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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 SUPPORT OF
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

[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.

I, Marc Toberoff, hereby declare as follows:

1. I am familiar with the facts set forth below and make this declaration in further support of defendants' opposition to plaintiffs' Motion for Summary Judgment. 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, California, 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 one of the "Fantastic Four" Termination Notices that my firm served on September 16, 2009.

6. The Termination Notices have varying "effective dates," with the majority of such dates falling between 2017-2019, for the most famous characters.

7. Attached hereto as "Exhibit B" are true and correct copies of excerpts from the November 9, 2010 deposition of Mark Evanier, which I attended.

8. Attached hereto as "Exhibit C" are true and correct copies of excerpts from the December 6, 2010 deposition of Mark Evanier, which I attended.

9. Attached hereto as "Exhibit D" are true and correct copies of excerpts

from the January 10, 2011 deposition of John Morrow, which I attended.

10. Attached hereto as “Exhibit E” are true and correct copies of excerpts from the January 7, 2011 deposition of Larry Lieber, which I attended.

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

12. Attached hereto as “Exhibit G” are true and correct copies of excerpts from the June 30, 2010 deposition of Neal Kirby, which I attended.

13. Attached hereto as “Exhibit H” are true and correct copies of excerpts from the October 25, 2010 deposition of Susan Kirby, which I attended.

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

15. Attached hereto as “Exhibit J” are true and correct copies of excerpts from the December 8, 2010 deposition of Stan Lee, which I attended.

16. Attached hereto as “Exhibit K” are true and correct copies of excerpts from the October 27, 2010 deposition of Roy Thomas, which I attended.

17. Attached hereto as “Exhibit L” is a true and correct copy of plaintiffs’ Response to Defendants’ First Set of Requests for Admission, served on December 20, 2010.

18. Attached hereto as “Exhibit M” is a true and correct copy of an “Assignment” by Jack Kirby to Magazine Management Co., Inc. which was fully executed on June 5, 1972.

19. Attached hereto as “Exhibit N” are true and correct copies of six large pencil drawings by Jack Kirby that were in the possession of Larry Lieber and produced

at his January 7, 2011 deposition in response to defendants' subpoena. The drawings were marked as Exhibit 5 at Mr. Lieber's deposition, which I attended.

20. Attached hereto as "Exhibit O" is a true and correct copy of an article entitled "Kirby's Gamma Rays: Alpha to Omega!- An Ultra-Rare Find from 1962" from *The Jack Kirby Collector* No. 41 (Fall 2004), which was marked as Exhibit 6 at the January 7, 2011 deposition of Larry Lieber, which I attended.

21. Attached hereto as "Exhibit P" is a true and correct copy of an agreement between Marvel Characters, Inc. and Lisa R. Kirby, as administrator of the estate of Jack Kirby, dated July 7, 2006, which defendants produced in this action.

22. Attached hereto as "Exhibit Q" is a true and correct copy of an agreement between Marvel Characters, Inc. and Lisa R. Kirby, as administrator of the estate of Jack Kirby, dated December 23, 2008, which defendants produced in this action.

23. Attached hereto as "Exhibit R" is a true and correct copy of an agreement between Marvel Characters, Inc. and Lisa R. Kirby, as administrator of the estate of Jack Kirby, dated November 3, 2008, which defendants produced in this action.

24. Attached hereto as "Exhibit S" is a true and correct copy of an article entitled "Fantastic Four #108: Jack's Way" from *The Collected Jack Kirby Collector*, Volume 1, which was produced by defendants in this action.

25. Attached hereto as "Exhibit T" is a true and correct copy of a "Request for Payment" dated March 21, 1965 from Don Heck to Western Printing and Lithographing Co. , which defendants produced in this action.

26. Attached hereto as "Exhibit U" are true and correct copies of excerpts from the book "Five Fabulous Decades of the World's Greatest Comics: Marvel" by Les

Daniels, which was marked as Exhibit 38 at the December 8, 2010 deposition of Stan Lee, which I attended.

27. Attached hereto as “Exhibit V” are true and correct copies of excerpts from the book “Alter Ego Presents: John Romita...and All that Jazz!” by Roy Thomas and Jim Amash, which was produced to defendants by John Romita in this action and marked as Exhibit 6 at the October 21, 2010 deposition of Mr. Romita, which I attended.

28. Attached hereto as “Exhibit W” are true and correct copies of excerpts from the book *Jack Kirby Checklist Gold Edition*, which defendants produced in this action.

29. Attached hereto as “Exhibit X” are true and correct copies of excerpts from the book *The Art of Jack Kirby*, which plaintiffs produced in this action.

30. Attached hereto as “Exhibit Y” is a true and correct copy of an article entitled “Kirby Gets Cracked” from *The Collected Jack Kirby Collector*, Volume 5.

31. Attached hereto as “Exhibit Z” is a true and correct copy of an article entitled “The Monster of Moraggia” from *The Collected Jack Kirby Collector*, Volume 3, which defendants produced in this action.

32. Attached hereto as “Exhibit AA” are true and correct copies of checks issued to freelance artist Dick Ayers by plaintiffs’ predecessors in 1974 and 1975, which plaintiffs produced in this action.

33. Attached hereto as “Exhibit BB” is a true and correct copy of a check purportedly issued to Jack Kirby in 1986, which plaintiffs produced in this action.

34. Attached hereto as “Exhibit CC” are true and correct copies of excerpts from an article entitled “Would You Like to See My Etchings?” from the *The Collected*

Jack Kirby Collector, Volume 2, which defendants produced in this action.

35. Attached hereto as “Exhibit DD” are true and correct copies of an agreement between John Romita and Marvel Comics Group dated May 19, 1978 as well as an agreement between Roy Thomas and Marvel Comics Group dated June 1, 1978, which plaintiffs produced in this action.

36. Attached hereto as “Exhibit EE” is a true and correct copy of a draft artwork release between Jack Kirby and Marvel Comics Group, which was produced by defendants’ expert Mark Evanier in this action.

37. Attached hereto as “Exhibit FF” are true and correct copies of artwork by Jack Kirby produced in this action.

38. Attached hereto as “Exhibit GG” is a true and correct copy an article entitled “A Failure to Communicate: Part Two” from *The Collected Jack Kirby Collector*, Volume 5.

39. Attached hereto as “Exhibit HH” are true and correct copies of excerpts from an article entitled “Jack Kirby” from *Comics Interview*, produced by defendants in this action.

40. Attached hereto as “Exhibit II” are true and correct copies of excerpts from an article entitled “Hour Twenty-Five” from *The Collected Jack Kirby Collector*, Volume 4, produced by defendants in this action.

41. Attached hereto as “Exhibit JJ” are true and correct copies of excerpts from an article entitled “Jack Kirby Interview” from *The Collected Jack Kirby Collector*, Volume 6.

42. Attached hereto as “Exhibit KK” are true and correct copies of excerpts

from an article entitled “Wow-What an Interview” from *The Collected Jack Kirby Collector*, Volume 2, produced by defendants in this action.

43. Attached hereto as “Exhibit LL” is a true and correct copy of the Declaration of Donald S. Engle and exhibits “C,” “D,” and “E” attached thereto submitted on November 12, 1980 in the action *Stephen Gerber v. Cadence Industries Corporation, et al*, Case No. 80-3840, U.S. District Court, Central District of California.

44. Attached hereto as “Exhibit MM” are true and correct copies of excerpts from a book entitled *Stan Lee Conversations*, produced by plaintiffs in this action

45. Attached hereto as “Exhibit NN” are true and correct copies of excerpts from an article entitled “Jack Kirby A Celebration” from *The Comics Journal* No. 167, produced by defendants in this action.

46. Attached hereto as “Exhibit OO” is a true and correct copy an article entitled “Jack Kirby Interview” from *The Collected Jack Kirby Collector*, Volume 5.

47. Attached hereto as “Exhibit PP” is a true and correct copy an article entitled “Kirby and Goliath: The Fight for Jack Kirby’s Marvel Artwork” from *The Comics Journal Library: Jack Kirby*, produced by defendants in this action.

48. Attached hereto as “Exhibit QQ” is a true and correct copy a letter dated November 19, 1985 from DC Comics to *The Comics Journal*, produced by plaintiffs in this action.

49. Attached hereto as “Exhibit RR” is a true and correct copy of handwritten notes signed by Jack Kirby produced by defendants’ expert Mark Evanier in this action.

50. Attached hereto as “Exhibit SS” are true and correct copies of an excerpt from an article entitled “A Talk with Artist-Writer-Editor Jack Kirby” from *The*

Collected Jack Kirby Collector, Volume 4, produced by defendants in this action.

51. Attached hereto as “Exhibit TT” is a true and correct copy an article entitled “Jack Kirby Interview” from *The Collected Jack Kirby Collector*, Volume 1, produced by defendants in this action.

52. Attached hereto as “Exhibit UU” are true and correct copies of excerpts from the book *Superhero Women* by Stan Lee, which was Exhibit 42 at the December 8, 2010 deposition of Stan Lee.

53. Attached hereto as “Exhibit VV” are true and correct copies of excerpts from an article entitled “Interview with Stan Lee” from the website ign.com, which was Exhibit 43 at the December 8, 2010 deposition of Stan Lee.

54. Attached hereto as “Exhibit WW” are true and correct copies of excerpts from the book *Son of Origins of Marvel Comics (1975)* by Stan Lee, which was Exhibit 34 at the December 8, 2010 deposition of Stan Lee.

55. Attached hereto as “Exhibit XX” are true and correct copies of excerpts from the book *The Fantastic Four* by Stan Lee, which was Exhibit 41 at the December 8, 2010 deposition of Stan Lee.

56. Attached hereto as “Exhibit YY” are true and correct copies of excerpts from the book *Alter Ego* No. 74, which was Exhibit 33 at the December 8, 2010 deposition of Stan Lee.

57. Attached hereto as “Exhibit ZZ” are true and correct copies of excerpts from an article entitled “Jack Kirby-The Master of Comic Book Art” from *The Collected Jack Kirby Collector*, Volume 1, produced by defendants in this action.

58. Attached hereto as “Exhibit AAA” are true and correct copies of excerpts

from an article entitled “Stan Lee Interview- WBAI Radio NY-August 12, 1968,” produced by defendants’ expert John Morrow in this action.

59. Attached hereto as “Exhibit BBB” are true and correct copies of excerpts from the book *Incredible Hulk* by Stan Lee, which was Exhibit 35 at the December 8, 2010 deposition of Stan Lee.

60. Attached hereto as “Exhibit CCC” are true and correct copies of excerpts from an article entitled “The Goldberg Variations.”

61. Attached hereto as “Exhibit DDD” are true and correct copies of excerpts from an article entitled “Stan Lee Interview- WBAI Radio NY- March 3, 1967”.

62. Attached hereto as “Exhibit EEE” is a true and correct copy an article entitled “Jack Kirby: Prisoner of Gravity” from *The Collected Jack Kirby Collector*, Volume 3, produced by defendants in this action.

63. Attached hereto as “Exhibit FFF” is a true and correct copy of an article entitled “Jack Kirby: A By-the-Month Chronology” for the periods 1950-1959 and 1960-1964 from the online database marvelmasterworks.org.

64. Attached hereto as “Exhibit GGG” are true and correct copies of excerpts of an article entitled “The Highs and Lows of Henry Pym” from *The Collected Jack Kirby Collector*, Volume 4, produced by defendants in this action.

65. Attached hereto as “Exhibit HHH” is a true and correct copy of an article entitled “They Were Aces” from *The Jack Kirby Collector* No. 25, produced by defendants expert John Morrow in this action.

66. Attached hereto as “Exhibit III” is a true and correct copy of the Declaration of Stephen Gerber and exhibit “3,” attached thereto submitted on December

24, 1980 in the action *Stephen Gerber v. Cadence Industries Corporation, et al*, Case No. 80-3840, U.S. District Court, Central District of California.

67. Attached hereto as “Exhibit JJJ” are true and correct copies of excerpts from the 1963 treatise *Nimmer on Copyright* by Melville B. Nimmer.

68. Attached hereto as “Exhibit KKK” is a true and correct copy of a letter dated August 5, 1986 from Joe J. Sacco to Paul Levine enclosing an interview with the Sales Tax Department for New York, produced by defendants in this action.

69. Attached hereto as “Exhibit LLL” is a true and correct copy of the cover of *Challengers of the Unknown, No. 1*, retrieved from the website “comics.org,” and located at <http://www.comics.org/series/1293/covers/>.

70. I cross-examined Stan Lee at a deposition on December 8, 2010. After I indicated that I had no further questions, Mr. Lee’s attorney, Arthur Lieberman, requested a break even though the parties had just recently already taken a break. At this break, on my way to the restroom, I noticed Disney/Marvel’s lead counsel, James Quinn, intently speaking to Mr. Lee in a corner separate and apart from the other Marvel attorneys. Upon resumption of the deposition, Mr. Quinn asked Mr. Lee very specific questions to which Lee immediately responded without any hesitation or reflection.

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

Dated: March 25, 2011

/s/ Marc Toberoff

Marc Toberoff

