

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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 :
 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

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

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 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. :
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LOCAL RULE 56.1 STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED IN SUPPORT OF MOTION BY PLAINTIFFS AND COUNTERCLAIM-DEFENDANTS 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 statement of material facts as to which there is no genuine issue to be tried in support of their motion for summary judgment.

THE PARTIES

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 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 & Chemical Corporation, Cadence Industries Corporation and Marvel Entertainment Group, Inc. (collectively, the “Marvel Predecessors”). Declaration of Eli Bard dated February 18, 2011 (“Bard Decl.”) ¶ 2; Declaration of Randi W. Singer dated February 18, 2011 (“Singer Decl.”) Exhibit (“Ex.”) 12 at ¶ 14.

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; *id.* Ex. 12 at ¶¶ 18-19.

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 *The Fantastic Four*, *The Incredible Hulk* and *The X-Men*. *Id.* Ex. 12 at ¶ 19.

4. Kirby died in 1994. *Id.* Ex. 12 at ¶ 18; *see also* November 9, 2010 Deposition of Mark Evanier (“Evanier Dep. (11/9/10)”) annexed as Ex. 8 to the Singer Decl. at 27:1-4.

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. *See id.* Ex. 14.

THE TERMINATION NOTICES AND CLAIMS OF COPYRIGHT OWNERSHIP

6. On August 31, 2009, Disney announced publicly that it had agreed to acquire Marvel Entertainment, Inc. *See id.* Ex. 15.

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 had allegedly contributed (the “Termination Notices”). *See id.* Ex. 16; *id.* Ex. 12 at ¶ 12.

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: *Amazing Adventures*, Vol. 1, Nos. 1-6; *Amazing Fantasy*, Vol. 1, No. 15; *The Amazing Spider-Man*, Vol. 1, Nos. 1-7; *The Avengers*, Vol. 1, Nos. 1-2; *The Fantastic Four*, Vol. 1, Nos. 1-21; *The Fantastic Four Annual*, No. 1; *Journey Into Mystery*, Vol. 1, Nos. 51-98; *The Incredible Hulk*, Vol. 1, Nos. 1-6; *The Rawhide Kid*, Vol. 1, Nos. 17-35; *Sgt. Fury and His Howling Commandos*, Vol. 1, Nos. 1-4; *Strange Tales*, Vol. 1, Nos. 67-115; *Tales of Suspense*, Vol. 1, Nos. 1, 3-48; *Tales to Astonish*, Vol. 1, Nos. 1, 3-50; and *The X-Men*, Vol. 1, Nos. 1-2 (collectively, the “Works”). *See id.* Ex. 16.

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 Management Co., Inc. “any and all right, title and interest [Kirby] may have or control” in any work Kirby ever created for Marvel. *Id.* Ex. 17 at ¶ 1.A.(1).

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. *Id.* at ¶ 5.

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. *See id.* Ex. 16; June 30, 2010 Deposition of Neal Kirby (“N. Kirby Dep.”) annexed as Ex. 5 to the Singer Decl. at 172:12-17.

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: *Amazing Adventures*, Vol. 1, Nos. 1-6; *Amazing Fantasy*, Vol. 1, No. 15; *The Amazing Spider-Man*, Vol. 1, Nos. 1-7; *The Avengers*, Vol. 1, Nos. 1-2; *The Fantastic Four*, Vol. 1, Nos. 1-21; *The Fantastic Four Annual*, No. 1; *Journey Into Mystery*, Vol. 1, Nos. 51-98; *The Incredible Hulk*, Vol. 1, Nos. 1-6; *The Rawhide Kid*, Vol. 1, Nos. 17-26, 28-35; *Sgt. Fury and His Howling Commandos*, Vol. 1, Nos. 1-4; *Strange Tales*, Vol. 1, Nos. 67-84, 96-115; *Tales of Suspense*, Vol. 1, Nos. 3-48; *Tales to Astonish*, Vol. 1, Nos. 3-50; and *The X-Men*, 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.

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), 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. *Id.* 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. *Id.* 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. *Id.* Ex. 4. On September 1, 1995, Marvel Entertainment Group, Inc. executed a Copyright Assignment to MCI of all copyrights relating to its comics business. *Id.* 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. *Id.* 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 *Hulk* and *Iron Man* and the registered copyrights set forth on the schedules attached to the assignment, to MVL. *Id.* Ex. 7.

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

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.

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.”); *see also* 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. (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; *see also* Evanier Dep. (12/6/10) at 104:20-105:5.

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. *See* Singer Decl. Exs. 19-25.

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.

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; *see also* Evanier Dep. (12/6/10) at 40:7-41:3, 149:10-16.

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.

21. At times, Goodman decided to discontinue certain comic book series if they were not selling well. Romita Dep. at 204:6-17; *see also* Lee Dep. at 56:18-22; Evanier Dep. (12/6/10) at 41:6-42:13.

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

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.

23. As editor of Marvel, Lee oversaw all of the creative and editorial aspects of every comic book that Marvel published during the Time 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 . . ."); *id.* 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.>").

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; *see also* 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.

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; *see also* 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.

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; *see also* Thomas Dep. at 59:22-60:21.

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; *see also* Romita Dep. 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).

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.

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.

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 editor of Marvel

unless Lee himself had approved it. Lee Dep. at 33:25-34:7; *see also* Thomas Dep. at 112:25-113:23.

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; *see also* Thomas Dep. at 66:13-67:2; Romita Dep. at 70:9-74:17.

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 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.

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.

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; *see also* Thomas Dep. at 67:16-68:6.

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; *see also* 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 Lee's handwritten notes directing Kirby to make certain changes. Singer Decl. Ex. 28 at K00299; *see also* Evanier Dep. (12/6/10) at 202:6-204:18.

Development of the Marvel Method

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; *see also* Evanier Dep. (12/6/10) at 201:14-202:5.

37. During the Time Period, Lee developed a new system wherein he provided the artist with a short outline or synopsis – which could be 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 ; *id.* Ex. 27; *see also* 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.

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; *see also* Lieber Dep. at 14:9-15:4.

39. Artists and writers did not draw pages prior to obtaining an assignment and a plot or synopsis from Stan Lee. Lee Dep. at 41:20-42:9; *see also id.* 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.

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.

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 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"); *see also* Thomas Dep. at 55:4-15, 55:16-56:3, 220:7-221:12.

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.

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.

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 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; *see also* Evanier Dep. (12/6/10) at 56:7-57:13; Morrow Dep. at 59:2-23, 60:5-17.

Payment of Artists and Writers

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; *see also* Thomas Dep. at 28:5-15 (freelancers paid per-page rates in 1960s); Romita Dep. at 16:13-21 (same in 1950s and 1960s).

46. Marvel did not purchase artwork from artists on speculation during the Time Period. Lee Dep. at 41:20-42:9; *see also* Thomas Dep. at 58:14-23 (same in 1960s and 1970s).

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; *see also* Romita Dep. at 32:2-5 (in 1950s, if an artist did the work, he would be paid for it).

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; *see also* Thomas Dep. at 68:24-69:6, 74:19-25 (during 1960s and 1970s, artists were paid for work even if changes were required).

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.”); *see also* Evanier Dep. (11/9/10) at 164:18-165:18, 165:21-166:11.

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

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 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; *id.* Ex. 23 at ¶ 4, *id.* Ex. 24 at ¶ 4, *id.* Ex. 35 at ¶ 2.

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 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; *see also* 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!”); *id.* Ex. 39 at MARVEL0018273 (Kirby stating, “[e]verybody was ‘work-for-hire’ . . . It was the traditional way that artists got jobs”).

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; *see also* Lee Dep. at 79:3-19.

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 Marvel owned the rights to the works he created or co-created. Lee Dep. at 28:20-29:11.

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

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

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 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; *see also* 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.

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; *see also* Evanier Dep. (11/9/10) at 92:22-93:4; Evanier Dep. (12/6/10) at 225:5-8.

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; *see also* Romita Dep. at 81:18-83:21 (describing plotting conferences in 1960s); Singer Decl. Ex. 11, Track 3.

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.

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; *see also* Thomas Dep. at 113:18-114:11; Evanier Dep. (12/6/10) at 105:6-14, 105:18-23.

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; *see also* 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.

60. Lee sometimes requested that an artist make changes to another artist's work. *See* Thomas Dep. at 114:13-115:9; *see also* 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." *Id.* 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. *Id.* at 88:16-24.

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."); *see also* 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.

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; *see also* 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.

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; *see also* Evanier Dep. (12/6/10) at 193:13-17, 193:25-195:3.

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."); *id.* 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 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."); *id.* at 168:24-169:7; Lee Dep. at 48:2-4, 56:10-16, 57:12-18; Thomas Dep. at 112:19-23.

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.

Kirby Acknowledged Marvel’s Authority and Editorial Control

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.” *Id.* Ex. 11, Track 3.

67. In an interview with Mark Herbert of *The Nostalgia Journal* in 1969, Kirby stated: “My job is what the policy of the organization [*i.e.*, Marvel] calls for.” *Id.* Ex. 43 at MARVEL0017197.

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

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.” *Id.* Ex. 39 at MARVEL0018273.

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.” *Id.* Ex. 44 at MARVEL0000354.

70. In 1968 and 1969, Kirby signed Applications for Registration of a Claim to Renewal Copyright for certain *Captain America* 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. *Id.* Ex. 45.

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. *Id.* Ex. 17 at ¶¶ 4-5.

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. *Id.* Ex. 46 at ¶ 7.

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.” *Id.* Ex. 47 at ¶ 1.

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.” *Id.* Ex. 48 at MARVEL0013635, at ¶¶ 1-3, 7.

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.” *Id.* Ex. 49.

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

76. In a statement to the *Comic Buyer’s Guide*, 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.” *Id.* Ex. 50.

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.” *Id.* Ex. 51 at ME0170.

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.

CREATION OF SPECIFIC CHARACTERS AT ISSUE

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 *The Fantastic Four*, *The Mighty Thor*, *The Incredible Hulk*, *The Amazing Spider-Man*, *The X-Men*, *Iron Man*, *The Avengers* and *Ant-Man*, among others. Singer Decl. Ex. 34; *see also* Lee Dep. at 145:7-21, 377:20-379:3.

Creation of *Fantastic Four*

80. In 1961, Martin Goodman instructed Stan Lee to create a new team of superheroes to compete with National Comics's *The Justice League of America*. 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.

81. Lee developed the concept behind Marvel's new team of heroes, *The Fantastic Four*, 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; *id.* 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.

82. Lee typed up a synopsis laying out the plot of the first issue of *The Fantastic Four* 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 *The Fantastic Four* 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.

83. Throughout the process of creating the first issue of *The Fantastic Four*, 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.

84. The Fantastic Four was originally published in its own comic book, *The Fantastic Four*, Vol. 1, No. 1, with a cover date of November 1961. See Bard Decl. Ex. 1 at MARVEL0001026.

Creation of *The Incredible Hulk*

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 *Frankenstein*, 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.

86. The first issue of *The Incredible Hulk*, Vol. 1, No. 1 was published with a cover date of May 1962. Bard Decl. Ex. 1 at MARVEL0001100.

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; see also *id.* Ex. 11, Track 12.

Creation of *The Mighty Thor*

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]”); *see also* Evanier Dep. (12/6/10) at 190:2-9, 190:15-22, 238:6-21.

89. Thor first appeared in *Journey Into Mystery*, Vol. 1, No. 83, published with a cover date of August 1962. Bard Decl. Ex. 1 at MARVEL0001182.

Creation of Spider-Man

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 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; *see also* 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.”).

91. Lee assigned Kirby to draw the cover of the first appearance of Spider-Man in *Amazing Fantasy*. 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.

92. The first appearance of Spider-Man was in *Amazing Fantasy*, Vol. 1, No. 15, published with a cover date of September 1962. Bard Decl. Ex. 1 at MARVEL0000988.

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, *The Amazing Spider-Man*, was first published with a cover date of March 1963. Bard Decl. Ex. 1 at MARVEL0000992.

Creation of Iron Man

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; Morrow Dep. at 260:16-261:7.

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.

96. The Iron Man character first appeared in *Tales of Suspense*, Vol. 1, No. 39, published with a cover date of March 1963. Bard Decl. Ex. 1 at MARVEL0001452.

Creation of The X-Men

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.

98. The first issue of *The X-Men*, Vol. 1, No. 1 was published with a cover date of September 1963. Bard Decl. Ex. 1 at MARVEL0001654.

Creation of *The Avengers*

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 *The Avengers* to Kirby to draw. Lee Dep. at 96:19-98:9.

100. The first issue of *The Avengers*, Vol. 1, No. 1, was published with a cover date of September 1963. Bard Decl. Ex. 1 at MARVEL0001020.

Creation of *Ant-Man*

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 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.

102. The first appearance of Ant-Man and his cast of subsidiary characters was in *Tales to Astonish*, Vol. 1, No. 27, published with a cover date of January 1962. Bard Decl. Ex. 1 at MARVEL0001966.

Creation of *Nick Fury*

103. In 1963, Lee decided to reintroduce a popular Marvel character from a war series called *Sgt. Fury and His Howling Commandos*, 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; *see also* Morrow Dep. at 201:2-6.

104. The Nick Fury character was first reintroduced to Marvel’s line of comic books in *Sgt. Fury and His Howling Commandos*, Vol. 1, No. 1, published with a cover date of May 1963. Bard Decl. Ex. 1 at MARVEL0001236.

Creation of *The Rawhide Kid*

105. Lee created *The Rawhide Kid* 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 *The Rawhide Kid*, 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.

106. The first issue of *The Rawhide Kid* named in the Termination Notices is Vol. 1, No. 17, which was published with a cover date of August 1960. *See* Bard Decl. Ex. 1 at MARVEL0001768.

Creation of *Silver Surfer*

107. In 1966, Lee conceived of a new super-villain called Galactus to be featured *The Fantastic Four*. 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 *The Fantastic Four*. Singer Decl. Ex. 11, Track 10; Lee Dep. at 70:23-73:23, 79:20-80:9, 331:2-18.

108. The Silver Surfer did not appear until *Fantastic Four*, Issue No. 48 in 1966, so the character is not subject to the Termination Notices. *See* Singer Decl. Ex. 16.

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

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

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. S. Kirby Dep. at 9:10-11.

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. N. Kirby Dep. at 7:18-19.

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. *Id.* at 7:5-8, 7:15-17. 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. Singer Decl. Ex. 54.

112. Lisa Kirby was born on September 7, 1960 and was approximately three years old in 1963. L. Kirby Dep. at 6:2-3.

113. None of the Defendants was present 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.

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.

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.

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.

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.

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

118. In their depositions, Defendants were unable to identify any specific facts regarding 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.

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.

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.

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. *Id.* at 92:24-93:3.

122. Defendants can point to no evidence to dispute Lee's testimony that he, and not Kirby, conceived of *The Fantastic Four*. N. Kirby Dep. at 117:23-118:7, 120:9-121:19; S. Kirby Dep. at 28:11-17.

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 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. *Id.* at 111:25-112:18, 113:9-114:14.

124. None of the Defendants has any specific information on the circumstances surrounding the creation of *The Incredible Hulk*. 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.

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 97:13-17, 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.

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.

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.

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.

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.

130. Lisa Kirby has no specific information on the circumstances surrounding the creation of *The X-Men*. L. Kirby Dep. at 109:5-8. Neal Kirby’s only basis to dispute Stan Lee’s testimony regarding the creation of *The X-Men* is that he has no reason to disbelieve his father. N. Kirby Dep. at 130:12-131:2.

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.

132. None of the Defendants has any specific information on the circumstances surrounding the creation of *The Rawhide Kid*. L. Kirby Dep. at 113:17-24; N. Kirby Dep. at 137:17-23; 139:10-13; S. Kirby Dep. at 64:21-25.

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.

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By: /s/ James W. Quinn

WEIL, GOTSHAL & MANGES LLP

James W. Quinn
R. Bruce Rich
Randi W. Singer
Sabrina A. Perelman
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000
Fax: (212) 310-8007

PAUL, HASTINGS, JANOFSKY & WALKER LLP

Jodi A. Kleinick
75 East 55th Street
New York, NY 10022
Tel. (212) 318-6000
Fax. (212) 230-7691

HAYNES AND BOONE, LLP

David Fleischer
30 Rockefeller Plaza, 26th floor
New York, NY 10112
Tel. (212) 659-7300
Fax. (212) 884-7691

Attorneys for Plaintiffs and Counterclaim-Defendants