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 N. KIRBY, Defendants.	Civil Action No. 10 Civ. 141 (CM) (KNF)
LISA R. KIRBY, BARBARA J. KIRBY, NEAL L. KIRBY and SUSAN N. KIRBY, Counterclaim-Plaintiffs, - against- MARVEL ENTERTAINMENT, INC., MARVEL WORLDWIDE, INC., MARVEL CHARACTERS, INC., MVL RIGHTS, LLC, THE WALT DISNEY COMPANY and DOES 1 through 10, Counterclaim-Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF MOTION BY PLAINTIFFS AND COUNTERCLAIM-DEFENDANTS TO EXCLUDE THE EXPERT REPORT AND TESTIMONY OF JOHN MORROW

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Plaintiffs Marvel Worldwide, Inc., Marvel Characters, Inc. and MVL Rights, LLC (collectively "Plaintiffs") and Counterclaim-Defendants Marvel Entertainment, LLC (sued herein as Marvel Entertainment, Inc. and together with Plaintiffs, "Marvel") and The Walt Disney Company ("Disney") submit this Memorandum of Law in Support of Their Motion to Exclude the Expert Report and Testimony of John Morrow.

PRELIMINARY STATEMENT

As the accompanying Motion to Exclude the Expert Report and Testimony of Mark Evanier ("Evanier Motion") demonstrates, Defendants cannot use experts to transform multiple levels of hearsay into admissible evidence to defeat Marvel and Disney's motion for summary judgment. That would violate Federal Rule of Evidence 703, which only allows properly qualified experts to rely on – not offer – inadmissible evidence where the expert can demonstrate that others in the expert's field reasonably rely on that type of evidence. It would also violate Federal Rule of Evidence 702, which bars the introduction of expert opinions and testimony where the proffered expert (a) is not a qualified expert, (b) employs no recognized or reliable methodology in forming his opinions, and (c) offers improper and irrelevant opinions that seek to usurp, not to assist, the factfinder.

As explained below, Morrow's report and testimony are clearly inadmissible under Rules 703 and 702. However, even if they were admissible under those Rules, they would still be barred under case law prohibiting duplicative expert testimony. Morrow's report is virtually identical to Evanier's, and courts preclude duplicative expert testimony as wasteful and without reasonable basis. For all these reasons, the expert report and testimony of John Morrow are inadmissible and should be excluded in their entirety.

MORROW'S PROFFERED REPORT AND TESTIMONY

Defendants asked Morrow to opine on virtually the same issues that they asked Evanier to address: "(a) Marvel's history before, during and after the 1958-1963 time period; (b) the business relationship between Jack Kirby and other freelancers with Marvel during this period and (c) Jack Kirby's creation or co-creation of many of Marvel's most famous characters during this period." Expert Report of John Morrow ("Morrow Rep."), annexed as Ex. A to the Declaration of David Fleischer ("Fleischer Decl."), at 1; *see also* Deposition of John Morrow ("Morrow Dep."), annexed as Ex. B to the Fleischer Decl., at 10:11-21; *cf.* Evanier Mot. at 2; Expert Report of Mark Evanier ("Evanier Rep."), annexed as Ex. C to the Fleischer Decl., at 1.

Significantly, Morrow conceded that Defendants' counsel prepared the first draft of his report, and did so without Morrow's substantive input on major portions. *See* Morrow Dep. at 71:13-72:2, 80:3-83:7. Morrow also testified that there was no way to distinguish between statements of fact and opinion in his report unless he explicitly stated something was an opinion. *See id.* at 133:11-135:8. Like Evanier, he admitted:

- the reliability of his report cannot be tested, *id.* at 135:18-136:12;
- he has no firsthand knowledge regarding Marvel's work-for-hire practices during relevant time period or the creation of any of the works at issue, and that he learned all of the facts set forth in his report from interviews and other secondary sources, *e.g.*, *id.* at 13:20-21, 37:21-23, 40:7-16, 53:20-55:10, 64:9-17, 74:8-76:20, 91:5-12, 129:10-131:2, 135:9-17, 153:22-25, 168:14-25, 173:7-15, 199:14-200:4, 201:2-6, 203:14-17, 203:24-204:24, 207:21-25, 226:14-17, 228:19-229:15;
- he did not test his opinions or theories against any source, *id.* at 136:13-137:19; and
- he did not review the deposition testimony of Stan Lee or any other witness before submitting his report, *id.* at 17:17-18:12.

Morrow also admitted that he has no legal training and is not qualified to offer a legal opinion, *id.* at 16:4-5, 241:18-20, and that he is not an expert on the work-for-hire doctrine, *id.* at 88:13-89:5. He nonetheless states that "Kirby's work for Marvel from 1958-1963 was not 'work for hire,'" Morrow Rep. at 14, calling his pronouncement an "expert layman's opinion." Morrow Dep. at 237:20-238:22, 241:15-17. Morrow also opined that he does not "believe that Marvel, itself, in [1958-63], viewed or understood . . . freelance work to be 'work made for hire.'" Morrow Rep. at 14-15. He further admitted it would have been prudent to review Marvel's copyright applications before rendering his opinion. Morrow Dep. at 245:21-246:14. Had he done that, he would have seen that Jack Kirby himself signed certain copyright renewal registration applications in 1968 on behalf of Marvel that listed Marvel as a "[p]roprietor of a work made for hire." *See* Declaration of Randi Singer Ex. 45.

ARGUMENT

This Court is the gatekeeper for expert testimony. *See, e.g., Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 597 (1993); *see also* Fed. R. Evid. 702 advisory committee's note. Inadmissible expert testimony must be excluded at the summary judgment phase because only admissible evidence may be considered in deciding such a motion. *See, e.g., Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 309, 311 (2d Cir. 2008). The Court has wide discretion to exclude expert testimony. *DiBella v. Hopkins*, 403 F.3d 102, 121 (2d Cir. 2005).

I. MORROW'S REPORT AND OPINIONS SHOULD BE EXCLUDED BECAUSE THEY ARE WHOLLY DUPLICATIVE OF THE OPINIONS PROFFERED BY EVANIER

As a threshold matter, Morrow's report, and any testimony based on it, should be excluded under case law barring duplicative expert evidence. Indeed, even a cursory review of Evanier's and Morrow's reports reveals that the two are substantially identical. The structure, organization and, in places, language of the two reports are strikingly similar. For example:

Morrow Report	**Evanier Report**
"From 1935 to 1940, Jack Kirby worked at the Max Fleischer studio, Universal Phoenix Syndicate, the Lincoln Features Syndicate and Fox Comics, Inc. At Fox Comics, Kirby partnered with Joe Simon, and to earn additional income they created on a freelance basis and sold comic book stories to other publishers." Morrow Rep. at 6.	"Between 1935 and 1940, he worked at the Max Fleischer animation studio, the Lincoln Features Syndicate, Universal Phoenix Syndicate, and Fox Comics, Inc. When he was employed as a staff artist, he would try to supplement his income in his off-hours with freelance comic book work for other companies." Evanier Rep. at 6.
"With Kirby, Lee would often provide only a bare-bones concept, or just the name of a character, and sometimes not even that. Kirby would plot and illustrate a story, usually with his specific notes and dialogue suggestions in the margins of the pages. Lee would then dialogue the balloons and write the captions based on Kirby's plotting, artwork, dialogue and story notes." *Id.* at 8.	"As Kirby worked, he would not only draw out the story and invent new characters where necessary, he would write marginal notes to Stan, including suggested captions and dialogue, so that when Stan wrote the dialogue, he would know what story points Kirby felt should be made in each panel. Stan would then write dialogue based on Kirby's notes and perhaps a brief conversation." *Id.* at 10.
"Marvel engaged in a practice of putting a legal acknowledgement or legend on the back of its checks, forcing freelancers to sign under the legend when they went to cash the check. Some freelancers would routinely cross out the legend before signing and depositing the checks." *Id.* at 9.	"Marvel at some point in time began placing legends with legal language on the back of its checks to freelancers, such as Kirby, where the freelancer signed the check to cash it. It was not unheard of for a freelancer to "cross out" the legend on the checks and still be able to cash it." *Id.* at 12.
"Kirby worked from his home in Long Island late into the night, not at Marvel's offices. He was extremely independent. . . . He simply went to Marvel's offices two or three times a month to drop off his material. Kirby paid for all his own expenses in connection with this material and was not reimbursed for such expenses by Marvel. He periodically bought his own paper, pencils, pens, brushes, ink and other materials. Kirby was only paid by the page for those pages that were purchased by Marvel after they had been created and was not paid any sort of salary by Marvel." *Id.* at 8.	"Kirby did not work at Marvel's offices. He worked at his own home, first in Long Island and, in the late 1960s, in Southern California. Kirby set his own hours and working conditions. Kirby paid his own overhead and all expenses associated with his creations. He purchased his own art supplies, including paper, pencils, ink, pens, brushes and other materials with which a comic book story is created. . . Kirby was not paid a salary by Marvel. His artwork and plotting was purchased by the page on a piecework basis – a set amount for each page accepted by Marvel for publication." *Id.* at 11-12.

"In 1942, Kirby created a Thor-like character in a story he did with Joe Simon—'Villain from Valhalla,' published in May 1942 in DC Comics' *Adventure Comics* #75. Kirby thereafter included Thor in DC's *Tales of the Unexpected* #16, published in August 1957, where Thor sported a horned helmet and wielded a magic hammer." *Id.* at 11.	"As early as 1942, Kirby had a character masquerading as Thor in his story 'Villain from Valhalla,' a collaboration with Joe Simon that appeared in DC Comics' *Adventure Comics* No. 75 (May 1942). Kirby then used the real Thor, complete with a homed helmet and powerful magic hammer, in DC's *Tales of the Unexpected* No. 16 (August 1957)." *Id.* at 16.

These substantial similarities are not surprising, as Defendants' counsel gave both witnesses substantially identical assignments, *compare* Fleischer Decl. Ex. A at 1 *with* Fleischer Decl. Ex. C at 1, and compel the conclusion that Morrow's should be excluded on that basis alone. *See Member Servs., Inc. v. Sec. Mutual Life Ins. Co. of N.Y.*, No. 3:06-cv-1164 (TJM/DEP), 2010 WL 3907489, at *27 (N.D.N.Y. Sept. 30, 2010) (citing Fed. R. Evid. 403) (where there is "substantial overlap between the expert reports . . . , there is no reasonable basis to allow a second expert to testify about the same things"); *Price v. Fox Entm't Group, Inc.*, 499 F. Supp. 2d 382, 390 (S.D.N.Y. 2007) (excluding expert because "there was substantial overlap between the reports and there is absolutely no need for both experts to testify").

Moreover, the "undeniable substantial similarities" between the Morrow and Evanier reports suggest that "counsel's participation so exceeded the bounds of legitimate 'assistance' as to negate the possibility that [the expert] actually prepared his own report within the meaning of Rule 26(a)(2)." *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, No. 96-MD-1122, 2000 WL 33654070, at *1 (W.D. Mich. Feb. 8, 2000); *see also Bekaert Corp. v. City of Dyersburg*, 256 F.R.D. 573, 579 (W.D. Tenn. 2009). That rule requires that an expert disclosure "be accompanied by a written report . . . prepared . . . by the witness." Fed. R. Civ. P. 26(a)(2)(B). In any event, Morrow's duplicative report should be excluded in its entirety.

II. MORROW SEEKS TO INTRODUCE ONLY INADMISSIBLE FACTS

Morrow's opinions also should be excluded because, like Evanier, he relies exclusively on second- and third-hand statements and seeks to introduce them for their truth. Morrow has repeatedly acknowledged that he has no firsthand knowledge of any of Marvel's work-for-hire practices during the relevant time period, or of the circumstances of the creation of the works at issue. *E.g.*, Morrow Dep. at 37:21-23, 40:7-16, 53:20-55:10, 64:9-17, 91:5-12, 129:10-131:2, 135:9-17, 153:22-25, 201:2-6, 203:14-17, 203:24-204:24, 207:21-25, 226:14-17, 228:19-229:15. He learned all of the information in his report from others, including from interviews and other secondary sources. *See, e.g.*, Morrow Rep. at 11, 12-13; *see also* Morrow Dep. at 74:8-76:20, 129:10-130:7, 130:20-131:2, 168:14-25, 173:7-15, 199:14-200:4, 229:7-15. Morrow testified that his accounts of Marvel's history, its working relationship with Kirby, and the creation of certain characters were based on "what [he has] read throughout the years" and what others have told him. *See, e.g.*, Morrow Dep. at 53:20-55:10, 91:5-12, 129:10-131:2. As detailed more fully in the Evanier Motion, expert testimony is not a conduit for hearsay. *See* Evanier Mot. at 5-8; *see also, e.g.*, *United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008); Fed. R. Evid. 703. Morrow's opinion should be excluded accordingly. The rule against hearsay evidence cannot be circumvented by calling hearsay testimony expert testimony.

III. MORROW'S PROFFERED OPINIONS ARE INADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 702

Under *Daubert* and Rule 702, the court first looks to whether the witness is qualified to testify as an expert, then conducts a two-prong inquiry: (1) whether the expert used a reliable methodology; and (2) whether the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. *Daubert*, 509 U.S. at 592-93; *Nimely v. City of N.Y.*,

414 F.3d 381, 396-97 (2d Cir. 2005); *Royal Ins. Co. of Am. v. Joseph Daniel Constr., Inc.*, 208 F. Supp. 2d 423, 424-25 (S.D.N.Y. 2002) (McMahon, J.). Morrow fails on each step of the inquiry.

A. Morrow Is Not Qualified To Testify As An Expert

As with Evanier, Morrow's opinions should be excluded because Defendants cannot show that he is qualified to testify as an expert. *See* Evanier Mot. at 8-10. Reciting what the expert contends are historical facts is not an expertise involving technical or specialized knowledge as required under Rule 702. *See Member Servs.*, 2010 WL 3907489 at *26 (testimony of "the parties' history is inadmissible because it is not scientific or technical in nature"). Like Evanier, Morrow's "expertise" is based on his experience collecting articles and interviews and essentially is limited to his speculation and subjective belief in an alternative version of the facts. Morrow Rep. at 1-2; *see also, e.g., Daubert*, 509 U.S. at 590 ("[T]he word 'knowledge' [in Rule 702] connotes more than subjective belief or unsupported speculation."); Evanier Mot. at 10. And just like Evanier, Morrow does not (and cannot) explain how this so-called experience is reliably applied to the facts in this case or how it qualifies him to offer a specific factual narrative of events that occurred fifty years ago (before he was born), let alone one that attempts to contradict the sworn testimony of percipient witnesses. *See* Fed. R. Evid. 702 advisory committee's note; Evanier Mot. 10. Without grounding in any proper qualification, Morrow's opinions should be excluded.

B. Morrow's Opinions Are Not Based Upon Any Reliable Methodology

The reliability prong of the *Daubert* analysis, in and of itself, provides another basis to exclude Morrow: as with Evanier, Morrow's opinions are based on no methodology at all, let alone a sufficiently reliable one. *See* Evanier Mot. at 11-13. Morrow's only methodology is to draw upon what he has read or heard in interviews. He did not review any documents or deposition testimony from this case, nor did he do any independent analysis. Morrow Dep. at

17:17-18:12; 133:15-135:17. Reading interviews "does not by itself equate to a methodology, let alone one generally accepted by the relevant professional community." *Berk v. St. Vincent's Hosp. & Med. Ctr.*, 380 F. Supp. 2d 334, 354 (S.D.N.Y. 2005); *see also* Evanier Mot. at 11-13. Like Evanier, Morrow himself conceded there was no reliable way to test the methodology of his report. Morrow Dep. at 135:18-136:12. Without any way to be tested, nor any known rate of error or controls, Morrow's testimony must be excluded. *See 24/7 Records, Inc. v. Sony Music Entm't, Inc.*, 514 F. Supp. 2d 571, 574-77 (S.D.N.Y. 2007).

C. Morrow's Opinions Do Not Assist The Factfinder

The final prong of the *Daubert* analysis provides yet another independent basis for excluding Morrow's report and testimony: just like Evanier's, Morrow's testimony usurps, rather than assists, the factfinder's role. *See, e.g., Dibella*, 403 F.3d at 121; *see* Evanier Mot. at 13-14.

Indeed, following Evanier, Morrow simply offers a factual narrative gleaned from interviews without regard for the admissible evidence in this case – the documentary record and testimony of percipient witnesses. In addition to falling outside any cognizable expertise, such testimony is also an improper subject for expert testimony because it addresses "lay matters which [the trier of fact] is capable of understanding and deciding without the expert's help." *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989). The law is clear that "an expert cannot be presented . . . solely for the purpose of constructing a factual narrative," especially when such narrative is crafted based exclusively on inadmissible double hearsay. *See Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 468-69 (S.D.N.Y. 2005), *aff'd*, 551 F. Supp. 2d 173, 180 (S.D.N.Y. 2008); *see also* Evanier Mot. at 13-14.

Echoing Evanier, Morrow also offers improper and irrelevant opinions as to the intent or motivations of Marvel and various non-parties: For example, Morrow opines that:

- he "do[es] not believe that Goodman, Lee, Marvel or the freelance artists, like Jack Kirby . . . thought that the material they created was 'work made for hire'" (Morrow Rep. at 9);
- "[n]o freelancer in the industry during that period . . . felt that what they were submitting . . . was already owned by the publisher as 'work for hire'" (*id.* at 14);
- "Marvel, itself, in this period, [did not] view[] or under[stand] such freelance work to be 'work made for hire'" (*id.*); and
- Marvel's work-for-hire releases were "a not-so-subtle attempt to rewrite history to confirm with the new [copyright] law" (*id*. at 15).

The law, however, is clear that "[i]nferences about the intent or motive of parties or others lie outside the bounds of expert testimony." *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 547 (S.D.N.Y. 2004); *see also* Evanier Mot. at 15-16.

Similarly, Morrow opines on the credibility of Stan Lee's versions of the creation of the stories and characters at issue in this case, deciding instead to believe the version of the creation stories attributed to Kirby and his allies. Morrow's opinion as to which version of historical events is more believable usurps the core function of the factfinder. As explained in detail in the Evanier Motion, it is "a well-recognized principle of our trial system that determining the weight and credibility of a witness's testimony belongs to the" factfinder and that expert testimony "is not relevant if the expert is offering a personal evaluation of the testimony and credibility of others." *Nimely*, 414 F.3d at 397; *Lippe v. Bairnco Corp.*, 288 B.R. 678, 687 (S.D.N.Y. 2003) (collecting cases); Evanier Mot. at 15-17.

Finally, despite conceding that he is unqualified to offer legal conclusions, Morrow nonetheless opines on the ultimate legal question in this case: whether the works at issue are not works made for hire. *See* Morrow Rep. at 14; *see also* Morrow Dep. at 100:4-7, 237:20-241:20. Very tellingly, Morrow deleted a reference to works for hire in an early draft because he

"thought it kind of wasn't pertinent, and then you guys would think I'm some kind of expert on work-for-hire, which I'm not." Morrow Dep. at 88:13-89:5. Morrow's opinion on the ultimate legal issues in the case – truly, the conclusions of Defendants' counsel, who "explained" work-for-hire principles to him, *id.* at 98:9-14, 281:25-282:21 – should be excluded because it cannot substitute for the Court's judgment. *See, e.g.*, *Highland Capital*, 551 F. Supp. 2d at 181 (experts "may not, under any circumstances, opine on the ultimate legal issue in the case").

Morrow's report is thus replete with impermissible opinions that seek to usurp the role of the factfinder, and all such opinions should be excluded in their entirety.

CONCLUSION

For all the foregoing reasons, Marvel and Disney respectfully request that the Court exclude the expert report and testimony of John Morrow in their entirety.

Dated: February 25, 2011

By: /s/ David Fleischer

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