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NC INTERACTIVE, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MARVEL ENTERPRISES, INC. AND
MARVEL CHARACTERS, INC.,

Plaintiffs,

v.

NC SOFT CORPORATION, CRYPTIC
STUDIOS, INC. AND NC INTERACTIVE,
INC.

Defendants.

Case No. 04CV9253 RGK (PLAx)

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION OF DEFENDANTS NC SOFT
CORPORATION AND NC
INTERACTIVE, INC. TO STRIKE
MATTER FROM PLAINTIFFS'
SECOND AMENDED COMPLAINT
(FED. R. CIV. P. 12(F))

Date: February 28, 2005
Time: 9:00 a.m.
Judge: Hon. R. Gary Klausner
Courtroom: 850 (Roybal)

2005 FEB -7 PM 9:19

FILED

FILE BY FAX

1 **I. INTRODUCTION**

2 Defendants NCsoft Corporation and NC Interactive, Inc. (the “NC
3 Defendants”) respectfully bring this motion, pursuant to Fed. R. Civ. P. 12(f), to
4 strike matter in the Second Amended Complaint (“Complaint”) of plaintiffs
5 Marvel Entertainment, Inc. and Marvel Characters, Inc. (collectively, “Marvel”).
6 After repeated questioning by the NC Defendants, Marvel has belatedly conceded
7 that several exhibits to the Complaint purportedly depicting unauthorized copies in
8 violation of Marvel copyrights are not infringements at all. Instead, they were
9 created by *Marvel itself*. While offering to withdraw the exhibits, Marvel has
10 refused to strike the infringement allegations based thereon.

11 **II. FACTUAL BACKGROUND**

12 The NC Defendants, along with defendant Cryptic Studios, Inc. (“Cryptic”)
13 (collectively, “defendants”) created the interactive game City of Heroes, which
14 allows users to design characters called “Heroes” and send them online to interact
15 with other Heroes in a place in cyberspace called “Paragon City.” Complaint ¶ 1.

16 Marvel alleges that users of City of Heroes create Heroes “that directly
17 infringe on Marvel’s valuable copyrights” in Marvel comic book characters, and
18 that defendants are contributorily liable for copyright infringement because the
19 game “enables” and “encourages” such activity. Complaint ¶ 40.

20 Specifically, Marvel charges that “Defendants facilitate having *literally*
21 *thousands* of infringing Heroes roaming the streets of Paragon City at any given
22 moment.” *Id.* ¶ 40 (emphasis added). It also alleges that “a *significant number* of
23 the 180,000+ users of their game are ‘creating’ and utilizing Heroes that directly
24 infringe upon Marvel’s copyrights in an [sic] to the Marvel Characters.” *Id.* ¶ 42
25 (emphasis added). These allegations are stated as if they actually have evidentiary
26 support – there is no specific qualification under Fed. R. Civ. P. 11(b)(3) that they
27 are “likely to have evidentiary support” after further investigation or discovery.

28

1 To support these sweeping allegations of rampant infringement, Marvel
2 pleaded but 11 examples of the claimed “literally thousands” of “infringing
3 Heroes,” depicted in screen shots allegedly from the game and attached as exhibits
4 to the Complaint. Complaint ¶ 43 and Exhibits J through Q.

5 The current Complaint is the first of Marvel’s three complaints to include
6 screen shots of allegedly-infringing Heroes. On January 6, 2005, shortly before
7 filing this version of the Complaint (and after defendants had moved to dismiss
8 Marvel’s previous complaint), Marvel provided screen shots to the NC Defendants
9 in response to a longstanding request from the NC Defendants for particulars of
10 claimed infringements. Declaration of Peter J. Willsey (“Willsey Decl.”), ¶¶ 3-5
11 and Exh. 1, 2.

12 The NC Defendants suspected that some of the “users” that created the
13 Heroes depicted in the screen shots were actually personnel or agents of Marvel.
14 On January 7, they wrote counsel for Marvel specifically asking whether Marvel
15 created any of the characters in the screen shots. *Id.* ¶ 6 and Exh. 3.

16 Having received no response to its earlier inquiry, on January 26, 2005
17 counsel for the NC Defendants asked the question again. *Id.* ¶ 7 and Exh. 4. And
18 in a letter dated January 31, 2005, counsel for the NC Defendants raised “the
19 possibility that Marvel or its agents created certain materials to which it now
20 objects.” *Id.* ¶ 8 and Exh. 5.

21 On February 2, Marvel finally admitted that four of the screen shots of
22 alleged user-created “infringements” (Complaint pages 300, 302, 303, and 304, in
23 Exhibits M, N, and O) were indeed created by Marvel. Willsey Decl. ¶ 9 and Exh.
24 6. Marvel also admitted that the “imitations of The Incredible Hulk” in Exhibit O,
25 pages 303-04, which paragraph 43 of the Complaint states are two separate
26 infringements, in fact are two images of the same Hero. Willsey Decl. ¶ 9 and
27 Exh. 6. The same Hero also appears to be in Exhibit Q, page 306, although
28

1 paragraph 43 of the Complaint calls it a third “imitation Incredible Hulk.”¹ Thus
2 five of the 11 “infringements” – one “Wolverine,” one “The Thing,” and three
3 “Incredible Hulks” – were manufactured by Marvel.

4 Counsel for defendants and Marvel conducted a Local Rule 7.3 meet and
5 confer session on February 3, 2005, but were not able to resolve the matter.
6 Although Marvel has offered to withdraw exhibit pages 300, 302, 303, and 304, it
7 has refused to withdraw the false allegations of the Complaint pertaining to the
8 Marvel-created “infringements.” Declaration of John W. Crittenden ¶¶ 2-4.

9 III. ARGUMENT

10 Rule 12(f) of the Federal Rules of Civil Procedure allows a court to strike
11 from a pleading “any redundant, immaterial, impertinent, or scandalous matter.”
12 This includes “false and sham” pleadings. 2-12 Moore’s Federal Practice - Civil §
13 12.37[3]), *citing Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1329-30
14 (9th Cir.1981) (trial court has authority to strike “false and sham” pleadings under
15 pre-1983 Fed. R. Civ. P. 11²); *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1324 (Fed.
16 Cir. 1998) (affirming district court’s striking of new allegations in second amended
17 complaint as “false and sham”).

18
19 ¹ The Complaint states that Exhibit Q, page 306 depicts an “imitation Iron Man, who was named
20 ‘Awesome Iron Man,’” and “another imitation Incredible Hulk.” Marvel’s counsel only states
21 that “Awesome Iron Man” was encountered by Marvel in the game, implying that the “Hulk” was
22 not, and thus created by Marvel. Willsey Decl., Exh. 6. It is obvious that the other character in
23 this exhibit is the same as the Marvel-created “imitations of Incredible Hulk” in Exhibit O,
24 pages 303 and 304. The NC Defendants have brought this to Marvel’s attention, but Marvel has
25 not yet confirmed or denied this. Declaration of John W. Crittenden ¶¶ 5-7.

26 ² The authority to strike “false and sham” pleadings now rests in Rule 12(f), not Rule 11. The
27 1983 amendment to Rule 11 added the now-familiar requirement that a lawyer’s signature on a
28 pleading is a certification of a reasonable pre-filing inquiry into the law and facts, as well as
provision for the imposition of sanctions for violations of the rule. That amendment also deleted
original Rule 11’s provision for striking pleadings as “sham and false,” because “[m]otions
under this provision generally present issues better dealt with under Rules 8, 12, or 56.”
Advisory Committee Note, 1983 Amendment, Fed. R. Civ. P. 11. The original rule’s reference
to scandalous or indecent matter was likewise deleted because “[m]uch matter may be stricken
under Rule 12(f)” or dealt with under the general provisions of Rule 11. *Id.*

1 If anything is a “false and sham” pleading, it is the act of a plaintiff making
2 its own purported copy of its own allegedly copyrighted works, and passing it off
3 in a complaint as the infringing work of an unrelated third party, in an attempt to
4 hold defendants secondarily liable therefor. And yet, on the basis of this
5 manufactured evidence, Marvel asks this Court to issue an injunction against
6 defendants and award damages and other monetary relief. Complaint at pp. 32-33.

7 Marvel may attempt to explain away these fabrications as justified because
8 they simply demonstrate “the mechanics” of City of Heroes and Marvel’s theory of
9 how they hypothetically might be used to copy Marvel characters. But Marvel did
10 not allege that these screen shots were mere demonstrations. Marvel pleaded them
11 as if they were examples of actual, direct infringement by ordinary users, in
12 support of its claim that there are “literally thousands” of such infringements:

13 Another user “created” an imitation of [Marvel character]
14 Wolverine... Other imitations of Wolverine, with his distinctive
15 claws and cigar, are depicted in true and copies of screen shots
16 attached hereto as Exhibit M. Another user “created” an imitation of
17 Marvel’s Fantastic Four character The Thing. A true and correct
18 copy of a screen shot depicting the user’s imitation is attached hereto
19 as Exhibit N. Other users “created” imitations of The Incredible
20 Hulk. True and correct copies of screen shots depicting the users’
21 imitations are attached hereto as Exhibit O. ... A true and correct
22 copy of a screen shot depicting... another imitation Incredible Hulk,
23 is attached hereto as Exhibit Q.

24 Complaint ¶ 43, lines 10-16 and 20-22.

25 This is not a trivial matter. These allegations were made to support the
26 unqualified charge of “literally thousands of infringing Heroes,” the core of
27 Marvel’s claims, and the basis for which is now in serious question. By signing
28 the Complaint, Marvel’s counsel certified that to the best of her knowledge based

1 on a reasonable inquiry, the allegations and factual contentions had evidentiary
2 support. Fed. R. Civ. P. 11(b)(3). A reasonable inquiry, at the least, would have
3 included asking Marvel if it was behind the “infringements,” especially since the
4 NC Defendants had been asking the same question all along.

5 Accordingly, each of the admittedly-manufactured “infringements” within
6 Exhibits M, N, and O, and all allegations in Paragraph 43 of the Complaint
7 referencing those “infringements” and the “imitation Incredible Hulk” depicted in
8 Exhibit Q page 306, should be stricken.

9 **IV. CONCLUSION**

10 Marvel’s tactic of making purported copies of its own works, and then
11 deceptively claiming them as examples of “literally thousands” of infringements
12 by third parties, for which it seeks an injunction and damages from defendants,
13 should not be tolerated. The screen shots within Exhibits M, N, and O to the
14 Complaint at pages 300, 302, 303, and 304 and the allegations in Paragraph 43,
15 lines 10-16 and 20-22 of the Complaint referencing them and the Marvel-created
16 “infringement” in Exhibit Q page 306 constitute “sham and false” pleading, and
17 should be stricken under Rule 12(f).

18 Respectfully submitted,

19 Dated: February 7, 2005

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