

# EXHIBIT E

1 UNITED STATES DISTRICT COURT  
2 CENTRAL DISTRICT OF NEW YORK  
3  
4

5 MARVEL WORLDWIDE, INC., MARVEL )  
6 CHARACTERS, INC., and MVL RIGHTS, )  
7 LLC, )  
8 )  
9 PLAINTIFFS, )

10 )  
11 VS.

) NO. 10 CV 141 (CM) (KNF)

12 )  
13 LISA A. KIRBY, BARBARA J. KIRBY, )  
14 NEAL L. KIRBY and SUSAN N. KIRBY, )  
15 )  
16 DEFENDANTS. )

17 \_\_\_\_\_ )  
18  
19 VIDEOTAPED DEPOSITION OF MARK EVANIER  
20 LOS ANGELES, CALIFORNIA  
21 DECEMBER 6, 2010  
22  
23

24 REPORTED BY: CHRISTY A. CANNARIATO, CSR #7954, RPR, CRR  
25 JOB NO.: 34168

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December 6, 2010  
9:35 a.m.

Deposition of Mark Evanier, taken on behalf of  
Plaintiffs, held at the offices of Paul Hastings,  
515 S. Flower Street, 25th Floor, Los Angeles,  
California, before Christy A. Cannariato,  
CSR #7954, RPR, CRR.

A P P E A R A N C E S

1  
2  
3 REPRESENTING THE PLAINTIFFS:

4 WEIL, GOTSHAL & MANGES

5 BY: JAMES W. QUINN, ESQ.

6 BY: RANDI W. SINGER, ESQ.

7 767 FIFTH AVENUE

8 NEW YORK, NY 10153

9 -AND-

10 HAYNES AND BOONE

11 BY: DAVID FLEISCHER, ESQ.

12 1221 AVENUE OF THE AMERICAS, 26TH FLOOR

13 NEW YORK, NY 10020

14  
15 REPRESENTING THE DEFENDANTS:

16 TOBEROFF & ASSOCIATES

17 BY: MARC TOBEROFF, ESQ.

18 2049 CENTURY PARK EAST, SUITE 2720

19 LOS ANGELES, CA 90067

20  
21 ALSO PRESENT:

22 ELI BARD, DEPUTY GENERAL COUNSEL MARVEL ENTERTAINMENT

23 CHRIS JORDAN, VIDEOGRAPHER

24

25

1 and comic book characters published by Marvel between '58  
2 and '63 as well as his relationship with Marvel during  
3 this key period?

4 A. Yes, I was.

5 Q. Okay. That's the opinion I'm referring to.  
6 Got it?

7 A. No, no. Let me -- the opinion is not on that  
8 page you're citing. The opinion is throughout the report.  
9 Are you asking me to how do I -- how did I arrive at the  
10 opinion stated throughout the document that are summarized  
11 on this page?

12 Q. Yes.

13 A. All right. Okay.

14 Q. Yeah. Not a trick question.

15 A. No. I'm just trying to answer -- I was trying  
16 to figure out why you were calling my attention to that  
17 one sentence.

18 Q. Because it summarized your opinion.

19 MR. TOBEROFF: Objection. Mischaracterizes  
20 the report. It doesn't summarize his opinion.

21 A. The opinions in this report were formulated by  
22 my calling upon years and years of studying Marvel Comics,  
23 reading Marvel Comics, interviewing and talking to people  
24 who made Marvel Comics, visiting the Marvel offices,  
25 discussing Marvel history with other people who have done

1 similar investigations and interviews, reading articles  
2 about Marvel. It's -- the opinions are based on 40 years  
3 of -- more than 40 years of following Marvel Comics,  
4 probably 50 years.

5 Q. And specifically you referred to reviewing  
6 or -- let me go back.

7 Could you tell me with some level of  
8 specificity the people interviews -- take it back. Strike  
9 the question.

10 In connection with preparing the report  
11 itself, did you conduct any interviews in order to prepare  
12 the report?

13 A. Did I conduct any interviews specifically for  
14 towards this report?

15 Q. Yes.

16 A. No, I did not.

17 Q. And specifically with regard to the  
18 preparation of the report, did you review any documents or  
19 reference works in connection with preparing the report?

20 A. I got some dates out of my own book on Jack,  
21 and I think I looked some up on the Internet to just  
22 verify my recollection of dates and spellings.

23 Q. So other than checking on some dates and  
24 spellings from your book on Jack Kirby and other  
25 information available on the Internet, you didn't review

1           A.       Jack's original pages of Spider-Man were not  
2 used. Then Steve Ditko did it. However, Jack maintained  
3 that he created Spider-Man.

4           Q.       And so this would be a circumstance, for  
5 example, where -- maybe I've got this wrong.

6                    But put aside what he maintained. What did  
7 you conclude as to the creation of Spider-Man? Did you  
8 find Mr. Kirby's version more credible than Mr. Lee's,  
9 which is in clear conflict?

10          A.       I don't find them completely in conflict. I  
11 find certain areas that overlap. And in this particular  
12 -- this is -- you're kind of asking me for what could be a  
13 very long answer here, if you want to go through the whole  
14 thing.

15          Q.       I don't know. That's a good question.

16          A.       Because I've spent hours discussing this with  
17 people. My version that I reported on, written about, of  
18 the creation of Spider-Man allows for certain he said/he  
19 said variations. There are, however, certain parallels in  
20 the stories and the accounts that I find indisputable.

21          Q.       So you're taking an amalgam of different facts  
22 and versions and choosing to try to make them consistent  
23 in such a way that you reach a conclusion?

24          A.       Well, when I report on this, I try to separate  
25 what is conjecture from what is, I believe, indisputable.

1 And I leave it -- well, when I have written about this, I  
2 generally leave it to the reader to make certain decisions  
3 about the process.

4 I think that there are things you can say  
5 about it that are obvious. I think there are things you  
6 can say that are simply common sense, because I don't  
7 think that either Stan's or Jack's accounts exactly match  
8 the physical evidence of the printed comic that resulted.

9 But I think it is possible to come to a  
10 scenario of how Spider-Man came to be that allows for the  
11 fact that at various stages there's the Stan Lee version,  
12 and the Jack Kirby version, and they could in some cases  
13 both be true based on interpretation of certain words,  
14 certain verbs.

15 It's something when I have written about it  
16 I'm very careful to try and not take -- not to say either  
17 Stan's version was completely correct or Jack's version  
18 was completely correct, because I don't think either one  
19 of those tells the entire story. But they are not -- it  
20 is wrong to say that they are in complete conflict.

21 Q. Some areas we can agree on. I think we did  
22 agree on one, which was that Stan, in fact, didn't use the  
23 original drawings by Jack with regard to Spider-Man;  
24 correct?

25 A. That is correct.



1 MR. TOBEROFF: Compound.

2 A. Well, Mr. Kirby believed -- said that he took  
3 some of the ideas that became the Marvel heroes in. He  
4 brought them in, did sketches first, took them in and  
5 showed them to Stan.

6 So to the extent that that answers your  
7 question, that answers your question.

8 Q. Well, I'm asking for your understanding as to,  
9 first of all, what did Mr. Kirby tell you about that,  
10 which characters, when did he do that, and whether or not  
11 this was one of the versions you chose to believe.

12 A. Okay. Mr. Kirby told me that he brought in  
13 sketches for new characters, including rough sketches of  
14 The Fantastic Four that he did on his own. Brought them  
15 in.

16 His version of the creation of Fantastic Four  
17 was that when Mr. Goodman asked for a superhero book to  
18 parallel DC Comics' Justice League of America, Stan's  
19 initial idea was to revive the characters from the 1940s  
20 The Human Torch, The Submariner, Captain America, and  
21 certain others.

22 And Mr. Kirby then went out and said, no, we  
23 need new characters. And he came up with some sketches.  
24 And he took them in, and The Fantastic Four was born out  
25 of those discussions.

1                   So I believe that is an answer to your  
2 question.

3           Q.       Well, let me parse that for a second.

4           A.       All right.

5           Q.       I'm asking for your understanding. And I want  
6 to know whether or not -- you understand, do you not, that  
7 those versions, the Kirby version and the Stan Lee  
8 version, are inconsistent?

9           A.       Yes.

10          Q.       Are they not?

11          A.       Yes. Those are inconsistent.

12          Q.       And so I'm asking for your understanding,  
13 based on the fact that you're the one sitting there in  
14 that chair, as to how the actual creation, other than the  
15 fact that Goodman wanted to have them created, how it came  
16 about. Are you picking the Kirby version, the Lee  
17 version, or somewhere in between?

18          A.       Well, I have not written that version for  
19 print anywhere.

20          Q.       That being the Kirby version?

21          A.       The version that I just described to you.

22          Q.       The Kirby version.

23          A.       Yes. I have not written that because -- and  
24 if and when I do, it will be written as a here's Jack's  
25 version, here's Stan's version. And I would add in Sol

1 Brodsky, who was the right-hand man who was present for a  
2 lot of this, he more or less endorsed the Kirby version to  
3 me.

4 Q. Sol Brodsky is dead; right?

5 A. Yes, he is. But I haven't published this.  
6 This is an area where when I write about this, I say that,  
7 and I think I say in my book, in effect, Jack and Stan got  
8 together and came up with the characters. I don't remove  
9 from that period, which as you keep reminding me I was not  
10 present for --

11 Q. I haven't reminded you the whole day.

12 A. I think you did someplace in there, but  
13 anyway.

14 You know, there's a limit to how much we can  
15 know about what two men did behind closed doors years ago.  
16 There's also a limit to how much each of them could even  
17 remember about that at the time.

18 And I was sometimes when I have written about  
19 this I also from my own experience talk about the fact  
20 that collaborators can honestly disagree five minutes  
21 after a meeting of whose idea was which because one person  
22 threw out an idea and another person expanded on it and  
23 such.

24 So I have not uncovered anything which would  
25 convince me that Jack didn't bring in some sketches. And

1 I don't know how much those sketches resembled the  
2 finished product. But Jack said he brought in ideas. I  
3 know that Jack was a fountain of ideas; that he had a  
4 lifetime history of batting out ideas for new characters  
5 and sketches. And every single human being who ever  
6 worked with Jack will tell you that, including Stan Lee.

7 So I choose to believe that because of Jack's  
8 modus operandi, and the way he always worked, that he  
9 brought in something, and Stan brought in something, and  
10 collectively The Fantastic Four emerged from those  
11 discussions. And I specifically avoid trying to say that  
12 I know exactly what happened behind those closed doors,  
13 because it was apparent to me that there was some level of  
14 collaboration there.

15 I find in my own experience, and in my own  
16 observation, and talking to the people who knew Jack well,  
17 Jack was a creating character machine. He was also  
18 creating characters. He created characters when he was  
19 asked to. He created characters when he wasn't asked to.  
20 He was a very fertile person. And Stan has said that many  
21 times.

22 Q. Do you know -- I'm sorry. Please finish.

23 A. So I hope I'm answering your question. But  
24 the mere fact that somebody says, you know, that a  
25 publisher says I would really like to do a western, and

1 somebody goes home and comes back with the Lone Ranger,  
2 doesn't mean the publisher created the Lone Ranger.

3 Q. Do you have any knowledge as to whether or not  
4 these sketches that Kirby told you about were given to  
5 Stan before or after Stan assigned Kirby to draw the first  
6 book?

7 A. My understanding is they were done before.

8 Q. That's based on what Kirby told you?

9 A. It's based on what Stan told me as well.

10 Q. But you haven't actually bothered to read  
11 Stan's sworn testimony in this case to find out what he  
12 testified to under oath?

13 A. I haven't gotten around to it. No.

14 MR. TOBEROFF: Is there any other type of  
15 testimony beyond sworn testimony?

16 Q. It just sounds better.

17 You noted in the sentence that was describing  
18 your understanding of "work for hire," that the terms  
19 "employee for hire" and "putative employer" are both in  
20 quotes. Was there some reason why you put them in quotes?

21 A. Where are we here? I'm sorry.

22 Q. Back on page 8 --

23 A. Page 8 of which --

24 Q. -- of the --

25 A. Superman or the --

1 THE WITNESS: You're objecting to me now?

2 MR. TOBEROFF: No. When you said comic  
3 relief.

4 A. No, I thought he meant comic relief for real.  
5 There was a lighter character. There was a  
6 professorial type character.

7 Q. You say at the bottom of page 15 that you find  
8 it highly unlikely that Lee acted alone in conceiving  
9 these characters. Is it your testimony that Lee is just  
10 misremembering or lying? Or how have you concluded that  
11 his version is false?

12 A. Well, I am addressing one of his versions.  
13 When I have talked to Stan, he talks about -- he has in  
14 the past frequently talked about Jack coming up with ideas  
15 left and right for everything they did.

16 And so when you've got this person like Jack  
17 Kirby who was famous for coming up with ideas for new  
18 characters, and when you look at the way these men always  
19 worked, the way they had worked on unimportant nonseries  
20 romance stories before then, when Jack was involved in  
21 plotting the things, I don't understand the logic behind  
22 leaving -- omitting Jack from the process of creating what  
23 was going to be a very important new comic for them. I  
24 don't see the reason to leave him out of that process. If  
25 you were an editor or writer, you would beg to have a guy

1 like that in the room helping flesh out whatever ideas you  
2 had, change them, and bring in his input.

3 I'm not saying Stan is lying. I'm saying he's  
4 choosing his words carefully, remembering a version. I  
5 disagree with Stan about some aspects of Marvel history.  
6 We've had friendly arguments about certain issues and  
7 certain comics and how things came about and how they were  
8 published. And sometimes I get him to agree with me. I  
9 show him evidence.

10 Q. Well, one thing we've established, during this  
11 period from '58 to '63, Stan was there, and you weren't.

12 A. Yes.

13 Q. You say in your expert report at page 15  
14 carrying over to 16 that "It is also worth noting that  
15 Stan Lee did not create any important characters either  
16 before Jack Kirby first worked with Lee or after Jack  
17 Kirby stopped working with Lee in 1970."

18 Do you see that bottom of 15 over to 16 in  
19 your report?

20 A. Hold on here. Yes, I see that.

21 Q. After he stopped working for Lee in 1970, what  
22 successful characters did Kirby create?

23 A. Well, he created a series for DC called The  
24 New Gods. Featured a villain called Dark Side, one of the  
25 most important villains in Allied DC Comics. Did a book

1 called Commandee for DC that ran for quite awhile. He  
2 went back to Marvel and created a book called Machine Man,  
3 and a book called The Eternals, which they keep reviving  
4 both of those. And it had a best-selling series of  
5 reprints of those.

6 He created a book -- well, if you want to go  
7 through the list, for DC he created The New Gods, The  
8 Forever People, Mr. Miracle. Some of these were ideas  
9 that he had while he was still at Marvel but they were  
10 published first by DC. The Demon, Commandee. He did --  
11 and each one of these comics had many, many spin off  
12 characters who are now toys and games and even go out to  
13 the toy store and buy model figures of an awful lot of  
14 these characters that he created for DC in the early 70s.

15 Then he went to work for Marvel, back to  
16 Marvel for a while. And he did The Eternals. And I  
17 mentioned he did Machine Man. He did -- he went back to  
18 Captain America and the Black Panther. And he introduced  
19 a lot of supporting characters in those books which have  
20 since been used over and over.

21 He then went to work for Pacific Comics, and  
22 he did Captain Victory and Silver Star.

23 Q. Anything else?

24 A. There's a lot of other lesser characters.

25 Q. And what's your definition of successful in



1 this context? New Gods was essentially a flop, wasn't it?

2 A. No. They keep reprinting it, and it sells  
3 very well.

4 Q. Did Kirby create any characters after he left  
5 Marvel in 1970 that ultimately had the kind of success  
6 that many of the characters that were created in the '58  
7 through '63 period at Marvel?

8 A. He created --

9 Q. Or he was involved with Lee and Kirby  
10 together?

11 A. He created some characters that were less  
12 successful. He also some of the '58 to '63 characters  
13 didn't catch on either.

14 Q. That's part of the business; right? Some of  
15 them catch on; some of them don't.

16 A. Yeah. Sometimes they don't go.

17 Q. And that's what the publisher has to worry  
18 about; correct?

19 A. Publisher worries about how his books are  
20 selling. Yes.

21 (Evanier Expert 14 marked for identification.)

22 Q. Would you take a look at -- where's the Kirby  
23 Collector? I would like to mark as Evanier 14 a document  
24 Jack Kirby Collector Thirty-Eight, priced at 9.95.

25 A. It's an old picture of me. And that's a real