged in defendants' fourth claim. *Id.* Within plaintiffs' production, defendants' counsel found copies of a document entitled "Artwork Release" dated June 16, 1987, that were not fully executed. Defendants' counsel inadvertently missed the alleged fully executed "Artwork Release" attached as Exhibit C to Mr. Quinn's declaration. *Id.*

Defendants' counsel apologizes to the Court for any confusion this honest mistake may have caused. *Id.*

Dated: New York, New York
November 5, 2010

TOBEROFF & ASSOCIATES, P.C.

By: /s/ Marc Toberoff
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