

EXHIBIT A

Marc Toberoff (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 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)

[Hon. Colleen McMahon]

[ECF Case]

DEFENDANTS' INITIAL DESIGNATION OF EXPERT WITNESS
MARK EVANIER

Pursuant to Rule 26 of the Federal Rules of Civil Procedure and the Court's April 19, 2010 Order, defendants and counterclaimants Lisa R. Kirby, Barbara J. Kirby, Neal L. Kirby and Susan M. Kirby (collectively "Defendants") hereby designate Mark Evanier as an expert witness whose testimony Defendants intend to introduce at the trial of these matters. A copy of Mr. Evanier's expert report is attached hereto as Exhibit A.

Defendants' foregoing initial designation does not include any expert whose testimony may be offered solely for purposes of impeachment or rebuttal. Defendants reserve the right to amend and/or modify its expert witness designation in accordance with the Federal Rules of Civil Procedure and the Local Rules of this Court.

Dated: New York, New York
November 4, 2010

TOBEROFF & ASSOCIATES, P.C.

By: 

Marc Toberoff (MT 4862)

2049 Century Park East, Suite 2720
Los Angeles, CA 90067
Tel: 310-246-3333

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EXHIBIT A

EXPERT REPORT OF MARK EVANIER

I.

INTRODUCTION

I have been informed that Lisa R. Kirby, Neal L. Kirby, Susan M. Kirby and Barbara Kirby, the four children of Jack Kirby (“Kirby”), have filed termination notices under the Copyright Act to recapture Jack Kirby’s copyrights in works that he created or co-created that were published by Marvel or its predecessors (“Marvel”) between 1958 and 1963. I have also been informed that Marvel has filed suit challenging the Kirbys’ termination notices.

I have been asked to analyze and give my opinions regarding the following topics:

The first is the manner in which Jack Kirby created or co-created comics and comic book characters published by Marvel between 1958-1963, as well as Kirby’s relationship with Marvel during this key period.

The second concerns Marvel’s policies and conduct with respect to the return of original artwork to artists, including Jack Kirby.

II.

QUALIFICATIONS

I have been involved in the comic book industry for over forty years as a writer, columnist and historian. My first sale as a professional writer came in 1969, when I was 17 years old, and soon after I was hired by a Los Angeles-based firm that was operating a licensed fan club for the Marvel properties, called Marvelmania, which advertised in Marvel comics. The “club” was a means of merchandising items such as posters and decals of the Marvel characters, and I was hired as the local firm’s in-house expert and as the editor of a fan magazine that Marvel authorized. Not long before I left that position,

Mr. Kirby hired me as an assistant to help him on some new projects he was producing for DC Comics. I assisted him with storylines, handled research and co-authored the letter pages in his comic books and did a limited amount of art production work.

While apprenticing under Kirby, I began working as a comic book writer for The Walt Disney Company and also for Western Publishing, which was issuing comic books published under the Gold Key imprint (*Bugs Bunny, Daffy Duck, Porky*, etc.). Shortly after that, I was hired as the editor and head writer for the Edgar Rice Burroughs estate (*Tarzan*).

In 1974, I began writing for television. My comedy writing experience includes working on *The Nancy Walker Show, Cheers, That's Incredible, Love Boat, Superboy, Pryor's Place, Bob* (starring Bob Newhart as a comic book artist) and *Welcome Back, Kotter*, where I worked as story editor. After leaving *Welcome Back, Kotter*, I worked for and eventually ran the comic book division of Hanna-Barbera Studios, as editor and head writer.

My animated series writing experience includes television shows such as *Scooby Doo, Plastic Man, Thundarr the Barbarian, The ABC Weekend Special, CBS Storybreak, Richie Rich, The Wuzzles, Superman: The Animated Series, Dungeons & Dragons* and *Garfield and Friends*.

While I continue to work in film and television, I have also worked on a number of comic books, including writing *Superman Adventures, The New Gods* and *Blackhawk* for DC Comics. I was both the writer and the editor for *Blackhawk*. Since 1983, I have collaborated with artist Sergio Aragonés on the long-running comic book series, *Groo the Wanderer*, which has been published in the past by Pacific Comics, Eclipse Comics, Marvel Comics and Image Comics, and which is currently published by Dark Horse Comics. I have also written, co-created and sometimes edited several other comic books series including *The DNagents* (with Will Meugniot) and *Crossfire* (with Dan Spiegle), both of which were published by Eclipse; *Hollywood Superstars* (with Spiegle), which

was published by Marvel; and *Magnor* (with Aragonés), which was published by Malibu Comics.

I have been nominated for three Emmy Awards for my work on *Garfield and Friends* (two) and *Pryor's Place* (one). In 2003, I was awarded the Lifetime Achievement Award in Animation Writing by the Animation Writers Caucus of the Writers Guild of America, West (WGAW).

I have been a panelist or moderator at numerous comic book industry events, including the Comic-Con International in San Diego, WonderCon in San Francisco, the Big Apple Comic Convention in New York City, and the Mid-Ohio Con in Columbus, Ohio. The Comic-Con International is the largest event of its kind in the world, and each year I spend much of the convention in panels and events during which I interview the comic book "greats" about their work. For my efforts in recording and preserving the history of the comic book art form, the convention awarded me the prestigious Bob Clampett Humanitarian Award in 2001.

In addition, the convention administers the industry's top award, the Will Eisner Award, which is given for excellence in the creation of comic books, and I have been awarded four "Eisners" and have been nominated seven times. The other major award in the comic book field is called the "Harvey" and I have been nominated three times for this award and have won twice.

Furthermore, I am active as an author writing about comic books, having published five books on the subject, including the recent *Kirby: King of Comics*, a biography of Jack Kirby which won both the Eisner and Harvey awards, and *Mad Art*, a history of *Mad* Magazine, tracing its evolution from a comic book into a magazine and other media.

I have been called upon to write numerous forewords and introductory material for books about comics, including many reprint volumes published by DC Comics and Marvel, and to appear on television programs and supplemental DVD materials dealing

with animation and comics. These include commentary for Marvel's *Maximum Fantastic Four*, an analysis of the first issue of the Fantastic Four comic book, and the foreword for the recent *Marvel Masterworks: The Mighty Thor* Vol. 6 (reprinting past issues of The Mighty Thor) and *Marvel Masterworks: The Inhumans*.

At Stan Lee's request, I appeared on the episode of the TV series, *Biography* (broadcast on the A&E Network and released on home video) detailing his life and career. I was interviewed as well for the feature-length documentary "With Great Power – The Stan Lee Story" and I have recently been asked by its producer-director to review this documentary for factual accuracy and to help correct factual errors. I also worked for Mr. Lee as the Vice-President of Creative Affairs at Stan Lee Media, a firm he presided over for a time.

I have also acted as an informal advisor and historian for most of the major comic book publishers, including DC, Marvel and Dark Horse. All these publishers have called on me from time to time to help them establish facts about their past publications and contributors. For example, I have been asked by staffers at Marvel to identify who "inked" particular Marvel comic book issues, and to determine the identity of pseudonymous contributors to various materials they have published in the past.

III.

ANALYSIS

Jack Kirby's Relationship with Marvel

From its beginnings in the 1930s to the 1960s and beyond, the comic book industry was very much a fly-by-night industry that germinated during the Great Depression. The first comic books were merely reprints of contemporary newspaper comic strips, re-pasted into a comic book page format. When publishers could not acquire reprint rights to newspaper strips (or wished to not pay the fees), they hired or

commissioned young, aspiring artists to create the same kind of material. Comic book publishers did not see any value in their product beyond monthly sales figures.

Little attention was paid to the copyrights and ownership of the newly-created material. The books were of a disposable nature, printed on the cheapest paper via the least expensive process available. There was no expectation that it would ever be reprinted and little that the characters would be merchandized or exploited in other media. The writers and artists who created the material were mostly young, Depression-era kids who were desperate for work to help put food on the family table.

At some companies, they worked on the premises, paid by the hour or the week to write and draw stories, usually at long rows of desks that resembled a factory setup. At others, the work was all freelance. The writers and artists worked at home and submitted their output to an editor who might or might not purchase it for publication on a per-page basis. The writers and artists were only paid if their work was accepted.

Both methods were used at times at the company we now know as Marvel Comics, which was started by a man named Martin Goodman. He operated under a variety of company names but during the forties, his operation was usually referred to as Timely Comics. Goodman had a background in magazine distribution, and with borrowed funds, he set up his own company which at first published “pulp” magazines. They were cheaply-printed periodicals filled with short stories, usually of an adventure or romance nature, sometimes both. The line was not the success Goodman hoped it would be so he began looking for other kinds of things to publish that might prove more lucrative. When he heard about the rising popularity of comic books – in particular, super-hero comic books – he decided to give that a try.

And so in 1939, Timely Comics began with the publication of *Marvel Comics* No. 1, containing material he bought from an outside editorial service called Funnies, Inc. The book was a financial success and Goodman decided to start his own in-house comic book division, which he did by engaging Joe Simon, who was one of the creators of

material for Funnies, Inc. Simon, in turn, suggested the hiring of Jack Kirby, an artist with whom he was then collaborating on freelance work for several publishers.

Jack Kirby's career is emblematic of the haphazard, un-businesslike nature of the industry in this era. Kirby (born Jacob Kurtzberg in 1917) began his career in the depths of the Great Depression, hauling his art portfolio to various publishers, newspaper syndicates, and animation companies in and around New York. Between 1935 and 1940, he worked at the Max Fleischer animation studio, the Lincoln Features Syndicate, Universal Phoenix Syndicate, and Fox Comics, Inc. When he was employed as a staff artist, he would try to supplement his income in his off-hours with freelance comic book work for other companies. While at Fox Comics, Kirby formed his partnership with Joe Simon, and together they created and sold comics material to several different publishers before going to work for Martin Goodman. In fact, they continued to freelance while working for Goodman. Shortly after they sent the first issue of a new creation, *Captain America*, to press for Goodman's firm, they produced the first full issue of *Captain Marvel Adventures* to be published by a rival firm, Fawcett.

Simon and Kirby produced ten issues of *Captain America*, as well as other titles published by Timely. Their agreement with Goodman called for them to receive 25% of the profits on new creations but they came to believe they were being cheated in the accounting. They left and took what they believed to be a more honest deal creating material for publication by DC Comics.

Goodman replaced them with a young man who'd been hired as an office boy and apprentice writer named Stanley Lieber. Lieber was the nephew of one of Goodman's business managers who soon married into the Goodman family, making Stan a relative of the publisher. Under the pen name "Stan Lee," Lieber began writing stories for Timely publications and learning the editorial ropes from Simon and Kirby. When they left, his appointment to the editorial position was said to be temporary but apart from a brief time away for military service, Stan Lee (as he was soon known to all) remained in charge

from 1941 until well into the seventies, and even held other positions with the firm after that.

Simon and Kirby continued to work for and with other publishers. The entry of the United States into the Second World War, and their military service all but ended the team's arrangement with DC, and after the war, they moved on to create super-hero, adventure, crime and romance comics for among other publishers, Hillman Publications, Crestwood, Headline Publications, and Harvey Publications.

Goodman, meanwhile, published every kind of comic book he could try, including but not limited to westerns, romance, crime, war comics, horror stories, books featuring "funny animal" characters and super-heroes. Some books lasted a few years. Others were cancelled after a few issues. But until the debut of *Fantastic Four* in 1961, few comics seemed to be permanent fixtures and almost none were merchandized or adapted into other media. Goodman was known throughout the industry as a man who imitated what was selling for other publishers and one who often flooded the stands with knockoffs. When, for example, he learned that a company called EC Publications was enjoying success with three comics it was publishing of horror stories, Goodman quickly put out somewhere between sixty and seventy similar comics, most of which did not last more than a few years.

Horror comics had a detrimental impact on the entire industry. In the fifties, a "horror comics scare" swept across the country. There was a concern that the reading of comic books, particularly those featuring crime and horror themes, was corrupting America's youth. This scare was summarized in the 1954 book by Dr. Fredric Wertham, *Seduction of the Innocent*, and it was addressed in Senate hearings and proposed legislation to ban or censor all comic books. The banning did not occur, but distribution was stifled and many publishers went out of business, leading to widespread unemployment among those who wrote or drew comic books.

One of the many casualties was Mainline Publications, a then-relatively new company begun by Joe Simon and Jack Kirby. With that, the long and successful partnership of Simon and Kirby began to come apart with both men scrambling for whatever work they could pick up either individually or together. At this point, Kirby was supporting a wife and three children, with a mortgage on a house in Long Island. Through an intermediary, he reconnected with Stan Lee and Martin Goodman's operation, which at this point still consisted of various small companies but which was now commonly referred to as "Atlas Comics." Kirby sold them some freelance work before the company largely stopped buying material for what some then feared was forever.

Martin Goodman did not cease publication but through a series of unwise business decisions, he wound up losing his distribution. To stay in the comic book marketplace, he pacted with Independent News, a division of DC Comics and therefore a competitor. Independent agreed to handle a reduced version of his line limited to approximately eight comics per month. As Atlas had issued as many as seventy a month not long before, that meant a drastic downsizing in staff and in work available to freelancers. There was, in fact, now a huge backlog of material so most of those freelancing for Atlas at the time were told there would be no more work. Kirby was among those so informed. By the decade's end, Goodman's comic book division consisted of just Stan Lee plus one or two assistants, in a very small, two-office space on Madison Avenue.

Kirby had other work at the time, though not nearly enough of it. For DC, he (with some initial participation by Simon) had created a successful new comic called *Challengers of the Unknown*, and he was drawing and sometimes writing short mystery and ghost comics for publication by DC. With another writer, Dave Wood, he created a syndicated newspaper strip called *Sky Masters*. *Challengers* was edited by a DC editor named Jack Schiff who was also involved in the sale of *Sky Masters*. The two Jacks had

a business dispute over the latter and Kirby discovered his services were no longer welcome at DC Comics. This created a financial crisis in the Kirby household, especially after *Sky Masters* folded.

Fortunately by this time, Stan Lee had just about exhausted the supply of inventory material and had begun buying new work from freelancers. Kirby was one of the first he called and though Goodman's firm paid low rates, Kirby did as much work as he could. Atlas had virtually no staff other than Lee, who was both the editor and art director, and was still limited to a handful of titles per month. The company typically split its output between Westerns, "teen" comics like *Millie the Model*, romance comics, and hybrid science fiction/monster comics. At the time Lee and his younger brother, Larry Lieber, were responsible for the scripts of all these comics.

Stan Lee and the freelance artists developed what became known as the "Marvel Method" during this time, both to relieve Lee of his heavy workload and to take advantage of the artists' skills as storytellers. Normally at an outfit like DC Comics, a fully formed, specific, panel-to-panel script would be handed to an artist to literally "fill in." The writer would have little (usually, no) contact with the artist. The writer would make up the entire plot and would indicate in his script what happened in each panel and what the artist should draw.

This was not the case at Marvel. Lee would simply talk with the artist about story ideas. Sometimes Lee would come up with the basic story idea or plot, sometimes the artist would, and sometimes it would be a joint effort.

Following such an informal meetings, the artist would return to his own studio, usually at home, and draw out the entire comic in pencil, deciding what the action should be in each panel and working out the storyline. These were decisions that had traditionally been made by the writer of the comic, not the artist.

As Stan Lee himself noted on many occasions, “plotting” with Kirby could often be accomplished in a matter of minutes, and in later years might be done via a brief phone call with Jack telling Stan what the next issue would be about.

As Kirby worked, he would not only draw out the story and invent new characters where necessary, he would write marginal notes to Stan, including suggested captions and dialogue, so that when Stan wrote the dialogue, he would know what story points Kirby felt should be made in each panel. Stan would then write dialogue based on Kirby’s notes and perhaps a brief conversation.

This new and unusual breakdown of the roles of writer and artist, with the artist assuming much of what had traditionally been done by writers, led to much confusion and debate within the comics community. Some artists working this way felt that they were co-writing the comics without pay or credit, and sometimes doing more than co-writing. To further complicate matters, the terminology became ambiguous, with the job of “writing” the comic sometimes defined by some to denote only the composition of the dialogue and captions, excluding inventing the storyline or deciding what occurred in each panel. In the mid-60s, to placate some artists’ complaints, Marvel altered the standard form of its credits. Instead of saying, “Written by Stan Lee, drawn by Jack Kirby,” a credit might say, “A Lee-Kirby Production” with no designation as to who had done what. It should also be noted that in recent years, reprints of Marvel comics produced in the 60s have sometimes retroactively assigned a co-plotting credit to Kirby.

Due to the precariousness of Timely/Atlas in 1958 and his own formidable workload, it is little wonder that Lee would rely so heavily on Kirby’s enormous creativity and talent to generate comic books. There is no question that Kirby was the creative spark for Marvel’s renaissance in the early 1960s and beyond based on Kirby’s incarnations of fantastic superheroes. Kirby not only drew a staggering amount of artwork for Marvel’s titles, he also originated many of its leading and supporting characters. A look at *Fantastic Four* alone is instructive. At Kirby’s peak in the early

and mid-1960s, the *Fantastic Four* comic book introduced dozens of new and imaginative characters, such as *Dr. Doom*, *Alicia Masters*, *The Watcher*, *The Inhumans*, *The Black Panther*, *Galactus*, *The Silver Surfer*, *The Frightful Four*, *The Skrulls* and so many more. Many of these characters spun off into their own series; others reappeared time and again, not only in *Fantastic Four* but in other Marvel comics. Tellingly, after Kirby became disenchanted with Marvel and contemplated a move to DC, the *Fantastic Four* offered no notable new characters.

Even on comic book titles handled by other artists, Kirby made important contributions, such as creating the cover illustration for Spider-Man's debut in *Amazing Fantasy* No. 15.

Given the chaotic and depressed nature of the comic book industry during the late 1950s, Atlas/Marvel and others rarely, if ever, had written contracts with freelancers, like Kirby. To the best of my knowledge, Kirby did not have a written contract regarding the freelance artwork he sold to Marvel commencing in 1958 through 1970, and certainly not in the 1958-1963 period at issue in this lawsuit. This simply was not the "custom and practice" of the industry at the time. I have been informed by the Kirby family's counsel that the earliest "agreement" between Marvel and Jack Kirby produced by Marvel is an Assignment executed by Jack Kirby on May 30, 1972, which coincides with my understanding of the historical record.

I also want to emphasize that Kirby worked on his own, and supervised himself, and did not create under the direction or supervision of Stan Lee or anyone else at Marvel. Kirby did not work at Marvel's offices. He worked at his own home, first in Long Island and, in the late 1960s, in Southern California. Kirby set his own hours and working conditions. Kirby paid his own overhead and all expenses associated with his creations. He purchased his own art supplies, including paper, pencils, ink, pens, brushes and other materials with which a comic book story is created. As such, Kirby took on the financial risk of creating his material, consistent with Marvel's desire to drastically

reduce its overhead and financial risk commencing in the late 1950's. Kirby was not paid a salary by Marvel. His artwork and plotting was purchased by the page on a piecework basis -- a set amount for each page accepted by Marvel for publication. If a page or story was rejected by Marvel, he was not compensated for it and personally withstood the financial loss for it. If Marvel rejected seven pages of Kirby's work, and he redid the seven pages which were then accepted, Kirby would not be paid for fourteen pages, but simply for the seven pages approved for purchase.

Kirby sold his product to Marvel, not his time. The page rate was fixed and did not depend on the amount of time that had been spent writing or illustrating the pages.

Marvel did not withhold payroll taxes or any other form of taxes from the money it paid to Kirby, nor did Kirby receive any health benefits or insurance, nor did he receive any other traditional employment benefits from Marvel such as sick pay or vacation pay, no matter how much Marvel prospered from Kirby's creations. Again, Marvel sought at all time during the period in question (1958-1963) to severely limit its financial commitments and exposure associated with the creation of the comic books it published.

Marvel at some point in time began placing legends with legal language on the back of its checks to freelancers, such as Kirby, where the freelancer signed the check to cash it. It was not unheard of for a freelancer to "cross out" the legend on the checks and still be able to cash it.

I have been informed by the Kirbys' counsel that Marvel has only produced in this action checks, with legends on the back, from 1974 and 1975, and from 1987 which I have reviewed. The 1974 and 1975 checks are to the freelance artist Dick Ayers.

It is worth noting that even the language on the back of these later 1974 and 1975 Marvel freelance checks is still language of purchase and assignment, not language that the work is owned at the outset as "work made for hire": "By endorsement of this check, I, the payee, acknowledge full payment for my employment by Magazine Management Company, Inc. and for my assignment to it of any copyright, trademark and any other

rights in or related to the material, and including my assignment of any rights to renewal copyright.”

This is consistent with my understanding that the legends on the back of Marvel’s checks to freelancers was language of assignment of all rights in their work up until at least the late 1970’s, when the 1976 Copyright Act went into effect. I believe that with the new copyright law’s emphasis on “work for hire,” that in the early 1980’s Marvel changed the language in the legends on the back of its freelance checks to a “work for hire” acknowledgement. The 1987 checks produced by Marvel appear to confirm this and unlike the assignment language of the 1974 and 1975 checks contain the following language: “By acceptance and endorsement of this check, payee acknowledges, a) full payment for payee’s employment by Marvel Entertainment Group, Inc., b) that all payee’s work has been within the scope of that employment, and c) that all payee’s works are and shall be considered as works made for hire, the property of Marvel Entertainment Group, Inc.”

Marvel had been purchased by Perfect Film and Chemical Corporation in 1968, which changed its name to Cadence Industries in 1973. Because of Marvel’s highly informal, if not haphazard, practices during the late 1950s and early 1960s as it was trying to survive, Cadence was concerned with first determining and then shoring up Marvel’s assets, including the status of Marvel’s warehouse(s) full of original artwork. This is why Cadence/Marvel started demanding in the 1970s that artists, such as Jack Kirby, sign agreements such as the 1972 Agreement assigning to Marvel all previous Kirby work published by Marvel. Similarly Cadence/Marvel sought to comply with the new Copyright Act’s explicit work-for-hire provisions, by having freelancers sign “work-for-hire” releases as to prior work long after such had been created. Cadence was trying to “clean up,” if not revise, Marvel’s past to protect what had become valuable intellectual property.

It is extremely doubtful that either Marvel or freelance artists, such as Jack Kirby, particularly between 1958 and 1963, had any understanding or intent that their freelance material created at home on their own steam and on their own dime, and later purchased on a per page basis after it was completed and approved for publication was somehow “work made for hire.” The nuances and formalities of copyright law were just not on anyone’s mind at this time, when the entire industry was functioning “hand to mouth,” having just barely survived the Comics Code scare in the mid-1950s.

Creation of Certain Comics

An analysis of certain of the famous works and characters Kirby created or co-created between 1958-1963 which fueled Marvel’s renaissance helps illustrate Kirby’s relationship with Marvel at this time.

Fantastic Four

In the early 1960s, Goodman informed Lee that he wanted a product to compete with DC Comics’ superhero team, *Justice League of America*. Lee and Kirby then spoke, tossing around ideas. Kirby then drew the artwork for the first issue of the *Fantastic Four* plotting out the story, and Lee wrote the dialogue in the balloons.

I have great respect and personal affection for Stan Lee, but I disagree with the accounts he has sometimes given of the creation of the *Fantastic Four* in which he solely created the concept and characters and Kirby’s role was limited to simply drawing up Lee’s creation. I instead believe other accounts he has given, not only of that comic’s inception but of his entire *modus operandi* of working with Kirby.

Much more logical is the other scenario of which he has spoken, both in interviews with myself and others, and in published accounts such as his introductions in books such as *Origins of Marvel Comics* and *Son of Origins of Marvel Comics*. In all these accounts, new comics were always created in joint “bull” sessions with the artist,

usually Kirby. I have long assumed Stan was correct when he indicated that *Fantastic Four* was created that way because that account matched Kirby's recollections, because it was consistent with the known way in which they always worked and because it explains why the basic premise of *Fantastic Four* contains so many elements that have antecedents in Kirby's other work, particularly his *Challengers of the Unknown* for DC Comics.

Like *Fantastic Four*, *Challengers of the Unknown* depicted the adventures of four people who form a team after surviving an air crash. The members of the *Challengers* had personality traits similar to the *Fantastic Four*. Pilot "Ace" Morgan, like the *Fantastic Four*'s Reed Richards, was the decisive leader of his group. "Rocky" Ryan, like Benjamin Grimm, aka "The Thing," was the group's strongman. Daredevil "Red" Ryan was the resident firebrand, much like Johnny Storm. "Prof" Haley was, like Sue Storm, the bland and nondescript member of the group. The *Challengers* team, like the *Fantastic Four*, confronted science fiction enemies in a wide variety of fantastic settings.

Furthermore, in light of how important the new *Fantastic Four* comic was to the firm's line, it seems implausible to me that Lee would suddenly change this working relationship and not first consult with Kirby on this new book, especially given Kirby's decades of experience in the superhero genre (e.g. *Captain America*) and renowned ability to spontaneously and quickly generate so many publishable creations.

After *Fantastic Four* had been published and was a success, Lee produced a synopsis for the first story which he said was what he gave Kirby to work from. Kirby, however, consistently asserted that he never saw any kind of typed synopsis or treatment for the *Fantastic Four*. Given his other statements about putting his head together with Kirby to devise the comics, I find it highly unlikely that Lee acted alone in conceiving these characters.

The Hulk, Thor, the X-Men, Ant-Man, the Avengers and Sgt. Fury and His Howling Commandos all resulted from a collaborative effort between Kirby and Lee. It

is also worth noting that Stan Lee did not create any important characters either before Jack Kirby first worked with Lee or after Jack Kirby stopped working with Lee in 1970.

The Mighty Thor

Thor is another creation that reflects earlier Kirby work but which has no precedence in the thousands of comic books that Stan Lee had worked on prior to its inception in *Journey into Mystery* No. 83 in 1962. As early as 1942, Kirby had a character masquerading as Thor in his story “Villain from Valhalla,” a collaboration with Joe Simon that appeared in DC Comics’ *Adventure Comics* No. 75 (May 1942). Kirby then used the real Thor, complete with a horned helmet and powerful magic hammer, in DC’s *Tales of the Unexpected* No. 16 (August 1957). Kirby’s lifelong interest in mythology continued after the creation of Thor when, working for DC Comics again in the 1970s, he created his own pantheon of mythological deities in his *New Gods* comic book and his “Fourth World” saga.

Spider-Man

Kirby also played an important role in the creation of Spider-Man. In 1962, as Marvel cast about for new super-hero ideas, Kirby and Lee devised Spider-Man, which Kirby said was based on an idea that he has developed with Joe Simon in the mid-fifties. It had originally been conceived as a character called The Silver Spider, then rebranded as Spiderman. In 1959 in one of their last collaborations, Simon and Kirby had refashioned it as a character called The Fly and sold it to John Goldwater, who was still publishing it through his company, Archie Comics.

Like Spider-Man, The Fly was a superhero who fought criminals, walked up walls and on the ceiling and who possessed insect-like extra-sensory senses. There were other similarities in the first few pages that Kirby drew for Stan Lee of what was to be the first installment of their Spider-Man. However, Lee rejected Kirby’s initial pages and that

version of the story was never completed. Lee then asked artist Steve Ditko to produce a new Spider-Man story.

In numerous interviews, Lee has stated that the change was made because he thought Kirby's interpretation of the character was too muscular and heroic, but I am skeptical of this explanation for two reasons. First, Kirby's rejected pages had Spider-Man in only a few panels, which could easily have been redrawn. Second, for the debut of Spider-Man in *Amazing Fantasy* no. 15, Lee rejected a cover illustration by Ditko and instead used a Spider-Man cover by Kirby. A more believable explanation for the change is that someone at Marvel was afraid that the story Lee and Kirby were crafting might come out close enough to *The Fly* to prompt legal action from Goldwater and/or Simon, both of whom were known to be litigious. The character was modified but many elements of the Lee-Kirby version would remain.

Lastly, I understand that Kirby was paid for his *Spiderman* cover but not for the story pages he did that Marvel rejected. That artwork was never returned to him despite repeated requests, and it resided in Marvel's files well into the late seventies or early eighties. Later, he was told the pages had disappeared and could not be located.

Return of Original Artwork to Freelance Artists

I should next explain Marvel's decision to return original comic book artwork to freelance artists in the 1970s which eventually included Kirby.

From the 1940s until the 1970s, Marvel and its predecessors gave little thought to the value of the freelance artwork they had purchased for publication. Much of the artwork was put in storage. Some was thrown out. Pages were given away to fans as souvenirs. Much of it began turning up on the collectors' market which suggested that someone in the office was smuggling it out and selling it.

The return of artwork became an issue in the 1970s, when artists saw their work sold for large amounts of money at conventions. Many artists complained and in

response, DC Comics decided that publishers had no legal claim to the artwork, and so it and most other companies began to return the artwork to the artists who had drawn it. In an open letter to the public DC Comics maintained that, as was customary for periodicals, they were only paying for the right to reproduce the artwork and that the ownership of the actual physical artwork belonged to the artist. Marvel initially refused to return original artwork but eventually changed its position in the mid-1970s. They did this for a number of reasons.

One was a concern that the company might owe substantial sales taxes on the artwork to the State of New York. As early as the 1950s, comic book companies such as Western Publishing (aka Gold Key Comics) had paid its artists in California a state sales tax when purchasing their artwork. The artists collected this tax and forwarded it to the state of California, as they were required by law to do. In the early 1980s, some New York artists inquired of their state tax officials as to whether, since no tax was paid or collected on their work, there was a legal transfer of ownership of the physical pages. The response, which was generally along the lines of “We’ll have to look into that” frightened some in management at Marvel. The fear was that Marvel might be assessed a substantial amount of current and overdue sales taxes for years and years of original artwork.

Also, some at Marvel also were concerned that, if the artwork was a corporate asset as the company sometimes asserted, Marvel/Cadence had a fiduciary duty to its shareholders to investigate the disappearance of artwork, and to perhaps prosecute any employees who were involved in its turning up on the open market. The characterization of the artwork as a corporate asset might also mean that the company was shirking its fiduciary responsibility by not having it properly insured. To do that would involve an expensive inventory and even more expensive insurance policies. An inventory could also cast doubt on the arbitrary value that had been assigned to the artwork over the years.

Originally, in the mid-1970s Marvel only agreed to return artwork from current issues and refused to return artwork from the past, particularly work from the 1960s, when the most significant characters were created. Then in the mid-1980s, Marvel implemented a policy to return past artwork to artists provided they sign legal releases stating that Marvel owned the copyrights to the artwork and re-characterizing their artwork created years earlier and everything depicted therein as “work-for-hire.” In need of income, artists routinely signed these releases without the benefit of legal counsel.

Even after Marvel reversed its policy as to older artwork, it refused to return artwork to Kirby unless Kirby signed an especially onerous release form that was sent to him and no one else. Whereas the release for other artists was a one-page form, for Kirby, Marvel in 1984 prepared a four-page form with far more obligations and limitations. For example, while the release prepared for other artists promised them the “original physical artwork,” the release for Kirby merely provided for “physical custody of the specific portion of the original artwork.” The four-page release additionally demanded that Kirby agree never to contest or dispute Marvel’s copyright in the artwork, or to help others in contesting or disputing Marvel’s copyright ownership. The agreement required Kirby to agree that he had no rights, whether the right of custody or any other right, to other artwork in Marvel’s possession. Unlike other artists, Kirby would not be able to sell his art, or display it publicly. He could transfer physical custody to another person, but only if the recipient signed the same four-page release.

Kirby wanted the pages so they could be sold to provide financial security for his family, but refused to sign the release because he did not believe that his freelance artwork was ever “work for hire,” and he objected to Marvel holding his artwork hostage unless he consented to this revisionist history. He also feared that Marvel officials wanted to expunge his name from his comic books, just as DC Comics had at one time expunged the names of Jerry Siegel and Joe Shuster from all appearances of their creation, Superman.

Marvel relented somewhat in May of 1987, after the dispute became a full-blown public relations disaster. The standoff became public knowledge when *The Comics Journal* reported on it in a series of stories in 1985, and took up Kirby's cause in an editorial entitled "House of No Shame" in February of 1986. In the same issue of *The Comics Journal*, the open letter from DC Comics to the public mentioned above was reproduced. This letter undermined a claim from some at Marvel that it was an "industry standard" that original artwork automatically belonged to its publisher.

In 1987, due to all the bad publicity, Marvel amended their "release" to a one-page version, but this still contained Marvel's post-hoc re-characterization of all of Jack Kirby's work from decades earlier as "work-made-for-hire." Marvel adamantly refused to return any original artwork to Kirby unless he signed the "release." Worn out and wanting to leave some part of his legacy to his wife and children, Kirby ultimately signed Marvel's release. Marvel provided Kirby with approximately 1,900 pages of his original artwork.

IV. CONCLUSIONS

Jack Kirby's Business Relationship with Marvel

Due to the perilous financial condition of the comic book business in the late 1950s, artists such as Jack Kirby were required to work as freelancers and their work was purchased for publication on a per-page basis. Each artist had an established page rate and every page was paid at this rate, regardless of the time or effort that had gone into its creation. If an artist spent an hour creating a page, he received the page rate. If he spent ten hours, he received the same page rate. If the work was rejected and therefore not accepted for publication, he received nothing.

Artists like Jack Kirby took on all of the financial risk of such creation and had little financial security. Kirby worked from his own facilities (at home), paid for his own

art materials and set his own hours. He did not receive any health benefits or insurance, nor did he receive any sick pay or vacation pay or any other form of employment security. Marvel did not withhold payroll taxes or any other form of taxes from Kirby's paychecks.

In fact, the first agreement Kirby had with Marvel which covered rights was a 1972 agreement assigning to Marvel all rights, including the copyrights, to Kirby's prior works published by Marvel, nearly ten years after the end of the 1958-1963 period.

Decades after the success of the key Kirby characters, Marvel, under its new corporate parents, Perfect Film/Cadence, attempted to "clean up" Marvel's ownership claims to what had become comic book franchises by re-writing history. The explicit "work for hire" provisions of the 1976 Copyright Act led to tremendous insecurity on the part of Marvel/Cadence which thus attempted to re-label everything Marvel had published decades earlier as "work made for hire," even though such purchased artwork had theretofore never been considered as such by either Marvel or the freelancers.

This coincided in the early 1980s with freelance artists trying to get their original artwork returned so that they could supplement their income. Marvel/Cadence leveraged this as a bargaining chip to get artists, like Jack Kirby, to sign self-serving releases supplied by Marvel which attempted to re-characterize all their prior material as "work-made-for-hire." I believe that Marvel is engaging in the same revisionist history today in response to the Kirby family availing themselves of their right of termination under the Copyright Act.

Jack Kirby's Major Contributions to Marvel's Major Characters

While I respect and like Stan Lee, I have to disagree with any suggestion that the major Marvel characters, commonly considered by most of the industry to be joint Lee-Kirby creations, were solo Lee creations. These would include *The Fantastic Four*, *The Hulk*, *Thor*, *the X-Men*, *Ant-Man*, *the Avengers* and *Sgt. Fury and His Howling*

Commandos, and many others. It is clear that Kirby was a driving force behind the creation of these now iconic characters, which have all the markings of his fertile creative mind and fascination with science, science fiction, astronomy, mythology and religion. Kirby created the iconic “look” of these characters, which have largely remained unchanged to this day, and would often work on his own to *both* plot and draw the original storylines of these comics. In addition to plotting, Kirby routinely also provided extensive story notes and dialogue in the margins of his artwork, and in addition to the main characters, also created many of the supporting characters (*e.g.*, new villains) appearing in such comics. Kirby even played a part in the creation of the Spider-Man character, even though the artist Steve Ditko “took over” the comic from Kirby.

Marvel’s Return of Original Artwork

Marvel has trailed other comic book publishers, particularly its chief rival DC Comics, in returning original artwork to artists such as Jack Kirby. The reasons are several, but boil down to two primary concerns: fear that they would owe sales tax to the New York government and questions about the validity of the company’s ownership of this artwork. Marvel’s new corporate owners, Perfect Film, which became Cadence, had concerns about Marvel’s highly informal business practices in the 1950s and 1960s and the extent to which this effected their ownership in what had become very valuable characters. Coinciding with the new work-for-hire provisions under the 1976 Copyright Act, Perfect Film/Cadence “rewrote” Marvel’s past to protect their ownership interests. As Jack Kirby was the major contributor to most of Marvel’s most famous characters, Jack Kirby suffered the brunt of these efforts for years. Like many other freelancers Kirby had requested the return of his artwork so as to provide his family with some form of security. Whereas other artists had to sign a single-page release to get their artwork back, Kirby was subjected to a much more aggressive four-page document. Due to the public outcry in support of Kirby, Marvel backed down somewhat but Kirby was still

required to sign Marvel's self-serving "work for hire" release before Marvel would return any of Kirbys' artwork to him.

V.

COMPENSATION

I am not being paid for my services as an expert witness.

VI.

PRIOR CASES

I served as an expert witness in a 1997 lawsuit filed by writer Marvin Wolfman against Marvel Characters, Inc.

I served as an expert witness in a 2004 lawsuit filed by Joanne Siegel and Laura Siegel Larson against Warner Bros. Entertainment, Inc., Time Warner, Inc. and DC Comics.

VII.

PUBLICATIONS

I have authored the following publications:

Comic Books and Other Necessities of Life (TwoMorrow Publications, 2002)

Wertham Was Right! (TwoMorrow Publications, 2003)

Mud Art (Watson-Guptill Publishing, 2003)

Super-Heroes In My Pants (TwoMorrow Publications, 2004)

Kirby: King of Comics (Abrams, 2008)

Respectfully submitted,



Mark Evanier

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2010, I caused a true and correct copy of the foregoing Defendants' Initial Designation of Expert Witness Mark Evanier to be served by first class mail on the following counsel of record:

Randi Singer
WEIL GOTSHAL & MANGES LLP
767 5th Avenue
New York, NY 10153

David Fleischer
HAYNES BOONE LLP
1221 Avenue of the Americas, 26th Floor
New York, NY 10020

Attorneys for Plaintiffs

Nicholas C. Williamson