

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

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

Pursuant to Local Rule 56.1(b) of the Local Rules of the United States District Court for the Southern District of New York, Marvel Worldwide, Inc. ("MWI"), Marvel Characters, Inc. ("MCI") and MVL Rights, LLC ("MVL") (collectively, "Plaintiffs," and with their predecessors-in-interest, "Marvel"), respectfully submit the following Opposition To Defendants' Statement

Of Material Facts Pursuant To Local Rule 56.1 In Support Of Defendants' 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).

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.

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 Marc 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.

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.

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.

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.

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.

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.

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 the inadmissible testimony of Evanier and Morrow. *Spiegel*, 604 F.3d at 81; *see also* Docket Nos. 67, 70.

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.

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.

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.

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.

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.

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.

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.

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. EVCI/TCI 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.

RESPONSE: Undisputed.

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.

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.

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.

Dated: March 25, 2011
New York, New York

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