

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIE TAYMOR and LOH, INC.,

Plaintiffs,

v.

8 LEGGED PRODUCTIONS, LLC, HELLO
ENTERTAINMENT, LLC, GOODBYE
ENTERTAINMENT, LLC, SAVIOR PRODUCTIONS,
LLC, MICHAEL COHL, JEREMIAH HARRIS and
GLEN BERGER,

Defendants.

Civil Action No. 11-CV-8002 (RJH)

ECF Case

GLEN BERGER,

Counterclaim-Plaintiff,

v.

JULIE TAYMOR and LOH, INC.,

Counterclaim-Defendants.

ANSWER AND COUNTERCLAIM OF DEFENDANT GLEN BERGER

Defendant Glen Berger (“Berger”), by his undersigned counsel, Cowan, DeBaets, Abrahams & Sheppard, LLP, hereby answers the Complaint of plaintiffs Julie Taymor (“Taymor”) and LOH, Inc. (“LOH”) (collectively, “Plaintiffs”) in this action, dated November 8, 2011, and counterclaims as follows:

NATURE OF THE ACTION

1. States that the allegations contained in Paragraph 1 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, admits that Plaintiffs purport to bring an action for copyright infringement and breaches of contract but denies that Plaintiffs are entitled to any relief on those claims.

2. States that the allegations contained in Paragraph 2 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 2.

3. States that the allegations contained in Paragraph 3 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies the allegations contained in Paragraph 3.

PARTIES

4. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 4 except admits that Taymor is domiciled in this district and that Exhibit D to the Complaint appears to be an agreement between Taymor and Hello Entertainment LLC regarding directing and collaboration services with respect to the Spider-Man Musical.

5. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 5.

6. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 6.

7. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 7.

8. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 8.

9. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 9.

10. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 10.

11. States that the allegations contained in Paragraph 11 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies the allegations contained in Paragraph 11 except admits that Berger entered into an agreement to write the book of the Spider-Man Musical, and refers to Exhibit B of the Complaint for the contents therein.

JURISDICTION & VENUE

12. States that the allegations contained in Paragraph 12 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, admits that the Court has subject matter and supplemental jurisdiction over Plaintiffs' Complaint.

13. States that the allegations contained in Paragraph 13 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, admits that venue is proper in this District.

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

14. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the first sentence of Paragraph 14. Admits the remaining allegations contained in Paragraph 14.

15. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 15, except denies the allegation that Taymor has “written numerous Broadway productions, motion pictures and operas.”

16. Admits the allegations contained in Paragraph 16, except states that allegations regarding ownership of intellectual property rights in the *Spider-Man* character are conclusions of law as to which no response is required.

17. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 17, except admits that Bono and The Edge agreed to work on the project.

18. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 18.

19. Admits the allegations contained in Paragraph 19, but states that the definitions of the “book,” “script” or “libretto” of a musical may not apply in every case.

20. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 20.

21. Denies the allegations set forth in Paragraph 21, except admits that Taymor claims to have authored a written document in 2004 which Plaintiffs incorrectly refer to as a “Treatment,” and admits that a treatment may be a work of prose.

22. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 22.

23. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 23.

24. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 24 except admits that Berger was contracted by the producers to write the book for the Spider-Man Musical in 2005 and his position was titled “co-bookwriter” of the Musical.

25. States that the registration certificate attached as Exhibit A to the Complaint speaks for itself and no responsive pleading is necessary, but that to the extent any response is required, denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 25.

26. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 26.

27. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 27.

28. States that the allegations in Paragraph 28 contain conclusions of law as to which no responsive pleading is necessary, but to the extent that any response is required, admits that Berger entered into an agreement with Hello Entertainment dated June 22, 2005, states that the agreement attached as Exhibit B to the Complaint speaks for itself, and denies the remaining allegations contained in Paragraph 28 to the extent the allegations are inconsistent with the terms of the agreement. Further denies Taymor had the sole right to authorize changes to the book of the Musical.

29. States that the allegations contained in Paragraph 29 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 29.

30. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 30.

31. States that the document referenced in the allegations as Exhibit C speaks for itself and no responsive pleading is necessary, but that to the extent any response is required, denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 31.

32. States that the document referenced in the allegations speaks for itself and no responsive pleading is necessary, but that to the extent any response is required, denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 32.

33. States that the document referenced in the allegations speaks for itself and no responsive pleading is necessary, but that to the extent any response is required, denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 33.

34. States that the document referenced in the allegations as Exhibit D speaks for itself and no responsive pleading is necessary, but that to the extent any response is required, admits that an arbitration brought by the Stage Directors and Choreographers Society against the producers is ongoing, and denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 34.

35. Admits the allegations contained in Paragraph 35.

36. Denies the allegations set forth in Paragraph 36, and objects to characterization of the preliminary drafts of the book as “the book.” Admits that in or around 2005, Berger met with Taymor to discuss a preliminary draft of the book.

37. Denies the allegations contained in Paragraph 37 of the Complaint, except denies knowledge or information sufficient to form a belief as to whether Marvel and the producers have viewed workshops and staged readings of the Musical.

38. States that the allegations contained in Paragraph 38 contain conclusions of law to which no responsive pleading is necessary, but to the extent any response is required, denies the allegations contained in Paragraph 38 of the Complaint, except admits that Berger engaged in negotiations with the producers on a long-form author agreement, but that agreement was never finalized or executed.

39. States that allegations regarding “independently copyrightable contributions” are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies the allegations in Paragraph 39 of the Complaint.

40. States that the allegations in the first sentence of Paragraph 40 contain conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required, denies the allegations contained in Paragraph 40 of the Complaint, except admits that the book tells the story of characters named Peter Parker and Mary Jane Watson, among others. States that allegations regarding work for hire status of the characters “Swiss Miss” and “Arachne” are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 40.

41. Admits the allegations in Paragraph 41.

42. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 42 except admits that Cohl and Harris took over as lead producers and admits that Cohl and Harris formed 8 Legged, Goodbye and Savior to continue the production and financing of the Musical.

43. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 43.

44. Admits that Berger entered into a written agreement on or about August 24, 2010 and that a copy of that agreement appears to be annexed as Exhibit E to the Complaint and denies the allegations of Paragraph 44 to the extent it alleges terms inconsistent with the agreement. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 44.

45. Denies the allegations in Paragraph 45 of the Complaint, except admits that the Musical began rehearsals in or around mid-August 2010, and admits that during the rehearsal period, Berger continued to write the book of the Musical and continued to work with Taymor in connection with the Musical.

46. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 46.

47. Admits the allegations in Paragraph 47.

48. Denies the allegations contained in Paragraph 48 of the Complaint, except admits Berger worked with Taymor during the preview period and admits that Berger drafted changes to the book.

49. Denies the allegations contained in Paragraph 49 of the Complaint except admits that Berger had discussions with Cohl and Harris and avers that discussions commenced in or about January 2011. Denies that Taymor's consent was required for Berger to engage in the aforementioned discussions with Cohl and Harris.

50. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 50.

51. Denies the allegations contained in Paragraph 51 of the Complaint, except admits that a meeting was held with Taymor, Cohl, Berger and The Edge at Gelblum's office, with Bono and Harris participating by telephone call and admits that potential changes, of which Taymor was aware, were discussed.

52. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 52.

53. States that the allegations in Paragraph 53 contain conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required, denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 53, except admits that the version of the book of the Musical as of March 2011 was titled "Spider-Man: Turn off the Dark" (the "March 2011 Book") and that the document attached as Exhibit G to the Complaint appears to be a Certificate of Registration with an effective date of October 11, 2011 from the United States Copyright Office for a work titled "Spider-Man: Turn Off the Dark."

54. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 54.

55. Denies the allegations in Paragraph 55, except admits that on March 9, 2011, it was announced that Philip Wm. McKinley and Roberto Aguirre-Sacasa were joining Spider-Man's creative team and that the press release included the quotation: "to help implement new staging and book rewrites, respectively," and admits that Taymor's consent was not obtained but denies that Taymor's consent was required.

56. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 56.

57. Denies the allegations in Paragraph 57, except admits that on April 17, 2011 Spider-Man closed for three weeks, admits that Berger, under his agreement with the producers, worked with Aguirre-Sacasa during the shut-down period and admits that by May 12, 2011 they had produced a new book of the Musical that was different from the previous version of the book that existed as of March 2011 (the "May 2011 Book").

58. Denies the allegations in Paragraph 58 except admits that Spider-Man re-opened in previews on May 12, 2011 using the May 2011 Book

59. States that the allegations contained in Paragraph 59 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies that the May 2011 Book has been used in the Musical since it reopened on May 12, 2011 and denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 59.

60. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 60, except admits Taymor has been billed and publicized as co-bookwriter of the Musical.

61. States that the documents referenced in the allegations as Exhibits H and I speak for themselves and no responsive pleading is necessary, but that to the extent any response is required, denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 61.

62. Denies the allegations in Paragraph 62, except admits that Spider-Man opened on Broadway on June 14, 2011.

63. Admits the allegations in Paragraph 63.

64. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 64, except admits that the Tony Awards Administration Committee ruled that Taymor was eligible to be nominated for a 2012 Tony Award for Best Direction of a Musical.

65. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 65, except admits that Spider-Man continues to play in the Foxwoods Theatre and regularly grosses in excess of \$1.4 million per week and that Foxwoods is currently Broadway's largest house.

66. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 66, except admits that Berger continues to be paid from revenues from the Musical. Further states that the term "use of Taymor's copyrighted works" is insufficiently defined and contains conclusions of law to which no responsive pleading is necessary, but that to the extent any response is required as to such term, denies the same.

67. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 67.

68. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 68.

69. States that the allegations contained in the first three sentences of Paragraph 69 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies the allegations in Paragraph 69, except admits that the May 2011 Book contains “Spider-Man” characters and refers to the March 2011 and May 2011 Books for a complete and accurate description of their contents. Further denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last sentence of Paragraph 69 and refers to the “Playbill” referenced therein for the accuracy of the phrase quoted in the last sentence of Paragraph 69.

70. States that the allegations contained in Paragraph 70 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies the allegations in Paragraph 70, except admits that “Arachne” is referenced in Marvel’s comic books and admits that Paragraph 70 of the Complaint contains side by side text blocks that appear to quote text describing stage activity but refers to the March 2011 and May 2011 Books for an accurate recitation of the contents therein.

71. States that the allegations contained in Paragraph 71 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies the allegations in Paragraph 71, except admits that Paragraph 71 of the Complaint contains side by side text blocks that appear to quote text from a scene but refers to the March 2011 and May 2011 Books for an accurate recitation of the contents therein.

72. States that the allegations contained in Paragraph 72 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any

response is required, denies the allegations in Paragraph 72, except admits that Paragraph 72 of the Complaint contains side by side text blocks that appear to quote text describing a fight between Peter Parker and “bullies,” but refers to the March 2011 and May 2011 Books for an accurate recitation of the contents therein.

73. States that the allegations contained in Paragraph 73 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies the allegations in Paragraph 73, except admits that Paragraph 73 of the Complaint contains side by side text blocks that appear to quote text describing a scene involving Peter Parker in class but refers to the March 2011 and May 2011 Books for an accurate recitation of the contents therein.

74. States that the allegations contained in Paragraph 74 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies the allegations in Paragraph 74, except admits that Paragraph 74 of the Complaint contains side by side text blocks that appear to quote text describing a conversation between Dr. Norman Osborn and Emily but refers to the March 2011 and May 2011 Books for an accurate recitation of the contents therein.

75. States that the allegations contained in Paragraph 75 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies the allegations in Paragraph 75, except admits that Paragraph 75 of the Complaint contains side by side text blocks that appear to quote text describing dialogue between character “JJ” Jameson and his newspaper staff but refers to the March 2011 and May 2011 Books for an accurate recitation of the contents therein.

76. States that the allegations contained in Paragraph 76 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies the allegations in Paragraph 76 and refers to the March and May 2011 Books respectively for an accurate recitation of the contents therein.

77. States that the allegations contained in Paragraph 77 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 77.

78. States that the allegations contained in Paragraph 78 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies the allegations in Paragraph 78 and refers to what Plaintiffs designate as a “treatment” (the “2004 Treatment”) and to the May 2011 Book for an accurate recitation of the contents therein.

79. Denies the allegations in Paragraph 79, and refers to the 2004 Treatment and the May 2011 Book for an accurate recitation of the contents therein.

80. Denies the allegations in Paragraph 80, and refers to the 2004 Treatment and the May 2011 Book for an accurate recitation of the contents therein.

81. Denies the allegations in Paragraph 81, and refers to the 2004 Treatment and the May 2011 Book for an accurate recitation of the contents therein.

82. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 82.

83. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 83.

84. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 84.

85. States that the allegations contained in Paragraph 85 of the Complaint are conclusions of law to which no responsive pleading is necessary, but to the extent any response is required, denies the allegations in Paragraph 85 as to Berger and denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 85 as against other Defendants.

FIRST CLAIM FOR RELIEF
Copyright Infringement, 17 U.S.C. § 501-Original Book (Against 8 Legged, Hello, Goodbye, Savior, Cohl and Harris)

86. Berger repeats and realleges each and every response to Paragraphs 1-85 above as if fully set forth herein.

87. – 102. Plaintiffs' First Claim for Relief is not against Berger, and Berger does not submit an answer to Paragraphs 87-102 of the Complaint.

SECOND CLAIM FOR RELIEF
Copyright Infringement, 17 U.S.C. § 501 – Treatment (Against 8 Legged, Hello, Goodbye, Savior, Cohl and Harris)

103. Berger repeats and realleges each and every response to Paragraphs 1 through 102 above as if fully set forth herein.

104. – 115. Plaintiffs' Second Claim for Relief is not against Berger, and Berger does not submit an answer to Paragraphs 104-115 of the Complaint.

THIRD CLAIM FOR RELIEF
Breach of Contract (Against Hello and 8 Legged)

116. Berger repeats and realleges each and every response to Paragraphs 1 through 115 above as if fully set forth herein.

117. – 124. Plaintiffs’ Third Claim for Relief is not against Berger, and Berger does not submit an answer to Paragraphs 117-124 of the Complaint.

FOURTH CLAIM FOR RELIEF
Declaratory Judgment and Injunction – Non-Broadway Productions
(Against Hello and 8 Legged)

125. Berger repeats and realleges each and every response to Paragraphs 1 through 124 above as if fully set forth herein.

126. – 132. Plaintiffs’ Fourth Claim for Relief is not against Berger, and Berger does not submit an answer to Paragraphs 126-132 of the Complaint.

FIFTH CLAIM FOR RELIEF
Declaratory Judgment and Injunction – NY Civil Rights Law §§ 50 and 51
(Against 8 Legged, Cohl and Harris)

133. Berger repeats and realleges each and every response to Paragraphs 1 through 132 above as if fully set forth herein.

134. – 141. Plaintiffs’ Fifth Claim for Relief is not against Berger, and Berger does not submit an answer to Paragraphs 134-141 of the Complaint.

SIXTH CLAIM FOR RELIEF
Copyright Accounting
(Against Berger)

142. Berger repeats and realleges each and every response to Paragraphs 1 through 141 above as if fully set forth herein.

143. States that the registration certificate referenced in the allegations speaks for itself, and no responsive pleading is necessary but to the extent any response is required, denies the allegations in Paragraph 143 except admits that Berger made independently copyrightable contributions to the March 2011 Book.

144. Denies the allegations in Paragraph 144.

145. States that the allegations contained in Paragraph 145 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, denies the allegations in Paragraph 145.

DEFENDANT BERGER'S AFFIRMATIVE DEFENSES

146. Berger makes the following allegations as affirmative defenses against the claim asserted against him without admitting that he bears the burden of persuasion or presentation of evidence on each or any of these matters, and without waiving the right to assert and rely upon other defenses that become available or appear during the course of this action.

FIRST DEFENSE

147. The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

148. Plaintiffs' claim is barred in whole or in part by the doctrine of unclean hands.

THIRD DEFENSE

149. Plaintiffs' claim is barred in whole or in part by laches or delay.

FOURTH DEFENSE

150. Plaintiffs' claim is barred in whole or in part by the doctrine of waiver, estoppel, acquiescence, or express or implied license.

FIFTH DEFENSE

151. Plaintiffs' claim is barred in whole or in part on the grounds that it is unripe.

SIXTH DEFENSE

152. Plaintiffs' claim is barred because both LOH and Berger have each entered into separate agreements with the producers regarding the exploitation of the book of the Musical, and thus, to the extent Taymor is held to be a co-author of the March 2011 Book and entitled to

an accounting of royalties for her ratable share of the profits realized from licensing the March 2011 Book, such accounting must be made against the producers of the Musical rather than against Berger.

SEVENTH DEFENSE

153. Plaintiffs' claim is barred against Berger because Berger has not realized profits, beyond his contractually guaranteed minimums, from any licensing of the March 2011 Book.

EIGHTH DEFENSE

154. Plaintiffs' claim is barred by the doctrine of *de minimis* use.

DEFENDANT BERGER'S COUNTERCLAIM

INTRODUCTION

1. Plaintiffs counterclaim-defendants Julie Taymor ("Taymor") and LOH, Inc. ("LOH") (together, "Plaintiffs" or "Counterclaim-Defendants")'s sole claim against defendant Glen Berger ("Berger") is one pled in the alternative to their copyright infringement claims relating to the book of the musical *Spider-Man: Turn Off The Dark* (the "Musical") that was used prior to Taymor's departure from the production of the Musical in March 2011 (the "March 2011 Book"). Under such claim, Plaintiffs seek an accounting and half of proceeds from unspecified licenses or transfers of rights in the March 2011 Book that Berger allegedly made.

2. The basis for Plaintiffs' claim against Berger is the claim that Taymor or LOH is a co-author and joint owner of the copyright in and to the March 2011 Book. In such a case, under the law, she may therefore be entitled to an accounting of her ratable share of profits that Berger has received.

3. Assuming the Court makes such a ruling that Taymor is a joint owner of the March 2011 Book, Berger would nonetheless be considered a co-author of the March 2011 Book

– something that Plaintiffs do not dispute – and thus Berger, as co-author, would be entitled to his ratable share of profits that Taymor receives from any license or transfer of the March 2011 Book.

PARTIES

4. Counterclaim-Plaintiff Glen Berger is an individual residing in Saugerties, New York. Berger is a professional writer.

5. Upon information and belief, Counterclaim-Defendant Julie Taymor is an individual domiciled in this District.

6. Upon information and belief, Counterclaim-Defendant LOH Inc. is a domestic business corporation organized and existing under the laws of the state of New York and having its principal place of business in this District. Upon information and belief, LOH is wholly owned by Taymor.

JURISDICTION AND VENUE

7. This action asserts a counterclaim arising under New York state law. This Court has supplemental jurisdiction over such counterclaim pursuant to 28 U.S.C. § 1367.

8. Upon information and belief, this Court has personal jurisdiction over Taymor and LOH because they reside in this District. This Court further has personal jurisdiction over Taymor and LOH because they have chosen to avail themselves of the laws and protections of this Court and Berger's counterclaim arises from the same or related series of operative facts that Plaintiffs allege.

9. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and 1400(a).

FACTUAL ALLEGATIONS

10. Spider-Man is a Marvel Comics superhero that, since created in 1962, has appeared in several comic book series, animated and live-action television shows, comic strips and a trilogy of major motion pictures.

11. In the comic books, Spider-Man is the alter ego of Peter Parker (“Parker”), who as a high-school student is bitten by a radioactive spider, which gives Parker the agility and strength of an arachnid. With these and other new abilities such as “spider sense” and the ability to launch webs from his wrists, Parker goes from being a teased and taunted geek to becoming a superhero complete with an arch-nemesis (the Green Goblin) and a female confidante and love interest, Mary Jane Watson.

12. In March 2004, Marvel Enterprises, Inc. (“Marvel”) entered into an agreement with Hello Entertainment, LLC (“Hello”) to give Hello the right to produce a stage musical based on certain characters, stories and concepts contained in Marvel’s *Spider-Man* comic books and other intellectual property.

13. Upon information and belief, in or around such time, Counterclaim-Defendant Julie Taymor, through her loan-out company LOH, was contracted by Hello to serve as Director and Collaborator of the Musical. Upon information and belief, she subsequently also became credited as Mask Designer.

14. Defendant Berger is a professional writer for the theater and television. Among his several award-winning plays is *Underneath the Lintel*, which has had over 200 productions worldwide. Berger has written over 150 episodes for children’s television series that have aired on PBS, NBC, and the BBC, including *Arthur* and *Fetch with Ruff Ruffman*, seen weekly by three million viewers. He has received 12 Emmy nominations and won two Emmy Awards.

15. On or about June 22, 2005, Berger entered into an agreement with Hello (the “Berger Agreement”) pursuant to which he agreed to provide co-writing services in connection with the treatment and/or book of the Musical currently titled “Spiderman: Turn off the Dark” f/k/a “Spider-Man: A Musical Web.”

16. The Berger Agreement provided, *inter alia*, that Berger would draft both a treatment for the Musical (the “Basic Treatment”) and, if engaged as a bookwriter, would also draft the book of the Musical. The Berger Agreement required the Basic Treatment to include the story, basic treatment, overall concept, and music style, including the basic storyline, character descriptions, portrayal of the powers, basic personal traits, physical appearance and the living habitat, environment and setting thereof, as well as a scene-by-scene breakdown.

17. Upon information and belief, Marvel had sole and/or final approval over the elements contained in the Basic Treatment.

18. Upon information and belief, in or around August 2005, LOH and Hello entered into an agreement regarding royalties and credits as a “co-bookwriter of the Musical.” Upon information and belief, the aforementioned agreement makes no mention of a treatment of any kind, or any services in drafting a treatment or the book.

19. Berger did not enter into any agreement with either Taymor or LOH regarding the Basic Treatment or book of the Musical, including any copyright interests in or uses of the Basic Treatment or book of the Musical.

20. Other than with the producers, Berger has no agreement with any third party to license or otherwise transfer rights in the Basic Treatment or in the book of the Musical. His only royalties for his work on the Basic Treatment and book of the Musical have come in the form of weekly minimums under his contract with the producers of the Musical.

21. Under the Berger Agreement, Berger was to “collaborate with Julie Taymor on bookwriter-related and other creative decisions for the Musical,” although ultimately, any proposed treatment for, and book of the Musical, was subject to the approval of Hello and Marvel.

22. Upon information and belief, Marvel required that the Musical would remain consistent with and faithful to the concept, spirit and characterization of the Spider-Man comic books and other licensed property.

23. At the time Berger joined the production, Taymor provided him with a short document, under three pages, dated July 1, 2004 and entitled “Spider-Man/Caught,” which Plaintiffs incorrectly classify as a “treatment” (the “Statement”). The Statement described the plot for a two-act story that embedded the Spider-Man story within the Greek myth of Arachne. In the Statement, the play opens with a dream scene in which Spider-Man tries to rescue Mary Jane. Then, the myth of Arachne, a woman under a curse from Athena that leaves her in spider form at the moment Arachne tries to hang herself, is introduced. Act One of the Statement covered “the terrain of the first film,” including: “the origins of Peter’s spider power,” his “bullied school days,” “love for Mary Jane,” “the wrestling scene, the loss of Uncle Ben, newspaper woes, transformation of Norman Osborne to the Green Goblin, etc.” Act Two reverts back to, and focuses on, Arachne, who “has been watching Peter’s progress” and “is impressed and provoked.” She believes “it is time . . . for Peter to deliver her from the shadows – to restore her humanity.” But Peter rejects Arachne, and he also “gives up being Spider-Man.” Then, an onslaught of “cyber-villains” takes hold of the world, with Arachne, the “nemesis of Spider-Man,” as the center of it all. When Arachne realizes that Peter has fallen in love with Mary Jane and decides to marry her instead, Arachne “lure[s] him into her web to dance a dance of

seduction. She needs to possess him, devour him for her light to shine again. . . .” At the end of Act Two, Parker takes pity on Arachne and kisses her, which breaks the curse; as she is transformed back into a woman, her original attempt to hang herself (which was suspended at the moment Athena transformed her into a spider) materializes. As she dies, she thanks Peter, and he and Mary Jane are left standing together, “simply, knowing . . .”

24. With Taymor’s Statement as a jumping-off point, Berger, in consultation with Taymor, set out to draft the Basic Treatment that he was required to prepare under the Berger Agreement.

25. In accordance with the Berger Agreement, Berger and Taymor submitted a first draft of the treatment for the book of the musical to Hello for Marvel’s approval in or about August 2005.

26. Per Hello’s request, Berger, in consultation with Taymor, revised the treatment and re-submitted the revised treatment to Hello in January 2006, for submission to Marvel.

27. This treatment contained nearly 20 pages of text, describing 46 scenes in two acts.

28. In around August 2006, Berger began working on the book of the Musical. As had been the parties’ course of conduct, Taymor contributed ideas and concepts to Berger via telephone calls, meetings and emails, Berger would write the particular scene they were discussing and send it to her, and then Berger and Taymor would discuss the draft scene over the telephone, in person or through emails.

29. The book went through several rounds of drafts and rewrites over the next four years, through the end of the rehearsal period in November 2010.

30. This book was used in the Musical when the Musical opened in previews on November 28, 2010.

31. After the Musical opened in previews, and through March 2011, further changes to the November 28, 2010 book of the Musical were made. Upon information and belief, such changes were made to allow the production to effectuate goals relating to the mechanical production that were insufficiently met as of November 28, 2010, as well as to clarify certain aspects of the Musical where the audience appeared to be getting lost. All of these changes were made by Berger in consultation with Taymor per his agreement with Hello.

32. Despite these changes, it was apparent from reaction from the audience during the preview period that a much more substantial re-writing of the script would be necessary in order to avoid the Musical from certain closure. Around Christmastime, Berger raised some of his ideas with Taymor, but she would not listen to him and told him not to make such suggestions again.

33. In or around January 2011, Berger discussed with the producers, Bono, The Edge and others whether certain major changes to the book of the Musical could elicit a more positive audience reaction to the Musical's plot and storyline. They asked Berger for proposals from Berger on possible ways to address the script, which Berger provided in broad, high-level terms.

34. However, no new dialogue was written until April 2011, after Taymor left the production, and no dialogue that Taymor hadn't previously seen and expressed her approval of was used in the Musical until April 2011.

35. In or around February 2011, the producers discussed the proposals with Taymor, and in late February or early March, Roberto Aguirre-Sacasa ("Aguirre-Sacasa") was hired to work with Berger in writing a new book for the Musical. Upon information and belief, Aguirre-Sacasa is a comic book writer who has written for Marvel Comics, including for "Spider-Man" comics; he is also a playwright, including on a recent update of a musical entitled "It's a Bird . . .

It's a Plane . . . It's Superman!," and has served as a writer for television series including *Big Love* and *Glee*.

36. Upon information and belief, Plaintiffs have not sought an accounting from Aguirre-Sacasa nor have brought any other claim against him.

37. In or around early March 2011, Taymor left the production. At or around that time, Philip Wm. McKinley ("McKinley") was engaged to replace Taymor as director on the production. Upon information and belief, McKinley was to implement any changes to the book of the Musical on-stage.

38. In or around April 2011, the Musical shut down for approximately three weeks to accommodate substantial changes to the Musical, including a new book by Aguirre-Sacasa and by Berger.

39. On May 12, 2011, the Musical re-opened in previews using a book that Berger and Aguirre-Sacasa wrote together (the "May 2011 Book").

40. Berger subsequently learned that Taymor had filed and received a Certificate of Registration from the United States Copyright Office for the March 2011 Book. The March 2011 Book is registered as Reg. No. Pau3-576-391, titled "Spider-Man: Turn Off the Dark."

41. Upon information and belief, Taymor filed her application for the copyright Certificate of Registration after she ceased involvement with the production of the Musical.

42. The Certificate of Registration lists Taymor and Berger as Authors of the Work, but expressly excludes lyrics, characters and setting from the Spider-Man comic books, the "Swiss Miss" and "Arachne" characters, and Taymor's Statement.

43. The Certificate of Registration lists Taymor and Berger as Claimants of the Work.

44. The preparation and filing of the Certificate of Registration in and to the March 2011 Book with the United States Copyright Office was done without Berger's knowledge, approval or consent.

CLAIMS FOR RELIEF

COUNT I – COPYRIGHT ACCOUNTING

45. Berger repeats and realleges the allegations set forth in Paragraphs 1 through 44 above as if fully set forth herein.

46. Registration No. Pau 3-576-391, dated October 11, 2011, for the work titled "Spider-Man: Turn Off the Dark" (which is, upon information and belief, the March 2011 Book) lists Taymor and Berger as joint authors of the Work.

47. Berger made independently copyrightable contributions to the March 2011 Book.

48. Upon information and belief, Taymor and/or LOH receives royalties as a "co-bookwriter" of the book of the Musical.

49. If the Court determines that Berger and Taymor or LOH are joint authors of the March 2011 Book, and if Taymor or LOH is found to have received (or be entitled to receive) compensation from license or transfer of rights in and to the March 2011 Book to third parties, including but not limited to any transfer or license to the producers, then Berger, as a joint author, is entitled to an accounting and his ratable share of profits obtained by Taymor or LOH as a result of any of Taymor's or LOH's license, transfer, sale or lease of rights in the March 2011 Book.

PRAYER FOR RELIEF

WHEREFORE, Defendant Counterclaim-Plaintiff Berger respectfully requests the following relief against Plaintiffs Counterclaim-Defendants Taymor and LOH:

- (a) that all claims against Berger be dismissed in their entirety and that judgment be entered thereupon in favor of Berger;
- (b) in the alternative, if Plaintiffs are held to be entitled to an accounting against Berger, a full and complete accounting of all profits, gains and advantages derived by Plaintiffs from any license, transfer, sale, or lease of any rights in the March 2011 Book; and
- (c) all such other and further relief as is just and proper.

JURY DEMAND

Counterclaim-Plaintiff Berger demands a trial by jury on all issues so triable in this action.

Dated: New York, New York
January 17, 2012

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