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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

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

Defendants.

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

**DECLARATION OF MARC
TOBEROFF IN OPPOSITION TO
PLAINTIFFS' MOTION TO
EXCLUDE THE EXPERT REPORT
AND TESTIMONY OF MARK
EVANIER**

[Hon. Colleen McMahon]

[ECF Case]

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

Counterclaimants,

-against-

MARVEL ENTERTAINMENT, INC.,
MARVEL WORLDWIDE, INC.,
MARVEL CHARACTERS, INC., MVL
RIGHTS, LLC, THE WALT DISNEY
COMPANY and DOES 1 through 10,

Counterclaim-Defendants.

DECLARATION OF MARC TOBEROFF

I, Marc Toberoff, declare as follows:

1. I am familiar with the facts set forth below and make this declaration in support of defendants' memorandum of law in opposition to plaintiffs' motion to exclude the expert report and testimony of Mark Evanier. The facts set forth herein are known to me of my own personal firsthand knowledge and, if called as a witness, I could and would testify competently thereto under oath.

2. I am an attorney and the founding partner of Toberoff & Associates, P.C., located at 2049 Century Park East, Suite 3630, Los Angeles, CA 90067.

3. My firm represents Lisa R. Kirby, Barbara J. Kirby, Neal L. Kirby and Susan M. Kirby (the "Kirbys"), the children of legendary comic book artist and writer Jack Kirby.

4. On September 16, 2009, the Kirbys availed themselves of their right under the Copyright Act to recapture their father's copyright interests by serving 45 notices of termination ("Termination Notices") by first class mail on plaintiffs and all of their known predecessors and successors-in-interest pursuant to 17 U.S.C. § 304(c).

5. Attached hereto as "Exhibit A" is a true and correct copy of Defendants' Initial Designation of Expert Witness Mark Evanier, with the attached Expert Report of Mark Evanier, served on Plaintiffs' counsel on November 4, 2010.

6. Attached hereto as "Exhibit B" is a true and correct copy of Defendants' Initial Designation of Expert Witness John Morrow, served on Plaintiffs' counsel on November 4, 2010.

7. Attached hereto as “Exhibit C” is a true and correct copy of page 159 of the book *Kirby: King of Comics* by Mark Evanier, which defendants produced in this action.

8. Attached hereto as “Exhibit D” is a true and correct copy of excerpts from the order dated July 8, 2009 in *Siegel v. Warner Bros. Ent. Inc.*, Case No. 04-CV-08400, Docket No. 554, in the U.S. District Court for the Central District of California.

9. Attached hereto as “Exhibit E” are true and correct copies of excerpts from transcript of the December 6, 2010 deposition of Mark Evanier, which I attended.

10. Attached hereto as “Exhibit F” are true and correct copies of excerpts from the transcript of the October 21, 2010 deposition of John Romita, which I attended.

11. Attached hereto as “Exhibit G” are true and correct copies of excerpts from the transcript of the October 26–27, 2010 deposition of Roy Thomas, which I attended.

12. Attached hereto as “Exhibit H” are true and correct copies of excerpts of the transcript of the May 13, 2010 deposition of Stan Lee, which I attended.

13. Attached hereto as “Exhibit I” is a true and correct copy of the Declaration of Mark Evanier in Support of Defendants’ Motion for Summary Judgment, as well as the attached Exhibit C, filed on February 25, 2011 in this action.

I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct.

Dated: March 25, 2011

/s/ Marc Toberoff

Marc Toberoff

