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The Honorable Scott S. Harris
Clerk, Supreme Court of the United States
One First Street, NE
Washington, DC 20543

Re: *Kimble* v. *Marvel Enterprises, Inc.*, No. 13-720

Dear Mr. Harris:

We represent Marvel Entertainment, LLC, successor of Marvel Enterprises, Inc., in the above-captioned matter, which is set for argument on March 31, 2015. We write in response to petitioners' letter of March 6, 2015, proposing to lodge non-record material with the Court. The request should be denied. If it is not, Marvel respectfully requests that this letter be circulated to Chambers as Marvel's response.

Petitioners propose to lodge letters that Marvel wrote in December 2014 to the American Intellectual Property Law Association and the Intellectual Property Owners Association after petitioners approached both organizations seeking amicus support. Those letters are not part of the record or otherwise subject to judicial notice. Moreover, the apparent purpose of lodging the letters with the Court at this late date is to permit petitioners to make a novel "amicus letter estoppel" argument for the first time in their reply brief, after Marvel has already filed its brief. That is not a proper basis for reaching beyond the record.

In any event, the underlying premise of petitioners' request is flatly wrong: The letters confirm Marvel's view of the case and do not contradict any position Marvel has taken in its briefs. Marvel has consistently argued—in its brief in opposition, in both letters petitioners seek to lodge, and in its merits brief—that petitioners' request to overrule *Brulotte* v. *Thys Co.*, 379 U.S. 29 (1964), should be denied in part because *Brulotte* is a statutory decision that Congress may modify or overrule if it chooses. *E.g.*, Opp. 7 (*Brulotte* is "firmly within Congress's power to change"); Resp. Br. 18-29; AIPLA Letter 2; IPO Letter 2. Marvel's brief also specifically rebutted petitioners' contention that *stare decisis* should be given little weight here because *Brulotte* is "partly constitutional" (Pet. Br. 50-51), reiterating that *Brulotte* was not an interpretation of the outer limits of Congress's authority under the Patent Clause but rather a statutory decision, which "Congress remains free to abrogate or modify ... at any time" (Resp. Br. 18-19 n.7).

Taking Marvel's words out of context, petitioners seek to manufacture an inconsistency between this argument and Marvel's statement in its amicus letters that "[*Brulotte*] reflects an important patent policy concern, with constitutional moorings, requiring that the rights conferred in a patent be limited in time." But Marvel was not suggesting that *Brulotte* was a constitutional decision, and certainly not in the sense that petitioners mean when they argue that *stare decisis* applies with less force because "'correction through legislative action is practically impossible.'" Pet. Br. 51 (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991)). Marvel's letters explained

that Congress had "considered a proposal to reverse *Brulotte*," that Congress had not done so, and that "were Congress to change its mind and revisit *Brulotte*" it could implement any change in a way that eased the transition. *Stare decisis* thus applies with special force, and "it is for Congress, not the courts, to decide whether a change in direction is needed."

Marvel's point about "constitutional moorings" was simply that when Congress prescribed the limited patent term in 35 U.S.C. § 154, giving rise to the patent policy concerns animating *Brulotte*, Congress was acting in conformity with the "limited Times" provision of the Patent Clause. That provision reinforces the importance of striking a balance between the need for "exclusive Rights" to encourage "the Progress of Science and useful Arts," and the need to circumscribe those rights so that further progress is not unduly hampered. *See, e.g.*, *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966). But "[w]ithin the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim." *Id.* at 6. In *Brulotte*, the Court observed that Congress had "exercised that [constitutional] power by 35 U.S.C. § 154," which sets the patent term and which the Court understood as requiring that patent rights "become public property once the [statutory term] expires." 379 U.S. at 30-31.

In Marvel's consistently stated view, "[i]f Congress disagrees with that interpretation of its policies, it may modify or overrule *Brulotte*." Resp. Br. 18. Petitioners' effort to lower the bar for overruling such a statutory decision is unavailing and certainly finds no support in any prior position Marvel has taken. Petitioners' request should be denied.

Yours sincerely,

Thomas G. Saunders

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cc: Roman Melnik, counsel for petitioners