AFFIDAVIT OF JERRY GREENBERG

1. My name is Jerry Greenberg. The statements in this affidavit are based on my personal knowledge.

2. I reside at, and conduct my business from, 6840 S.W. 92nd Street, Miami, Florida.

3. For more than 50 years I have been an independent, professional photographer. Virtually all of my work has been underwater, shooting pictures of fishes and other subjects found in marine environments. I am now 71 years old and still active in underwater photography.

4. While studying at the University of Miami after World War II, I assisted in marine biology research.

5. During the years 1960 to 1990, I had nine assignments for the monthly magazine of the National Geographic Society. Four of them developed into photo essays that were published. I also did photographic projects for the Society's Traveler magazine and for its book division. I have also done photographic assignments for Life, Sports Illustrated, Audubon Society, Stern magazine, Paris Match, and other publications. I did underwater photo studies on classified projects for the U. S. Navy.

6. My wife, Idaz, is an illustrator of fishes and other undersea life. In our 43 years of marriage, through a business known as Seahawk Press, we have published books, calendars, posters, coloring books, submersible field guides, and other products. All of our products feature only our original photographs and illustrations. Each product bears notice of copyright, and each copyright has been registered with the U. S. Copyright Office. On occasion, our three children

have participated in the creation of products. In the aggregate, we hold more than 100 U. S. copyrights on our work.

7. One of the books published through Seahawk Press was "The Living Reef." A copy of the book is attached as Attachment A. It was published originally in 1972, followed by a revised edition in 1979. Each edition contains copyright notice and the copyright in each edition has been registered.

8. During the half-century of my career as a professional photographer, I have read and extensively studied publications devoted to fishes and other undersea life. I have accumulated a personal library in excess of 1,000 publications containing such photographs. Apart from unauthorized copies of some of my photographs, and my wife's artwork, I have never seen an original photograph or an original illustration, prepared by someone else, that was similar to any of the photographs of mine that are at issue in this litigation.

9. Not even I can re-create my own photographic images, other than by photo-mechanical means, because each image represents a definitive moment in time, consisting of innumerable variables, when the shutter of the camera is tripped. The underwater photographer operates in an alien and fluid environment, where neither the photographer nor the fish is tethered. In order to track a moving fish in the frame of the camera, the photographer is constantly following it, so that the snap of a shutter captures a specific and unique perspective of the fish. In my long experience, it has been impossible to duplicate photographs when the fish and the photographer are moving, even when the shutter of the camera is firing at the fastest possible rate.

10. A photograph of a fish is defined and determined by such things as locating the fish, having a particular lens and film available, the position of the photographer vis-a-vis the

fish, the movement of the fish as the picture is framed, and the light available, natural or flashed. Additionally, because fish tend to be constantly in motion, a fish's posture, attitude, turns, and activity contribute to the originality of a photograph. A fish's body compresses or distends as it moves to feed, mate, or to protect territory. Almost all fishes are capable of natural camouflage, flushing dark or light patterns, and many can increase in size to avoid being swallowed.

11. A photograph of a particular fish also can be unique because of the lens chosen: for close-up, for distance, or for a distorted effect as produced by a 'fish-eye' or curved wide-angle lens.

12. A particular fish is rendered unique by its posture, motion, activity, color, sex, and age. Many species are so different throughout their development from immature to juvenile to adult that they were once thought to be separate species. Even the position of a fish's seven or more fins contribute to the originality of a photograph. Fishes are in almost constant motion, and each of their fins is in constant motion, not often simultaneously.

13. The photographs at issue in this litigation, with reference to Count I, are Redband Parrotfish, Stoplight Parrotfish, Green Moray, and two photographs of scuba-divers under water. All of the photographs appear in "The Living Reef." Attachment 1.

14. A photograph of a Redband Parrotfish appears on the cover of "The Living Reef" and the same photograph appears at page 49 of that book. The photograph shows a "supermale" Redband Parrotfish, sometimes called a terminal-phase male. Most adult-phase male and female redbands share a common color and pattern. However, an occasional large specimen, after functioning as a female, turns into a sex-reversed supermale. This evolution creates a functioning male of superior size and different color, pattern and body shape. The photograph of

the supermale in "The Living Reef" is also unique because of the "barrel" distortion caused by the 17mm semi-fisheye Takumar lens used.

15. The Stoplight Parrotfish shown on page 50 of "The Living Reef" has similar biologic characteristics. It is a supermale, which undergoes the same metamorphosis described in paragraph 15 above. The differences between the two phases of the Stoplight Parrotfish are so striking that each phase, although it is the same fish, had separate names until recently. Those astonishing differences may be seen in "The Living Reef" on page 50, where the two are juxtaposed and where the total difference of color and pattern can be seen. The supermale has a much larger head, with the eyes set back considerably. Its tail has long trailing rays.

16. On page 84 of "The Living Reef" is a photograph of a Green Moray. Like the snakes they resemble, morays are extremely flexible. Morays tend to be secretive, hiding in crevices and under coral ledges. They are nocturnal, feeding mostly at night. The moray in my photograph has emerged almost halfway from its lair. The distinctive thrust upward, its outward gaze, and the graceful, undulating dorsal fin make it unique.

17. On pages 73 and 74 of "The Living Reef" is a photograph of a scuba diver. The photograph was originally used in the January 1962 issue of the National Geographic Society's monthly magazine. Copyright in the photograph, originally possessed by the Society, was assigned to me in 1985. Attachment 2. I subsequently renewed the copyright in 1989. Attachment 3. The diver in the photograph was using a now-outmoded two-hose regulator and an obsolete strap harness for a double-tank block.

18. On page 17 of "The Living Reef" is a photograph of our son taken when he was 11 years old. He was too small for ready-made equipment. I had to rig a unique miniature double-tank scuba outfit for him. The half-empty tanks are floating upward because there was no

room for a crotch-strap to secure them. He is using a single-hose regulator. His wetsuit is too large, allowing a bubble to form at his back above the weight belt that cinches it.

19. In 1989, I entered into an agreement with the Society to photograph Pennekamp Reef Park for the Society's monthly magazine. Attachment 4. The photographs were used in the magazine's July 1990 issue, including a photograph of a sea fan that appeared on page 130 of that issue.

20. The 1989 agreement provided that "all photographs" would be returned to me, except that the Society could make and retain copies of some of the unpublished photographs for reference purposes only. The Society called them "reference selects." Id.

21. After publication of the article in 1990, the Society returned all of the photographs I had provided for the article, including my photograph of the sea fan. The Society also returned to me 76 other photographs that had not been used in the article, although the Society informed me that it was retaining copies of the 76 photographs as "reference selects." I registered my copyright on the photographs used in the article. Attachment 5. I also separately registered the 76 "reference selects." Attachment 6.

22. In 1995 I learned that the Society had improperly used a copy of my photograph of the sea fan referenced in paragraph 21 above. The sea fan photograph appeared in promotional literature for the Society's Jason Project. Attachment 7. The Society had retained a copy of the sea fan photograph without my knowledge, and used it in the promotional material without my permission. In doing so, the Society "flopped" and "cropped" the photograph, also without permission.

23. Copyright to all of the photographs at issue in this litigation was possessed by me at all material times. I never authorized the use of any of them by the National Geographic Society for any purpose.

AFFIANT SAYS NOTHING FURTHER.

Jerry Greenberg

STATE OF FLORIDA)
) ss
COUNTY OF DADE)

The foregoing instrument was acknowledged before me this 28 day of September, 1998, by Jerry Greenberg, who was sworn and who said that the information set forth above is true and correct. Mr. Greenberg is personally known to me, or produced FL DL as personal identification.

Julie L Ruigomez
Notary Public

My Commission Expires:

JULIE L. RUIGOMEZ
MY COMMISSION # CC 626588
EXPIRES: April 17, 2001
Bonded Thru Notary Public Underwriters