

Marc Tobcroff (MT 4862)
TOBEROFF & ASSOCIATES, P.C.
2049 Century Park East, Suite 2720
Los Angeles, CA 90067
Tel: 310-246-3333

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

Defendants.

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

[Hon. Colleen McMahon]

[ECF Case]

**DECLARATION OF RICHARD AYERS IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I, Richard Ayers, hereby declare as follows:

1. I am familiar with the facts set forth below known to me of my own personal firsthand knowledge and make this declaration in support of defendants' motion for summary judgment and defendants' opposition to plaintiffs' motion for summary judgment.

2. I am a comic book artist and have worked in the comic book industry since the 1940s. For my professional accomplishments, I was inducted into the Will Eisner Comic Book Hall of Fame in 2007.

3. I first began working in comics in the late 1940s. While I was studying under Burne Hogarth at Hogarth's Cartoonists and Illustrators School, I was spotted by Joe Shuster, co-creator of Superman, and Shuster subsequently asked me to draw some of his *Funnyman* stories. I subsequently worked as a artist, penciling (*i.e.*, drawing) and inking *A-1 Comics* and *Trail Colt* comic books and the *Jimmy Durante* humor strip, all at Magazine Enterprises, and on Prize Comics' *Prize Comics Western*. I also co-created the Western character *Ghost Rider* for the *Tim Holt* comic book, published by Magazine Enterprises.

4. In 1952, while selling freelance work to Magazine Enterprises, I began selling freelance work to Marvel Comics, then named Atlas Comics. Marvel began publishing my work commencing with *Spellbound* No. 1 (March 1952), *Adventures into Terror* No. 9 (April 1952), *Adventures into Weird Worlds* No. 5 (April 1952), and *Journey into Unknown Worlds* No. 10 (April 1952), and continuing in numerous other comic books. I drew the revived character of the pre-*Fantastic Four* Human Torch in such issues as *Young Men* No. 24 (February 1954), *The Human Torch* Nos. 36 (April 1954), 37 (June 1954), and 38 (August 1954), and *Sub-Mariner Comics* Nos. 33 (April 1954), 34 (June 1954), and 35 (August 1954).

5. I also inked Jack Kirby's newspaper strip *Sky Masters of the Space Force*, syndicated George Matthew Adams Agency from September of 1959 to January of 1960 for the Sunday strips and from September of 1959 to December of 1961 for the daily newspaper strips. Marvel was not involved in this strip.

6. During the 1950s and 1960s, I drew on a freelance basis and sold to Marvel artwork for such titles as *Astonishing* (June 1952–March 1957), *Battle* (January 1953–April 1959), *Combat Kelly* (March 1954), *Cowboy Action* (July 1955–January 1956), *Gunsmoke Western* (December 1956–May 1963), *Journey into Mystery* (February 1954–October 1956, August–October 1965), *Kid Colt Outlaw* (August 1955–November 1967), *Marvel Tales* (June 1953–April 1956, May 1967–July 1970), *Men's Adventures* (April 1953–July 1954), *Mystery Tales* (May 1952–April 1957), *Mystic* (May 1952–May 1956), *The Outlaw Kid* (July 1956–May 1957), *Rawhide Kid* (January 1956–September 1957, October 1961–December 1967), *Spellbound* (March 1952–February 1956), *Strange Tales* (July 1954–July 1956, July 1962–February 1965), *Two Gun Kid* (April 1954–June 1959, January 1964–May 1967), *Uncanny Tales* (June 1952–June 1956), *Western Outlaws* (February 1955–May 1957), *Wild Western* (April 1954–March 1957), and *Wyatt Earp* (January 1957–June 1960).

7. After Jack Kirby reinvigorated the superhero genre in 1961 with *The Fantastic Four*, I drew and sold my own superhero stories to Marvel, including the *Human Torch* solo stories in *Strange Tales* Nos. 107 (April 1963), 110 (July 1963) through 113 (October 1963), 115 (December 1963) through 119 (April 1964), 121 (June 1964), 122 (July 1964), and 124 (September 1964) through 129 (February 1965), and Giant-Man and Wasp stories in *Tales to Astonish* Nos. 52 (February 1964), 53 (March 1964), and 55 (May 1964) through 60 (October 1964). I also drew most of the artwork published in *Sgt. Fury and His Howling Commandos*, commencing with issue No. 8 (July 1964), and continuing through issue No. 120 (July 1974), with only a few issues containing artwork by other artists.

8. In total, I sold freelance artwork to Marvel from 1959 to 1975.

9. During this period I sold artwork on a freelance basis to several other companies including Magazine Enterprises, Charlton, St. John, Fago Magazines, Prize, Harvey, Alan Class, Tower, Eerie Publications, and Skywald.

10. As a freelancer, I worked out of my home, set my own hours, received no medical benefits or insurance, vacation time or sick pay, and paid for all my own expenses, including for my own pens, inks, paper, pencils and other materials. I was not reimbursed for these expenses by Marvel or by the other companies I sold artwork to.

11. I was paid by the page; and, as one might imagine, I was simply paid for the work that Marvel or the other comic book publishers accepted. I was not paid for rejected material, nor was I paid for the additional work and time of redoing any artwork at Marvel's request as a condition to their purchase of the material. I was paid solely for the finished artwork, accepted and bought by Marvel.

12. From 1959 to 1975, I never had a written contract with Marvel. We had a loose, open-ended relationship. My understanding was that Marvel was not obligated to buy material from me or to pay me for material they did not like; and I was not obligated to Marvel to create or work on any material.

13. I did not view my artwork that Marvel published as "work for hire," and received no indication from Marvel at the time that they considered my artwork as "work for hire." The freelancers and the comic book publishers did not view their relationship that way in the 1960's. In fact, I do not believe I ever even heard the term "work for hire" mentioned in the comic book business until the very late 1970's or early 1980's. The reality was that Marvel and other comic book publishers bought our freelance artwork once it had been submitted and accepted by the publisher. I believed that Marvel owned all rights to the artwork because they bought it from me.

14. This was reflected in how we were paid after delivery and acceptance of freelance material. Marvel's checks to me would include stamped writing on the back,

where I was supposed to endorse the check, which stated that by signing the check I was transferring to the comic book publisher all of my rights in the material it had purchased.

15. Years later, Marvel returned some of my original artwork to me. For example, in the Spring, 1998, Marvel notified me that they had some of my original artwork for the *Rawhide Kid* which they would like to return to me. I was enthusiastic about these returns because there is a collector's market for such material, and I could use the income. Marvel sent me a one page artwork release form to sign, and informed me that unless I signed and returned the form "as is," they would not return my original artwork. I signed the release, because I was in no position to bargain, and I would otherwise not get my artwork back. I did not have an attorney review the legal language in the release because, frankly, I could not afford one.

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

Dated: March 25, 2011


Richard Ayers

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served electronically by the Court's ECF system and by first class mail on those parties not registered for ECF pursuant to the rules of this court.

Dated: March 25, 2011

Respectfully submitted,
TOBEROFF & ASSOCIATES, P.C.

/s/ Marc Toberoff

Marc Toberoff
2049 Century Park East, Suite 3630
Los Angeles, California 90067
Tel. (310) 246-3333
Facsimile: (310) 246-3101
E-mail: mtoberoff@ipwla.com

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