

1 FRANCIS M. GREGOREK (144785)
 gregorek@whafh.com
 2 BETSY C. MANIFOLD (182450)
 manifold@whafh.com
 3 RACHELE R. RICKERT (190634)
 rickert@whafh.com
 4 MARISA C. LIVESAY (223247)
 livesay@whafh.com
 5 **WOLF HALDENSTEIN ADLER**
FREEMAN & HERZ LLP
 6 750 B Street, Suite 2770
 San Diego, CA 92101
 7 Telephone: 619/239-4599
 Facsimile: 619/234-4599

8 Attorneys for Plaintiff

9
 10 **UNITED STATES DISTRICT COURT**
CENTRAL DISTRICT OF CALIFORNIA
 11 **WESTERN DIVISION**

12 GOOD MORNING TO YOU)
 PRODUCTIONS CORP., *et al.*,)

13 Plaintiffs,)

14 v.)

15 WARNER/CHAPPELL MUSIC,)
 INC., *et al.*)

16 Defendants.)

) Case No. CV 13-04460-GHK (MRWx)

) **LOCAL RULE 37-2 JOINT**
) **STIPULATION FOR ORDER: (i)**
) **COMPELLING DEFENDANTS TO**
) **PRODUCE WITHHELD**
) **DOCUMENTS; OR (ii) RELIEF**
) **FROM DISCOVERY CUTOFF TO**
) **CONDUCT COURT REVIEW IN**
) **CAMERA OF WITHHELD**
) **DOCUMENTS; AND [PROPOSED]**
) **ORDER THEREON**

) Date: June 25, 2014
) Time: 9:30 A.M.
) Judge: Mag. Michael R. Wilner
) Room: H-9th Floor
) Disc. Cutoff: June 27, 2014
) Pretrial Conf.: N/A
) Trial Date: N/A
) L/D File Jt. MSJ: 11/14/14

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1 **JOINT STIPULATION PURSUANT TO LOCAL RULE 37-2**

2 Pursuant to Local Rule 37-2, the parties respectfully submit the following
3 stipulation regarding the motion by plaintiffs Good Morning To You Productions
4 Corp., Robert Siegel, Rupa Marya d/b/a Rupa & The April Fishes, and Majar
5 Productions, LLC's ("Plaintiffs'") for an order: (i) compelling defendants
6 Warner/Chappell Music, Inc. and Summy-Birchard, Inc. (collectively the
7 "Defendants" or "Warner/Chappell"), to produce all withheld documents, or in the
8 alternative (ii) relief from the discovery cutoff for the Court to conduct in camera
9 review of the withheld documents (the "Motion"). Defendants request that the
10 Court deny the Motion in its entirety.

11 **I. PLAINTIFFS' INTRODUCTION**

12 Plaintiffs commenced this now consolidated class action seeking, *inter alia*, a
13 declaration, pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202,
14 that Defendants: (i) do not own any valid copyright to the world's most popular
15 song, *Happy Birthday to You* (the "Song"); (ii) that any copyright Defendants do
16 own is limited in scope; and (iii) that the Song itself is in fact dedicated to public use
17 and in the public domain (hereafter "Claim One"). *See generally* Pls.' Fourth
18 Amend. Consol. Class Action Compl. (Dkt. 95) (the "FAC"); Decl. of Betsy C.
19 Manifold in Support of the Motion (the "Manifold Decl.") at 1, ¶ 3. Pursuant to the
20 Court's suggestion and the parties' subsequent agreement, Claim One of the FAC
21 was bifurcated from the other claims and the scope of discovery is therefore limited
22 to the issues raised by Claim One only. Manifold Decl. at 1, ¶ 4; *see also*
23 Scheduling Order (Dkt. 92) annexed hereto as Exhibit B.

24 *Plaintiffs' Discovery Served on Defendants*

25 On February 12, 2014, Plaintiffs personally served the following discovery
26 requests upon counsel for Defendants at their Los Angeles and San Francisco
27 offices:
28

- 1 (1) Plaintiff Good Morning To You Productions Corp.’s
- 2 Interrogatories to Defendant Warner/Chappell;
- 3 (2) Plaintiffs’ First Set of Requests for Production of Documents to
- 4 Defendants (“Document Requests”); and
- 5 (3) Plaintiffs’ First Set of Requests for Admission to Defendants.

6 Manifold Decl. at 2, ¶ 5.
7 Defendants’ responses to the discovery requests were due on or before March 14,
8 2014 (*see* Fed. R. Civ. P. 31, 33-34), but Plaintiffs granted Defendants an extension
9 of time to respond to all pending discovery requests. As is relevant here, Plaintiffs
10 received Defendants’ Objections and Responses to Plaintiffs’ Document Requests
11 on March 21, 2014 (“Defendants’ “Response”) with the understanding that
12 Defendants would produce the responsive documents shortly thereafter. *Id.* at ¶ 6.

13 Three weeks later, on April 11, 2014, Defendants forwarded to Plaintiffs
14 approximately 1,103 pages of documents bearing production numbers WC000001-
15 WC001103, which Plaintiffs received on April 14, 2014. In many instances,
16 Defendants produced multiple copies of the same the documents; thus, the document
17 production actually was much smaller than 1,100 pages. *Id.* at ¶ 7. None of the
18 documents produced were in redacted form or identified any claim of privilege. *Id.*

19 Then, after almost 30 *more* days had passed, on May 9, 2014, Defendants
20 supplemented their Response by producing to Plaintiffs another 805 pages of
21 documents, bearing production numbers WC001104-WC001908, which included
22 for the first time, redacted documents. A true and correct copy of Defendants’ May
23 9, 2014, Privilege Log is annexed hereto as Exhibit A (“Ex. A”); *see also* Manifold
24 Decl. at 2, ¶ 8. Concurrently with its supplemental production, Defendants also
25 produced a redaction log and a 42-page privilege log purportedly invoking attorney-
26 client or work product protection for 157 discrete documents. *Id.*

27
28

1 Plaintiffs’ Attempts to Conduct L.R. 37-1 Conference of Counsel

2 On May 12, 13, and 14, 2014, Plaintiffs’ counsel wrote to Defendants’
3 counsel describing the deficiencies in Defendants’ privilege log and requesting that
4 the parties meet and confer about these issues during the conference of counsel
5 previously scheduled for May 12, 2014. *Id.* at 3, ¶ 9. However, Defendants’
6 counsel refused to engage in any discussions regarding the deficiencies in
7 Defendants’ privilege log until after Plaintiffs produced their own privilege log,
8 which Plaintiffs agreed to provide before May 22, 2014. *Id.* Plaintiffs served their
9 privilege log on May 19, 2014, but Defendants refused to conduct the conference of
10 counsel until May 22, 2014. *Id.*

11 L.R. 37-1 Conference of Counsel on May 22, 2014

12 On May 22, 2014, the parties held a teleconference to discuss the deficiencies
13 in Defendants’ privilege log. *Id.* at 3-4, ¶ 13. *First*, Plaintiffs explained that the
14 privilege log was untimely and all the privileges asserted therein are therefore
15 waived. *Id.* *Second*, Plaintiffs explained that any purported privilege as to certain
16 of the documents identified in the privilege log has been waived because the
17 documents have been disclosed to third-parties. *Id.* *Third*, Plaintiffs explained that
18 the privilege log is deficient in its description of the documents for which privilege
19 is claimed, which deprives Plaintiffs and the Court of the ability to determine
20 whether any of the documents are, in fact, privileged, and the privilege is therefore
21 waived or the deficiency otherwise must be remedied. *Id.* For example, (i) the
22 privilege log fails to identify the authors or recipients for many of the documents;
23 (ii) the privilege log does not identify the attorney or the client for many (if not
24 most) of the documents; (iii) the phrase “relating to legal advice” used repeatedly in
25 the privilege log is overly vague and ambiguous, and (iv) the privilege log fails to
26 identify everyone who may have been shown the document in question or how they
27 may relate to the Defendants and give Defendants grounds to claim privilege. *Id.*
28 And *fourth*, Plaintiffs explained that the privilege log failed to identify the specific

1 document request(s) to which any of the purportedly privileged documents relate.

2 *Id.*

3 Defendants disagreed that their privilege log was untimely and disagreed that
4 they waived any privilege as a result of the allegedly untimely log. *Id.* at 4, ¶ 14.
5 Defendants agreed to review only the purportedly privileged documents specifically
6 listed by number in the letter from Plaintiffs’ counsel on May 12, 2014, to see if
7 more non-privileged information can be provided, in which event Defendants will
8 supplement the log. *Id.* Defendants refused to identify the document requests to
9 which the purportedly privileged documents are responsive, but agreed to review the
10 case law Plaintiffs cited for its proposition that Defendants must do so. *Id.*
11 Defendants also agreed to consider identifying the attorney and client for documents
12 as to which the attorney-client privilege is claimed, but only with respect to the
13 “historical communications.” *Id.* When asked whether they would identify everyone
14 who has seen, or received the substance, of the withheld documents, Defendants
15 said they would not be able to do so. *Id.*

16 **II. WARNER/CHAPPELL’S INTRODUCTION**

17 **A. Plaintiffs’ Motion Should Be Denied**

18 Plaintiffs ask the Court to compel the production of 157 privileged documents
19 on three grounds: (1) Warner/Chappell’s assertion of privilege was untimely; (2)
20 Warner/Chappell’s privilege log lacked requisite detail; and (3) Warner/Chappell
21 claims privilege over documents shared with third parties, and the privilege as to
22 those documents has been waived. Because none of these three grounds has merit,
23 Plaintiffs’ Motion should be denied.

24 *First*, there is no basis for the claim of delay. Warner/Chappell objected to
25 Plaintiffs’ document requests on privilege grounds and sent its documents in
26 accordance with the parties’ explicitly agreed-upon deadline. Warner/Chappell then
27 served its privilege log less than a month after its initial document production, and
28 concurrently with a second production; and Warner/Chappell kept Plaintiffs abreast

1 of the progress of document production in the interim. Plaintiffs never objected
2 when informed of Warner/Chappell's progress. Plaintiffs, on the other hand, served
3 their documents two weeks late under the parties' agreement, and served their
4 privilege log *thirty-eight* days after their documents were due. If Plaintiffs' theory
5 of "delay" were correct, Plaintiffs would be tardy (tardier than they accuse
6 Warner/Chappell of being) and their privilege claims would be forfeited. Plaintiffs
7 did not live by the imagined and extreme waiver rule that they now try to impose
8 upon Warner/Chappell. The claim of delay and the draconian remedy Plaintiffs
9 seek shows that this motion is a thinly veiled attempt to try to invade the privilege
10 for tactical advantage.

11 ***Second***, controlling law refutes Plaintiffs' complaints of an inadequately
12 detailed log. Fed. R. Civ. P. 26(b)(5). The Ninth Circuit has held that a party must
13 make a "prima facie showing" that the privilege protects the information sought to
14 be withheld. *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992).
15 To do so, a party asserting the privilege should produce a log that includes: "(a) the
16 attorney and client involved, (b) the nature of the document, (c) all persons or
17 entities shown on the document to have received or sent the document, (d) all
18 persons or entities known to have been furnished the document or informed of its
19 substance, and (e) the date the document was generated, prepared, or dated." *Id.*
20 Detail about the documents' subject matter goes above and beyond these core
21 requirements. *Id.* Here, Warner/Chappell provided not only what it knew with
22 regard to the core requirements, it provided *additional* information about each
23 documents' subject matter. In any event, Plaintiffs' complaints are moot because
24 Warner/Chappell has produced a log containing even more detail, as
25 Warner/Chappell said it would when the parties met and conferred.¹

26 _____
27 ¹ While meeting and conferring with Plaintiffs before Plaintiffs served their portion of this
28 stipulation, Warner/Chappell offered to revise its log to provide additional detail.
(footnote continued)

1 *Finally*, Plaintiffs’ assertions of waiver on the ground that certain documents
2 involve communications with third parties with common legal interests are wrong
3 on the facts and the law. Many of the documents Plaintiffs claim were shared with
4 third parties in fact were *not* shared with third parties. They instead were shared
5 with Warner/Chappell affiliates or with outside counsel, as the log makes clear.
6 Warner/Chappell has withheld a handful of privileged communications shared with
7 third-party licensing agents and performing rights societies that had responsibility
8 for licensing Warner/Chappell’s copyrighted works, and thus common legal
9 interests in the subject matter of the withheld communications concerning
10 Warner/Chappell’s copyright to *Happy Birthday to You*.

11 **B. Warner/Chappell’s Response to Plaintiffs’ Mischaracterization of**
12 **Events Preceding This Motion**

13 Plaintiffs’ cries of “delay” mischaracterize the sequence of events that
14 preceded this Motion.

15 Plaintiffs personally served document requests on Warner/Chappell on
16 February 12, 2014, and Warner/Chappell personally served document requests on
17 Plaintiffs on March 6, 2014. Klaus Decl. ¶¶2-3. Pursuant to the parties’ agreement
18 on March 3, Warner/Chappell’s written objections to the document requests were
19 due on March 21, its document production was due on April 11, and Plaintiffs’
20 document production was due on April 11. *Id.* ¶2; *id.* at Ex. A.² On March 21,
21 Warner/Chappell timely served objections and responses to Plaintiffs’ document
22 requests, which included objections based on the attorney-client privilege and the

23 Declaration of Kelly M. Klaus (“Klaus Decl.”) ¶¶15-16. In performing that re-review,
24 Warner/Chappell determined that the claim of privilege should be withdrawn as to a small
25 number of documents (Nos. 126-128 and 137-138), and Warner/Chappell has produced
26 these. *Id.* ¶16. Thus, those log numbers are no longer on the log, because their
27 corresponding documents have been produced. *See id.* at Ex. B.

28 ² Plaintiffs’ document production would have been due on April 7, but the parties’ March
3 agreement provided that Plaintiffs’ response to any discovery would not be due before
April 11. Klaus Decl. ¶3.

1 attorney work-product doctrine. *Id.* ¶4. On April 7, Plaintiffs served objections and
2 responses to Warner/Chappell’s document requests. *Id.*

3 Throughout the process, Warner/Chappell kept Plaintiffs apprised that its
4 privilege log was in progress and would be forthcoming. On April 7, the parties met
5 and conferred about various discovery issues and Warner/Chappell explained that its
6 privilege log would take a few weeks to complete, and that if Warner/Chappell
7 needed additional time, it would let Plaintiffs know. *Id.* ¶¶5-6. Plaintiffs did not
8 object to this procedure. *Id.* Warner/Chappell produced approximately 1,100 pages
9 to Plaintiffs on April 11, as agreed. *Id.* ¶6. Shortly thereafter, Warner/Chappell
10 informed Plaintiffs that it would not be able to complete the log by April 25. *Id.*
11 Again, Plaintiffs did not object. *Id.* On April 25, Warner/Chappell received
12 Plaintiffs’ production of documents—which was two weeks late—but not Plaintiffs’
13 privilege log or redaction log. *Id.* ¶7. On May 1, Warner/Chappell explained to
14 Plaintiffs that it had taken considerable time to put together its log given the breadth
15 of Plaintiffs’ document requests, but that Warner/Chappell was aiming to finish the
16 log by the following week. *Id.* ¶8. Warner/Chappell’s log indeed took a substantial
17 amount of time to prepare given that counsel had to review several thousands of
18 pages of documents that spanned well over a century and were often difficult to read
19 given their age and condition. *Id.* ¶10. In response to Warner/Chappell’s May 1
20 letter, Plaintiffs for the first time told Warner/Chappell that it considered the log
21 “overdue,” and requested that Warner/Chappell serve the log by May 9. *Id.* ¶8. As
22 requested, Warner/Chappell served its privilege log on May 9 (along with a
23 supplemental production of about 800 pages). *Id.* ¶9.

24 On May 12, less than two hours before the parties were scheduled to meet and
25 confer about various discovery issues, Plaintiffs requested that Warner/Chappell
26 also meet and confer about 33 entries on Warner/Chappell’s privilege log. *Id.* ¶12.
27 Warner/Chappell wrote back to explain that there was insufficient time before the
28 meeting to consider Plaintiffs’ objections. *Id.* During the meet and confer,

1 Warner/Chappell asked when Plaintiffs would be producing their log, noting that if
2 privilege log issues might lead to motion practice, it would be preferable to have all
3 privilege issues on the table at the same time. *Id.* By letter two days later, Plaintiffs
4 made the extreme and unfounded assertion that Warner/Chappell had waived all
5 privilege objections due to a (purportedly) untimely and deficient privilege log.³ *Id.*
6 ¶13. Plaintiffs' letter requested that the parties meet and confer two days later, on
7 May 16. *Id.* Because Warner/Chappell's lead counsel on these matters was
8 traveling and out of the office from May 15 through May 21, Warner/Chappell
9 proposed that the parties meet and confer on May 22, and Plaintiffs agreed. *Id.*
10 Plaintiffs, meanwhile, who had complained about Warner/Chappell's production of
11 its log, finally produced their redaction log on May 19 (ten days after
12 Warner/Chappell produced its log)—and for all the additional time to which
13 Plaintiffs helped themselves beyond their production, Plaintiffs' log included a
14 measly four entries. *Id.* ¶14. The parties met and conferred on May 22, and on May
15 27 Warner/Chappell agreed to supplement its privilege log. *Id.* ¶15-16. Plaintiffs
16 sent Warner/Chappell their portion of this stipulation after 9:30 PM on the Tuesday
17 after Memorial Day, May 27. *Id.* ¶16.⁴

18 Although Warner/Chappell maintains that its initial log provided sufficient
19 detail, it has followed through on its promise to provide a log with additional detail

20 ³ Contrary to their assertion, Plaintiffs did not send letters on both May 13 and May 14
21 regarding Warner/Chappell's privilege log. *Id.* ¶13. Plaintiffs sent a letter on May 14
22 regarding this subject and the letter was dated May 13. *Id.*

23 ⁴ Plaintiffs mischaracterize various aspects of the parties' meet and confer of May 22.
24 Defendants agreed to consider supplementing any log entries that Plaintiffs identified as
25 deficient—not just the log entries identified in Plaintiffs' May 12 letter—and to provide
26 the additional information Plaintiffs requested if Plaintiffs' cited authority justifying the
27 same. *Id.* ¶15. Further, Warner/Chappell did not refuse to identify who else had received
28 the communications on Warner/Chappell's privilege log. *Id.* Rather, Warner/Chappell
told Plaintiffs that it was not aware of any persons who were recipients of the
communications or their contents other than the individuals reflected on the documents,
and these were the individuals listed on the log itself. *Id.*

1 – serving a revised log on June 2. *Id*; *id.* at Ex. B. Warner/Chappell further
2 supplements its log with the attached declarations of Kelly M. Klaus and Jeremy
3 Blietz.

4 **III. PLAINTIFFS’ POSITION**

5 **A. Defendants Are Not Entitled To Protection Under The Attorney-
6 Client Privilege Or Work Product Doctrine**

7 **1. Defendants Failed to Produce Their Privilege Log in a
8 Timely Manner and Unnecessarily Delayed Plaintiffs’
9 Attempts to Resolve Their Privilege Log Concerns**

10 Plaintiffs served their narrow, focused Discovery Requests upon Defendants
11 immediately after the Court permitted discovery to proceed on Claim One. In
12 particular, Plaintiffs served just twelve document requests, set forth below, all
13 focused directly upon the scope and validity of any copyright to the Song.

14 **PLAINTIFFS’ REQUESTS FOR PRODUCTION**

15 **REQUEST FOR PRODUCTION NO. 1:**

16 All documents constituting, creating, describing, or relating to each Right
17 You claim to *Happy Birthday to You*, including, for the following listing of
18 Copyrights and every other Right You claim to Happy Birthday to You, applications
19 for Copyright, Copyright registration documents, certificates of registration,
20 Copyright renewal documents, Deposit Copies, correspondence with the Copyright
21 Office, and business records.

Registration Number	Registration Date	Renewal Number	Renewal Date
E45655	Dec. 29, 1934	R289194	Jan. 22, 1962
E46661	Feb. 18, 1935	R291287	Feb. 19, 1962
E47439	Apr. 5, 1935	R293413	Apr. 4, 1962
E47440	Apr. 5, 1935	R293412	Apr. 4, 1962
E51988	Dec. 9, 1935	R306185	Dec. 6, 1962
E51990	Dec. 9, 1935	R306186	Dec. 6, 1962

Registration Number	Registration Date	Renewal Number	Renewal Date
45997	Oct. 16, 1893	R19043	Sep. 3, 1921
34260	Jun. 18, 1896	R25771	Jan. 9, 1924
20441	Mar. 20, 1899	R36618	Jan. 3, 1927
142468	Feb. 7, 1907	R34877	Jan. 2, 1935
E513745	Jul. 28, 1921		
286958	Feb. 14, 1942		
EP26375	Apr. 13, 1948		
EP32204	Dec. 9, 1948		
EP45486	Apr. 13, 1950		
EP72792	Jun. 18, 1953	RE103939	Oct. 20, 1981
EP108379	Apr. 26, 1957	RE243304	Mar. 25, 1985
PA66009	Apr. 16, 1980		
PA140843	Jun. 17, 1982		

REQUEST FOR PRODUCTION NO. 2:

All documents constituting, creating, describing, or relating to Your acquisition of each Right You claim to *Happy Birthday to You*, including documentation of assignment(s) and transfer(s) of such Rights.

REQUEST FOR PRODUCTION NO. 3:

Pertinent publications of *Happy Birthday to You*, including the scores, lyrics, arrangements, notes on arrangements, Deposit Copies, and other documents related to *Happy Birthday to You* and *Good Morning to All*.

REQUEST FOR PRODUCTION NO. 4:

All documents constituting, evidencing, describing or relating to the origin of *Happy Birthday to You*.

1 **REQUEST FOR PRODUCTION NO. 5:**

2 The closing binder and all other documents constituting, memorializing, or
3 relating to Warner/Chappell's acquisition of Birchtree Limited in or around 1988.

4 **REQUEST FOR PRODUCTION NO. 6:**

5 The due diligence file and all other documents including without limitation,
6 reports, opinion letters, audit documents and representations of warranty in
7 connection with Warner/Chappell's acquisition of Birchtree Limited in or around
8 1988.

9 **REQUEST FOR PRODUCTION NO. 7:**

10 All documents pertaining to the Rights of the following entities to *Happy*
11 *Birthday to You* or *Good Morning to All*:

- 12 a. Clayton F. Summy
- 13 b. Clayton F. Summy Co. (incorporated 1895, Ill.)
- 14 c. Clayton F. Summy Co. (incorporated 1925, Ill.)
- 15 d. Clayton F. Summy Co. (incorporated 1931, Del.)
- 16 e. John F. Segenstack
- 17 f. Mildred Hill
- 18 g. Patty Hill
- 19 h. Jessica Hill
- 20 i. The Hill Foundation

21 **REQUEST FOR PRODUCTION NO. 8**

22 All documents relating to any litigation over Rights to *Happy Birthday to You*
23 or *Good Morning to All* including without limitation docket sheets, pleadings,
24 motions, briefs, affidavits, declarations, memoranda, transcripts, opinions,
25 settlement agreements, orders and judgments.

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1 **REQUEST FOR PRODUCTION NO. 9**

2 All documents describing the corporate structure, relationship and revenue
3 sharing agreements and policies concerning *Happy Birthday to You* between and
4 among Warner/Chappell and Summy-Birchard.

5 **REQUEST FOR PRODUCTION NO.10**

6 All documents constituting, evidencing, describing or relating to ASCAP's
7 Right(s) to license *Happy Birthday to You*.

8 **REQUEST FOR PRODUCTION NO.11**

9 All documents constituting, evidencing, describing or relating to Mildred
10 Hill's induction into ASCAP.

11 **REQUEST FOR PRODUCTION NO.12**

12 All documents constituting, evidencing, describing or relating to CFSC's
13 induction into ASCAP.

14 Plaintiffs scrupulously avoided broad discovery so that they could complete
15 discovery relevant to Claim One within the short discovery period permitted by the
16 Court. Recognizing that most of the relevant facts took place many decades or even
17 centuries ago, Plaintiffs were keenly aware that historical documents in Defendants'
18 possession, custody, or control would be extremely important evidence in the case.

19 **2. The Privilege Log is Not Timely**

20 Despite the aforementioned focused discovery and the limited number of
21 Document Requests in particular, Defendants unreasonably withheld their privilege
22 log until May 9, 2014, nearly three months after Plaintiffs served their Document
23 Requests and nearly 60 days after Defendants belatedly served their responses and
24 objections to those Document Requests. Plaintiffs were never asked to consent to
25 the untimely service of the privilege log, and they did not do so. Indeed, Plaintiffs
26 were promised the privilege log several times before it was produced.

27 Failure to produce an adequate privilege log within the 30-day time period
28 provided by Fed. R. Civ. P. 34 for answering document requests waives the

1 privileges claimed therein. *See Burlington Northern & Santa Fe Ry. v. United States*
2 *Dist. Court*, 408 F.3d 1142 (9th Cir. 2005). The Ninth Circuit held that the district
3 courts should make a “case-by-case determination” as to whether a party’s delay
4 waives the privilege, using the 30-day time limit provided for under Rule 34 as a
5 guideline and “taking into account the following factors”:

6 the degree to which the objection or assertion of privilege
7 enables the litigant seeking discovery and the court to
8 evaluate whether each of the withheld documents is
9 privilege . . . ; the timeliness of the objection and
10 accompanying information about the withheld documents
11 (where service within 30 days, as a default guideline, is
12 sufficient); the magnitude of the document production; and
13 other particular circumstances of the litigation that make
14 responding to discovery unusually easy . . . or unusually
15 hard.

16 *Burlington*, 408 F.3d at 1149. The Ninth Circuit held that where a privilege log is
17 filed five months after the Rule 34 time limit, privilege would be waived even if no
18 other mitigating circumstance is present. *Id.*

19 Here, Defendants’ privilege log was sent more than two month late, without
20 Plaintiffs’ consent and despite Defendants’ assurances that it would be furnished
21 sooner. In addition, there are many other factors that require a finding of waiver
22 under the circumstances. The most important of these additional factors is the
23 extremely short discovery schedule ordered by the Court, which precludes Plaintiffs
24 from testing the claims of privilege by seeking additional discovery and then
25 moving to compel the production of non-privileged documents – in effect, by
26 delaying the privilege log, Defendants have insulated their claim of privilege from
27 judicial review.

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1 In addition, Defendants produced in total fewer than 2,000 pages of
2 documents, including multiple copies of many of the same documents. By contrast,
3 they have withheld 157 purportedly privileged documents. The small number of
4 documents produced, compared with the unusually large number of purportedly
5 privileged documents withheld, made it incumbent upon Defendants to produce
6 their privilege log in a timely fashion – or, at a minimum, to have sought Plaintiffs’
7 consent to a brief delay in producing the privilege log – to avoid unfairly prejudicing
8 Plaintiffs. By delaying their privilege log, even after promising it to Plaintiffs,
9 Defendants have made it difficult, if not impossible, for Plaintiffs to evaluate their
10 claimed privileges and seek the Court’s intervention in time to conduct follow-up
11 discovery after the claimed privilege is adjudicated.

12 The prejudice to Plaintiffs is especially significant in this case because of the
13 limited amount of non-document discovery that Plaintiffs will be able to obtain.
14 Most of the pertinent facts took place many decades ago: some relevant facts
15 occurred as early as the 1890s and most of the other relevant facts took place
16 between 1934 and 1962. It is extremely unlikely that anyone with first-hand
17 knowledge of relevant historical facts can be located and deposed. Therefore, the
18 documents maintained by Defendants will be crucial in adjudicating the scope and
19 validity of any copyright for the Song. Because the documents will play such an
20 important part in this case, Plaintiffs’ have been substantially prejudiced by
21 Defendants’ unreasonable delay in producing a privilege log. That prejudice is
22 further increased by the numerous deficiencies in the privilege log itself, which are
23 described below, all of which make combine to make it much more difficult – if not
24 impossible – for Plaintiffs and the Court to evaluate the claimed privilege. *Id.* at 4-
25 5, ¶¶ 15-18.

26 Compounding that delay, and exacerbating the resulting prejudice to
27 Plaintiffs, when Plaintiffs’ counsel sought to meet and confer with Defendants’
28 counsel over the privilege log, Defendants’ counsel unreasonably refused to do so

1 until after Plaintiffs produced their own privilege log, which Defendants had agreed
2 to accept on May 22, 2014. *Id.* Even after Plaintiffs delivered their privilege log
3 three days early in an attempt to limit the delay, Defendants’ counsel *again* refused
4 to meet and confer until May 22 – the 10th and last possible day on which they
5 could do so. Defendants refused Plaintiffs’ request to discuss that discrete item on
6 May 12 (the third day after Plaintiff received the privilege log), and Plaintiffs
7 supplemented its letter request with another letter, dated May 13, 2014. That letter
8 notified Defendants that Plaintiffs found that the vast majority of the entries on the
9 privilege log do not contain sufficient information for Plaintiffs or the Court to
10 assess whether the documents are, in fact, subject to the claimed privilege. Here,
11 Defendants have produced their privilege log in an untimely manner, and have
12 failed to include sufficient information in the privilege log for Plaintiffs or the Court
13 to evaluate many of Defendants claims of privilege. *Id.*

14 All these facts support a determination that Defendants have waived the right
15 to claim privilege by their unreasonably untimely production of a privilege log.

16 **3. The Privilege Log Does Not Provide Sufficient Information**
17 **for Plaintiffs or the Court to Evaluate the Privilege Claims**

18 For the attorney-client privilege to apply, (1) legal advice must be sought, (2)
19 from a professional legal adviser in his or her capacity as such, (3) with the
20 communication relating to that purpose, (4) made in confidence, (5) by the client.
21 *Lenz v. Universal Music Corp.*, No. 07-3783, 2009 U.S. Dist. LEXIS 105180, at *3-
22 4 (N.D. Cal. Oct. 29, 2009) (citing *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486,
23 1492 (9th Cir. 1989)). The burden of demonstrating the applicability of the
24 privilege is on the party claiming it – here, the Defendants. *Lenz*, 2009 U.S. Dist.
25 LEXIS 105180, at *4.

26 “When a party withholds information otherwise discoverable by claiming that
27 the information is privileged or subject to protection as trial-preparation material,
28 the party *must*: (i) expressly make the claim; and (ii) describe the nature of the

1 documents, communications, or tangible things not produced or disclosed – and do
2 so in a manner that, without revealing information itself privileged or protected, will
3 *enable other parties to assess the claim.*” Fed. R. Civ. P. 26(b)(5)(A) (emphasis
4 added). Plainly, the Rule protects the right of the party seeking discovery to
5 challenge the claimed privilege; otherwise, the party claiming privilege acts as its
6 own judge.

7 Recently, in *Franco-Gonzalez v. Holder*, No. 10-2211, 2013 U.S. Dist.
8 LEXIS 186499, at *24 (C.D. Cal. May 3, 2013), the Central District held that
9 “[p]rivilege logs should contain the following information: (1) the general nature of
10 the document, (2) the identity and position of its author, (3) the date it was written,
11 (4) identity and position of recipients, (5) location of the document, and (6) reason
12 document was withheld. *Id.* (citing Hon. William W. Schwarzer et al., Federal Civil
13 Procedure Before Trial § 11:1919 (2013)). The information is necessary for the
14 party seeking the document in question and the Court to determine whether the
15 document is exempt from discovery. By withholding this basic information, the
16 party seeking protection from discovery insulates its claim of privilege from judicial
17 review.

18 Defendants’ privilege log utterly fails to provide that most basic information
19 for most of the 157 purportedly protected documents. For example, Defendants do
20 not identify either the attorney or the client in any of the entries clearly. Without
21 that basic information, it is impossible for Plaintiffs – or the Court – to determine
22 whether the communications in question are privileged.

23 Not every document touched by an attorney is automatically privileged.
24 Documents do not become privileged merely because they are communicated to an
25 attorney. *Fischer v. U. S.*, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1975).
26 Unless a pre-existing document was itself privileged before it was communicated to
27 a lawyer, it does not become privileged by virtue of the transfer. *Fischer*, 425 U.S.
28 at 391. In that case, the communication to the lawyer may be privileged, but the

1 underlying document is not. Furthermore, if an attorney acts as a mere conduit for
 2 communications between others, the documents communicated by the attorney are
 3 not privileged merely because they pass through the attorney’s hands. For many
 4 documents, the Privilege Log does little more than state that it was sent to or by an
 5 attorney.

6 Nearly all of the documents – Nos. 3-5, 8-9, 13-14, 16-20, 22, 24-34, 36, 47,
 7 49, 55, 56, 67-79, 83-95, 98, 100, 101, 105-113, 116, 125-133, 135-141, 145-147,
 8 149, 152, and 154 identified on the Privilege Log – are described by the ambiguous
 9 and potentially misleading phrase “reflecting legal advice regarding . . .”. *See Ex.*
 10 *A.*

11 Although the phrase might appear to suggest that the document in question
 12 contains or communicates legal advice, it does not necessarily mean that. The
 13 phrase “reflecting legal advice” literally applies as well to a letter between non-
 14 lawyers who are on opposite sides in a business dispute if the sender of the letter
 15 relied upon legal advice in sending the letter to his adversary.

16 Document No. 125 may be an example of such a communication:

17	125	3/24/1975	Letter reflecting legal advice regarding correspondence with potential licensee regarding "Happy Birthday to You"	Theodore R. Jackson, Esq. (Gilbert & Gilbert)	Roberta Savler (Publicati on Director, Summy- Birchard Co.)	AC
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23 That document, apparently sent by a non-lawyer working for Summy-Birchard Co.
 24 (“Summy-Birchard”), one of Warner Chappell’s predecessors-in-interest, to a non-
 25 lawyer working for the Harry Fox Agency, Inc. (“Harry Fox”), is described only as
 26 “Letter reflecting legal advice regarding correspondence with unauthorized user of
 27 “Happy Birthday to You.” The letter may or may not – almost certainly not – have
 28 been communicated between a client and her lawyer, it may or may not have been

1 sent for the purpose of obtaining or transmitting legal advice, it may or may not
 2 have contained legal advice, and Summy-Birchard and Harry Fox may or may not
 3 have shared an interest in that legal advice. The paucity of information imparted by
 4 the phrase “reflecting legal advice” simply provides no meaningful information and
 5 its reach is far too broad for the narrow scope of protection afforded by the attorney-
 6 client privilege.

7 Other entries in the Privilege Log suffer from the same infirmity. For
 8 example, No. 138:

9 Privilege	DATE	DESCRIPTION	FROM	TO	CC	TYPE
10 138	7/31/1984	Letter reflecting legal advice regarding correspondence with unauthorized user of "Happy Birthday to You"	Howard Balsam, Esq. (Harry Fox Agency, Inc., Inc.)	Ernest R. Farmer (Summy- Birchard Music, Inc.)	Edward P. Murphy (Harry Fox Agency, Inc.)	AC

15 is described as “Letter reflecting legal advice regarding correspondence with
 16 unauthorized user of “Happy Birthday to You,” sent by Howard Balsam, Esq., of
 17 Harry Fox to an employee of Summy-Birchard Music, Inc. (related to one of Warner
 18 Chappell’s predecessors). The Privilege Log does not identify Summy Birchard
 19 Music, Inc. as the client or Mr. Balsam as the lawyer, but it is almost certain that
 20 Mr. Balsam (an employee of a different company) was not actually representing
 21 Summy-Birchard Music, Inc. Once again, the vague and imprecise phrase
 22 “reflecting legal advice” swallows the rule limiting the scope of the attorney-client
 23 privilege. In any event, it is impossible to determine from the Privilege Log whether
 24 the communication in question is or is not subject to a valid claim of privilege.

25 Likewise, No. 156:

26 Privilege Number	DATE	DESCRIPTION	FROM	TO	CC	TYPE
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1	156	11/4/1963	Letter reflecting request for legal advice regarding "Happy Birthday to You"	David K. Sengstack (President, Summy- Birchard Co.)	Theodore Kupferman, Esq. (Kupferman & Price)		AC
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6 is identified as a “Letter reflecting legal advice regarding “Happy Birthday to You”
7 sent by David K. Sengstack, President of Summy-Birchard to Theodore Kupferman,
8 Esq., of Kupferman & Price. The Privilege Log does not identify Mr. Sengstack or
9 Summy-Birchard as the client or Mr. Kupferman or Kupferman & Price as the
10 attorney. While it may be that Mr. Kupferman was Mr. Sengstack’s lawyer, it is
11 equally possible that Mr. Kupferman represented an adverse party. Here again, the
12 vague and imprecise phrase “reflecting legal advice” does not provide sufficient
13 information to permit Plaintiff or the Court to assess the validity of Defendants’
14 claim that the communication in question was, in fact, privileged. Thus, Defendants
15 have failed to meet their burden to substantiate their claimed privilege.

16 Furthermore, although the Privilege Log identifies “cc” recipients of many
17 documents – presumably those whose names appear on the documents themselves –
18 it does not identify others who were shown the documents but whose names do not
19 appear on the document itself. *Franco-Gonzalez*, 2013 U.S. Dist. LEXIS 186499, at
20 *25-27. Defendants’ failure to provide that information deprives Plaintiffs and the
21 Court of the opportunity to consider whether any applicable privilege has been
22 waived.

23 **4. The Attorney-Client Privilege is Destroyed When Documents
24 Are Shared With Third Parties**

25 The attorney-client privilege is wholly dependent upon the confidentiality of
26 the communication between the attorney and the client. *Nidex Corp. v. Victor Co.*,
27 249 F.R.D. 575, 578 (N.D. Cal. 2007) (quoting 1 Paul R. Rice, *Attorney-Client
28 Privilege in the United States* § 4:35, at 195 (1999 ed.)). It necessarily follows,

1 therefore, that the privilege is “destroyed” if an otherwise protected attorney-client
 2 communication is made “in the presence of” a third party or is “shared with” a third-
 3 party. *Id.*

4 As inadequate as the privilege log is, what little information has been
 5 provided shows that 33 documents purportedly protected by the attorney-client
 6 privilege were disclosed to third-parties. Those third-party documents are Nos. 1, 2,
 7 6, 12, 13, 32, 54, 87-89, 97, 101, 103, 105-114, 123, 126-130, 135, 136, 140, and
 8 141:

Privilege Number	DATE	DESCRIPTION	FROM	TO	CC	TYPE
1	5/28/1991	Research report regarding "Happy Birthday to You" prepared at direction of counsel	Nancy H. McAleer (Thompson & Thompson)	Ed Arrow (Copyright Department, Warner/Chappell Music, Inc.)		AC, WP
2	5/28/1991	Research report regarding "Happy Birthday to You" prepared at direction of counsel	Nancy H. McAleer (Thompson & Thompson)	Ed Arrow (Copyright Department, Warner/Chappell Music, Inc.)		AC, WP
6	9/16/2004	Fax message reflecting legal advice and reflecting request for legal advice regarding "Happy Birthday to You"	Claes Hennig (Warner/Chappell Music Scandinavia AB)	Jeremy Blietz (Warner/Chappell Music, Inc.)		AC

Privilege Number	DATE	DESCRIPTION	FROM	TO	CC	TYPE
12	11/5/1958	Letter from UK performing rights society to exclusive UK subpublisher of "Happy Birthday to You" reflecting legal advice and reflecting request for legal advice regarding issues related to "Happy Birthday to You" copyright under UK law	R. F. Whale (Secretary, The Performing Right Society Ltd.)	Keith Prowse Music Publishing Co. Ltd.		AC
13	10/12/1965	Letter from French performing rights society to its parent organization reflecting legal advice regarding issues related to "Happy Birthday to You" copyright under French law	S.A.C. E.M.	S.D.R.M		AC
32	1/5/1990	Letter reflecting legal advice regarding "Happy Birthday to You"; handwritten correspondence from Don Biederman, Esq., to John Brunning, Esq. (Legal Department, Warner Bros. Music-UK) reflecting the same	David K. Sengstack (Consultant to Warner/Chappell Music, Inc.)	Jay R. Morgenstern (President, Warner Bros. Publications, Inc.)	John C. Taylor, Esq. (Paul, Weiss, Rifkind, Wharton & Garrison)	AC

Privilege Number	DATE	DESCRIPTION	FROM	TO	CC	TYPE
1	5/28/1991	Research report regarding "Happy Birthday to You" prepared at direction of counsel	Nancy H. McAleer (Thompson & Thompson)	Ed Arrow (Copyright Department, Warner/Chappell Music, Inc.)		AC, WP

Privilege Number	DATE	DESCRIPTION	FROM	TO	CC	TYPE
2	5/28/1991	Research report regarding "Happy Birthday to You" prepared at direction of counsel	Nancy H. McAleer (Thompson & Thompson)	Ed Arrow (Copyright Department, Warner/Chappell Music, Inc.)		AC, WP
6	9/16/2004	Fax message reflecting legal advice and reflecting request for legal advice regarding "Happy Birthday to You"	Claes Hennig (Warner/Chappell Music Scandinavia AB)	Jeremy Blietz (Warner/Chappell Music, Inc.)		AC
12	11/5/1958	Letter from UK performing rights society to exclusive UK subpublisher of "Happy Birthday to You" reflecting legal advice and reflecting request for legal advice regarding issues related to "Happy Birthday to You" copyright under UK law	R. F. Whale (Secretary, The Performing Right Society Ltd.)	Keith Prowse Music Publishing Co. Ltd.		AC
13	10/12/1965	Letter from French performing rights society to its parent organization reflecting legal advice regarding issues related to "Happy Birthday to You" copyright under French law	S.A.C. E.M.	S.D.R.M		AC

Privilege Number	DATE	DESCRIPTION	FROM	TO	CC	TYPE
32	1/5/1990	Letter reflecting legal advice regarding "Happy Birthday to You"; handwritten correspondence from Don Biederman, Esq., to John Brunning, Esq. (Legal Department, Warner Bros. Music-UK) reflecting the same	David K. Sengstack (Consultant to Warner/Chappell Music, Inc.)	Jay R. Morgenstern (President, Warner Bros. Publications, Inc.)	John C. Taylor, Esq. (Paul, Weiss, Rifkind, Wharton & Garrison)	AC

Privilege Number	DATE	DESCRIPTION	FROM	TO	CC	TYPE
1	5/28/1991	Research report regarding "Happy Birthday to You" prepared at direction of counsel	Nancy H. McAleer (Thompson & Thompson)	Ed Arrow (Copyright Department, Warner/Chappell Music, Inc.)		AC, WP
2	5/28/1991	Research report regarding "Happy Birthday to You" prepared at direction of counsel	Nancy H. McAleer (Thompson & Thompson)	Ed Arrow (Copyright Department, Warner/Chappell Music, Inc.)		AC, WP
6	9/16/2004	Fax message reflecting legal advice and reflecting request for legal advice regarding "Happy Birthday to You"	Claes Hennig (Warner/Chappell Music Scandinavia AB)	Jeremy Blietz (Warner/Chappell Music, Inc.)		AC

Privilege Number	DATE	DESCRIPTION	FROM	TO	CC	TYPE
12	11/5/1958	Letter from UK performing rights society to exclusive UK subpublisher of "Happy Birthday to You" reflecting legal advice and reflecting request for legal advice regarding issues related to "Happy Birthday to You" copyright under UK law	R. F. Whale (Secretary, The Performing Right Society Ltd.)	Keith Prowse Music Publishing Co. Ltd.		AC
13	10/12/1965	Letter from French performing rights society to its parent organization reflecting legal advice regarding issues related to "Happy Birthday to You" copyright under French law	S.A.C. E.M.	S.D.R.M		AC
32	1/5/1990	Letter reflecting legal advice regarding "Happy Birthday to You"; handwritten correspondence from Don Biederman, Esq., to John Brunning, Esq. (Legal Department, Warner Bros. Music-UK) reflecting the same	David K. Sengstack (Consultant to Warner/Chappell Music, Inc.)	Jay R. Morgenstern (President, Warner Bros. Publications, Inc.)	John C. Taylor, Esq. (Paul, Weiss, Rifkind, Wharton & Garrison)	AC

Privilege Number	DATE	DESCRIPTION	FROM	TO	CC	TYPE
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Privilege Number	DATE	DESCRIPTION	FROM	TO	CC	TYPE
108	6/6/1974	Letter reflecting legal advice regarding correspondence with potential licensee regarding "Happy Birthday to You"	C. Lyman Emrich, Jr., Esq. (Brown, Jackson, Boettcher & Dienner)	Roberta Savler (Publication Director, Summy-Birchard Co.)	Charles Liebman, Esq.; David K. Sengstack (President, Summy-Birchard Co.)	AC
109	6/6/1974	Attachment to letter reflecting legal advice regarding correspondence with potential licensee regarding "Happy Birthday to You"	C. Lyman Emrich, Jr., Esq. (Brown, Jackson, Boettcher & Dienner)	Roberta Savler (Publication Director, Summy-Birchard Co.)	Charles Liebman, Esq.; David K. Sengstack (President, Summy-Birchard Co.)	AC
110	10/8/1968	Letter reflecting legal advice regarding communication with potential licensee regarding "Happy Birthday to You"	Patrick W. O'Brien, Esq. (Mayer, Friedlich, Spless, Tierney, Brown & Platt)	David K. Sengstack (President, Summy-Birchard Co.)		AC

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Privilege Number	DATE	DESCRIPTION	FROM	TO	CC	TYPE
111	Unknown	Transcription of telephone conversation between C. Lyman Emrich, Jr., Esq., Patrick O'Brien, Esq., David Sengstack and Roberta Savler reflecting legal advice regarding "Happy Birthday to You" and correspondence with potential licensee regarding the same	C. Lyman Emrich, Jr., Esq. (Brown, Jackson, Boettcher & Dienner)			AC
112	6/9/1965	Letter reflecting legal advice regarding "Happy Birthday to You" and correspondence with potential licensee regarding the same	C. Lyman Emrich, Jr., Esq. (Brown, Jackson, Boettcher & Dienner)	David K. Sengstack (President, Summy-Birchard Co.)		AC
113	5/13/1963	Letter reflecting legal advice regarding correspondence with potential licensee regarding "Happy Birthday to You"	C. Lyman Emrich, Jr., Esq. (Brown, Jackson, Boettcher & Dienner)	Theodore Kupferman, Esq. (Kupferman & Price)	David K. Sengstack (President, Summy-Birchard Co.)	AC

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114	4/14/1982	Memo reflecting request for legal advice regarding communication with potential licensee regarding "Happy Birthday to You"	NJR (Summy-Birchard Co.)	Legal File		AC
123	4/3/1975	Letter reflecting request for legal advice regarding potential licensing of "Happy Birthday to You"	Roberta Savler (Publication Director, Summy-Birchard Co.)	Theodore R. Jackson, Esq. (Gilbert & Gilbert)		AC
126	11/8/1974	Letter reflecting legal advice regarding correspondence with unauthorized user of "Happy Birthday to You"	Roberta Savler (Publication Director, Summy-Birchard Co.)	Albert Berman (Managing Director, Harry Fox Agency, Inc.)		AC
127	11/8/1974	Attachment to letter reflecting legal advice regarding correspondence with unauthorized user of "Happy Birthday to You"	Roberta Savler (Publication Director, Summy-Birchard Co.)	Albert Berman (Managing Director, Harry Fox Agency, Inc.)		AC
128	11/8/1974	Attachment to letter reflecting legal advice regarding correspondence with unauthorized user of "Happy Birthday to You"	Roberta Savler (Publication Director, Summy-Birchard Co.)	Albert Berman (Managing Director, Harry Fox Agency, Inc.)		AC
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129	5/4/1967	Letter reflecting legal advice regarding correspondence with unauthorized user of "Happy Birthday to You"	C. Lyman Emrich, Jr., Esq. (Brown, Jackson, Boettcher & Dienner)	D. Arthur Yergey, Esq.		AC, WP
130	1/26/1967	Letter reflecting legal advice regarding correspondence with unauthorized user of "Happy Birthday to You"	C. Lyman Emrich, Jr., Esq. (Brown, Jackson, Boettcher & Dienner)	L. C. Lunde (Administrative Assistant, Summy-Birchard Co.)		AC, WP
135	1/9/1985	Letter reflecting legal advice regarding correspondence with unauthorized user of "Happy Birthday to You"	Andrew M. Manshel, Esq. (Administrative Director and Counsel, Birch Tree Group Ltd.)	Howard Balsam, Esq. (Harry Fox Agency, Inc.)		AC
136	11/6/1984	Letter reflecting legal advice regarding correspondence with potential licensee regarding "Happy Birthday to You"	Andrew M. Manshel, Esq. (Administrative Director and Counsel, Birch Tree Group Ltd.)	Howard Balsam, Esq. (Harry Fox Agency, Inc.)		AC

Privilege Number	DATE	DESCRIPTION	FROM	TO	CC	TYP E
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1	140	4/5/1989	Letter reflecting legal advice regarding "Happy Birthday to You"	David Nimmer, Esq. (Irell & Manella LLP)	Don Biederman, Esq. (Senior Vice President, Legal and Business Affairs, Warner/Chappell Music, Inc.)	AC
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10	141	2/17/1989	Letter reflecting legal advice regarding "Happy Birthday to You"	David Nimmer, Esq. (Irell & Manella LLP)	Don Biederman, Esq. (Senior Vice President, Legal and Business Affairs, Warner/Chappell Music, Inc.)	AC
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19 All 33 of those documents were shared by Warner Chappell or its predecessor-in-
20 interest with a third-party or the third-party's attorney. Such disclosure of an
21 otherwise privileged communication to a third party strips away the
22 communication's requisite confidentiality and thereby destroys the privilege. *Nidec*
23 *Corp.*, 249 F.R.D. at 578. All 33 of those third-party documents are, therefore, fully
24 discoverable and should have been produced to Plaintiffs.

25 There is no dispute that the 33 documents in question were either prepared by
26 or provided to third-parties. During the meet and confer conference on May 22,
27 2014, Defendants claimed that these third-party documents remain privileged
28 despite being shared with third-parties, purportedly because the documents in

1 question are protected by the so-called “common interest” doctrine or because the
2 documents were authored or received by a “privileged agent” acting in a capacity to
3 which the privileged matter relates. Neither of these two narrow exceptions to the
4 general rule that sharing an otherwise protected communication with a third-party
5 destroys the attorney-client privilege applies here.

6 (a) **The Common Interest Doctrine Does Not Apply to the**
7 **Third-Party Documents**

8 Defendants have asserted that third-parties to whom the allegedly privileged
9 documents were disclosed, or who wrote the documents in question are privileged
10 agents of Defendants. Accordingly, Defendants argue, sharing the documents with
11 such third-parties does not destroy the privilege.

12 The common interest doctrine is a narrow exception to the general rule that
13 sharing privileged communications with third-parties destroys the attorney-client
14 privilege. Where the requirements for the privilege are otherwise met,⁵
15 communications that are disclosed to a third party may still be protected when the
16 client and the third party “have a common legal, as opposed to commercial,
17 interest.” *Nidec Corp.*, 249 F.R.D. at 576. Furthermore, the common interest
18 doctrine protects privileged “[c]ommunications shared with third persons who have
19 a common legal interest *with respect to the subject matter thereof.*” *MGA Entm’t,*
20 *LLC v. Nat’l Prods. LTD.*, 2012 U.S. Dist. LEXIS 108408, 15 (C.D. Cal. Aug. 2,
21 2012) (citing *Metro Wastewater Reclamation v. Continental Casualty*, 142 F.R.D.
22 471, 476 (D. Colo. 1992)) (emphasis added). No such common legal interest is
23 evident here, nor can any be discerned from the limited information available in the
24 production log.

25
26
27 ⁵ For the reasons explained in Section II.A., *supra*, Defendants have not established that
28 they are entitled to claim protection under the attorney-client privilege.

1 For example, many of the third-party documents (Nos. 126-128, 135-138)
 2 were shared with Harry Fox, an organization that collects and royalties for public
 3 performances of copyrighted works, as follows:
 4

Privilege Number	DATE	DESCRIPTI ON	FROM	TO	CC	TYPE
126	11/8/1974	Letter reflecting legal advice regarding correspondence with unauthorized user of "Happy Birthday to You"	Roberta Savler (Publication Director, Summy-Birchard Co.)	Albert Berman (Managing Director, Harry Fox Agency, Inc.)		AC
127	11/8/1974	Attachment to letter reflecting legal advice regarding correspondence with unauthorized user of "Happy Birthday to You"	Roberta Savler (Publication Director, Summy-Birchard Co.)	Albert Berman (Managing Director, Harry Fox Agency, Inc.)		AC

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Privilege Number	DATE	DESCRIPTION	FROM	TO	CC	TYPE
128	11/8/1974	Attachment to letter reflecting legal advice regarding correspondence with unauthorized user of "Happy Birthday to You"	Roberta Savler (Publication Director, Summy-Birchard Co.)	Albert Berman (Managing Director, Harry Fox Agency, Inc.)		AC
136	11/6/1984	Letter reflecting legal advice regarding correspondence with potential licensee regarding "Happy Birthday to You"	Andrew M. Manshel, Esq. (Administrative Director and Counsel, Birch Tree Group Ltd.)	Howard Balsam, Esq. (Harry Fox Agency, Inc.)		AC
137	8/7/1984	Letter reflecting legal advice regarding "Happy Birthday to You"	Andrew M. Manshel, Esq. (Administrative Director and Counsel, Birch Tree Group Ltd.)	Howard Balsam, Esq. (Harry Fox Agency, Inc.)		AC

Privilege Number	DATE	DESCRIPTION	FROM	TO	CC	TYPE
138	7/31/1984	Letter reflecting legal advice regarding correspondence with unauthorized user of "Happy Birthday to You"	Howard Balsam, Esq. (Harry Fox Agency, Inc., Inc.)	Ernest R. Farmer (Summy-Birchard Music, Inc.)	Edward P. Murphy (Harry Fox Agency, Inc.)	AC

Harry Fox has no ownership interest in any of the works for which it collects royalties, and it certainly does not share Defendants' legal interests in the Song. While it may share a *commercial* interest in the Song with Defendants, Harry Fox has no legal interest whatsoever in whether Warner Chappell owns any copyright in the Song, what the limited scope of such a copyright may be, or whether that copyright is valid.

As a royalty collection agent, Harry Fox's role is simply to enforce rights asserted by its members. Harry Fox has no legal interest in determining the existence of those rights, and certainly no legal interest in a determination in favor of Defendants. Harry Fox is not a defendant in this action, and Plaintiffs assert no claim against it. Nor is there any reason to believe that a holding adverse to Defendants in this matter would harm Harry Fox's *legal* interests, rather than its business interests.

Indeed, Harry Fox's interests do not necessarily align with all of its members. For example, when two or more members make disputed royalty claims for the same work, Harry Fox serves multiple masters whose interests are directly adverse. Harry Fox does not – and cannot – take sides in such disputes. Documents produced to Plaintiffs in this case by the American Society of Composers, Authors and

1 Publishers (“ASCAP”), another performance rights organization like Harry Fox,
2 demonstrate that the interests of ASCAP and Warner Chappell or its predecessors-
3 in-interest have been *adverse* over disputes regarding royalty payments for the Song
4 itself. Therefore, ASCAP and Warner Chappell do not share a common legal
5 interest in any copyright to the Song.

6 The same is true – and for the same reasons – of documents shared with other
7 third-parties, including The Performing Rights Society Ltd., a British organization
8 that performs the same function as ASCAP and Harry Fox, SDRM and its affiliate
9 S.A.C.E.M., French organizations that similarly collect royalties for public
10 performances of copyrighted works, Keith Prowse Music Publishing Co. Ltd., a
11 British music publisher that is not owned or controlled by Defendants, and for
12 Alfred Publishing Co. and EMI Music Publishing Co., also music publishers that are
13 not owned or controlled by Defendants. In each of these instances, documents
14 shared with third-parties who do not share common *legal* interests and whose legal
15 interests may be potentially adverse, lose any protection under the attorney-client
16 privilege.

17 **(b) None of the Third-Parties are Privileged Agents of**
18 **Defendants**

19 Defendants also have asserted that disclosure to third-parties did not waive
20 the privilege because the third-parties in question are privileged agents of
21 Defendants. Specifically, Defendants claimed that Harry Fox and ASCAP, who
22 have entered into contracts with Defendants to facilitate licensing of copyrighted
23 works, are their privileged agents.

24 A privileged agent is an agent of either the attorney (*i.e.*, one who is retained
25 by the attorney for the purpose of providing legal assistance to the client), or of the
26 client (*i.e.*, one who is retained by the client to communicate with the attorney or act
27 upon the attorney’s advice). *Restatement 3d of the Law Governing Lawyers*, § 70.
28 A routine business relationship with a third-party does not render that third-party a

1 “privileged agent” or preserve the privilege after documents disclosed to such a
2 third-party. This is the case even if the subject of the business relationship between
3 the party claiming the privilege and the third-party relates to the underlying legal
4 issue.

5 Defendants have not identified to which of these categories its asserted
6 relationship with third parties such as Harry Fox and ASCAP may belong, however
7 any such relationship is commercial in nature; it was not formed for purposes of aid
8 in this particular lawsuit – to the contrary, Harry Fox and ASCAP are two of the
9 third-parties with which Defendants regularly work in the course of their business.
10 Only if the communications were from, to, or disclosed to such third parties for the
11 purpose of obtaining or providing a legal service in connection with the issues in
12 dispute in this action, may Defendants claim the third parties as privileged agents.
13 *See id.*

14 **1. At a Minimum, the Court Must Conduct an *In***
15 ***Camera* Inspection of the 157 Documents**
16 **Identified on Defendants’ Privilege Log**

17 If the Court determines that it has inadequate information to decide whether
18 any of the documents on Defendants’ Privilege Log are properly privileged, or if it
19 has inadequate information to decide whether any applicable privilege was waived
20 by disclosure to third-parties, it should rule against Defendants since they bear the
21 burden to demonstrate that the documents are privileged and need not be produced.
22 *Lenz*, 2009 U.S. Dist. LEXIS 105180, at *4.

23 At a minimum, if the Court lacks information sufficient to decide these
24 privilege issues, it should compel production of all 157 documents for an *in camera*
25 inspection to determine whether any privilege applies, whether any privilege has
26 been waived, or whether additional information is necessary to determine whether
27 the documents are discoverable. “[*I*n camera review is an acceptable means to
28 determine whether disputed materials fit within [a] privilege.” *In re Grand Jury*
Investigation, 974 F.2d 1068, 1074 (9th Cir. 1992). “To empower the district court

1 to review the disputed materials in camera, the party opposing the privilege need
2 only show a factual basis sufficient to support a reasonable, good faith belief that in
3 camera inspection may reveal evidence that information in the materials is not
4 privileged.” *Id.* at 1075. A plaintiff is entitled to have documents reviewed in
5 camera by showing that the attorney-client privilege may not apply to documents in
6 the defendant’s privilege log simply by contending “that log entries for several
7 documents fail to identify any attorney involved in the communication.” *Applied*
8 *Med. Res. Corp. v. Ethicon, Inc.*, No. 03-1329, 2005 U.S. Dist. LEXIS 41199, at *6
9 (C.D. Cal. May 23, 2005).

10 Here, in addition to the other deficiencies identified in Defendants’ Privilege
11 Log, Plaintiffs also contend that Defendants have failed to identify either the
12 attorneys or the clients involved in the communication. In that event, the Court must
13 grant Plaintiffs a reasonable extension of the fact discovery cut-off, currently set for
14 June 27, 2014, so that the privilege issues can be decided and, should the Court
15 compel production of any of the withheld documents, additional discovery can be
16 completed. Without a reasonable extension, Plaintiffs will be denied the
17 opportunity to complete discovery and risk being prejudiced thereby.

18 **IV. WARNER/CHAPPELL’S POSITION**

19 **A. Plaintiffs’ Claims of Delay Are Frivolous and Should Be Rejected**

20 Warner/Chappell did not delay in asserting the privilege, and the case on
21 which Plaintiffs principally rely confirms that the severe sanction of vitiating the
22 privilege should not apply in this case. *See Burlington N. & Santa Fe Ry. Co. v.*
23 *United States Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005);
24 *Khasin v. Hershey Co.*, No. 5:12-CV-01862-EJD-PSG, 2014 WL 690278, at *6
25 (N.D. Cal. Feb. 21, 2014) (“Wholesale waiver is a severe outcome, and given the
26 relatively minor nature of Hershey’s errors, weighed against the complications of
27 ongoing and evolving discovery obligations, such a remedy is not warranted here.”).

28

1 Warner/Chappell timely asserted privilege objections in its written responses
2 to Plaintiffs' document requests. The parties agreed that Warner/Chappell could
3 serve those responses on March 21, 2014, and Warner/Chappell did so. Klaus Decl.
4 ¶¶2, 4. Shortly thereafter, Warner/Chappell produced documents to Plaintiffs on
5 April 11, in accordance with the parties' agreement. *Id.* ¶¶2, 6. Warner/Chappell
6 then served its detailed privilege log on May 9, after informing Plaintiffs of their
7 progress. *Id.* ¶¶5-6, 8-9.

8 Although Plaintiffs say that Warner/Chappell's log was served "nearly three
9 months after Plaintiffs served their Document Requests," and that the log was "more
10 than two month[s] late," Plaintiffs explicitly agreed that Warner/Chappell would
11 have until March 21 to object to the requests and until April 11 to produce its
12 documents. *Id.* at Ex. A. Plaintiffs do not advise the Court of this explicit
13 agreement with Warner/Chappell, alluding only to the fact that Plaintiffs granted
14 Warner/Chappell an extension of time to respond to Plaintiffs' discovery requests.
15 Instead, and inexplicably, Plaintiffs call Warner/Chappell's responses and objections
16 to Plaintiffs' document requests "belated[]," when Warner/Chappell provided those
17 responses and objections on the day Plaintiffs agreed those objections would be due.

18 Plaintiffs never advised Warner/Chappell that despite this explicit agreement,
19 they would take the view that Warner/Chappell's privilege log would be due long
20 before the agreed-upon date for responses and production. The parties' agreement
21 does not suggest that Plaintiffs expected Warner/Chappell would produce a privilege
22 log concurrently with their written objections on March 21 or at any time *prior* to
23 Warner/Chappell's April 11 production of documents. *Id.* at Ex. A. And when the
24 parties met and conferred on April 7, Plaintiffs did not suggest that
25 Warner/Chappell's privilege log was late. *Id.* ¶¶5-6. Instead, the parties discussed
26 that Warner/Chappell would produce its log *after* the April 11 production of
27 documents. *Id.* And while Plaintiffs claim they were not asked to consent to
28 untimely service of Warner/Chappell's privilege log, they ignore that

1 Warner/Chappell told them on April 7—before the log was due—that it would take
2 Warner/Chappell additional time complete the log, and Plaintiffs did not object at
3 that time. *Id.* ¶5. Plaintiffs likewise ignore that they did not object on any
4 subsequent occasion when Warner/Chappell told them that the log would require
5 additional time. *Id.* ¶¶6, 8. In the circumstances, Plaintiffs gave the appearance of
6 having acquiesced to this time frame, but were apparently lying in wait to launch
7 claims of “delay.”

8 This newfound delay objection is even more inexplicable in light of Plaintiffs’
9 conduct in producing their own log. Plaintiffs’ documents were due on the same
10 date as Warner/Chappell’s documents, and yet Plaintiffs served their privilege log
11 on May 19. *Id.* ¶19. In other words, under Plaintiffs’ theory, Plaintiffs’ privilege
12 log was *ten days tardier* than Warner/Chappell’s log. And while Warner/Chappell
13 informed Plaintiffs before the log was due that it would need additional time,
14 Plaintiffs did not so inform Warner/Chappell. *Id.* ¶7. (Plaintiffs also served their
15 documents two weeks late, without asking for Warner/Chappell’s consent. *Id.* ¶¶3,
16 7.) Plaintiffs’ actions are particularly noteworthy because they had just a handful of
17 documents to log and their potentially privileged communications would have gone
18 back at most handful of years. *Id.* ¶14. Warner/Chappell’s files, by contrast,
19 contained hundreds of responsive, privileged communications dating back to the
20 1940s (and which, potentially, could have dated back to the 1800s). *Id.* at ¶¶10-11.

21 Plaintiffs rely on *Burlington*, to argue that Warner/Chappell should be
22 deemed to have waived its privileges. In *Burlington*, the Court denied a mandamus
23 petition challenging the district court’s determination that a party had waived its
24 privilege objections. 408 F.3d at 1150. The Court explicitly rejected the rule
25 Plaintiffs urge here: “a *per se* waiver rule that deems a privilege waived if a
26 privilege log is not produced within Rule 34’s 30-day time limit.” *Id.* at 1149. But
27 under the strict “clearly erroneous” standard applicable to mandamus, the Court held
28 that the ruling was not clearly erroneous because the privilege log was five months

1 late and the district court’s holding was supported by additional circumstances,
2 including evidence of “gamesmanship.” *See id.* at 1149-50.

3 Here, the circumstances are not anywhere near those present in *Burlington*.
4 Warner/Chappell (1) asserted privilege on the date the parties agreed
5 Warner/Chappell’s initial objections would be due, (2) produced a thorough and
6 detailed privilege log less than a month after the date the parties agreed
7 Warner/Chappell’s documents would be due and (3) kept Plaintiffs informed of the
8 progress of their privilege log and the timing of its production—including notifying
9 Plaintiffs that the log would not be produced concurrently with Warner/Chappell’s
10 documents. Plaintiffs’ claims of tardiness and prejudice due to the discovery
11 deadlines are unpersuasive. Plaintiffs’ documents and log were due at the same time
12 as Warner/Chappell’s documents and log, and yet Plaintiffs produced their
13 documents two weeks late and produced their log ten days after Warner/Chappell
14 produced its log. Plaintiffs also did not object when Warner/Chappell explained that
15 its log would take additional time to complete. Plaintiffs’ effort to gin up the
16 appearance of unreasonableness on Warner/Chappell’s part is also unsupported.
17 Warner/Chappell was unable to meet and confer about their privilege log on the day
18 Plaintiffs initially proposed because Plaintiffs provided *under two hours’ notice* for
19 their request. Warner/Chappell’s counsel acted in good faith at all times, and met
20 and conferred with Plaintiffs upon returning from travel, which was within the time
21 period permitted under L.R. 37-1.

22 Although Plaintiffs nominally cite *Burlington*’s requirement of a “case-by-
23 case determination” as to waiver, they inaccurately apply *Burlington* as though a *per*
24 *se* rule dictates waiver when privilege logs are produced after the 30-day period set
25 in Rule 34. Courts routinely reject this characterization. *See Best Buy Stores, L.P.*
26 *v. Manteca Lifestyle Ctr., LLC*, No. 2:10-CV-0389-WBS-KJN, 2011 WL 2433655,
27 at *45 (E.D. Cal. June 14, 2011). Indeed, the opposite is true: “district courts
28 applying *Burlington Northern* have declined to find a waiver of privilege in cases

1 where a party first raised insufficient ‘boilerplate’ privilege objections in its RFP
2 responses but subsequently raised privilege objections within a detailed privilege log
3 provided after the 30–day time period.” *Id.* at *6.

4 *Burlington* instead announces a four-factor test for assessing whether a
5 purported delay results in a waiver—which four factors Plaintiffs’ stipulation never
6 even applies. Each of the four factors weighs against a finding of waiver here. The
7 first factor, “the degree to which the objection or assertion of privilege enables the
8 litigant seeking discovery and the court to evaluate whether each of the withheld
9 documents is privileged (where providing particulars typically contained in a
10 privilege log is presumptively sufficient and boilerplate objections are
11 presumptively insufficient),” *Burlington*, 408 F.3d at 1149, weighs strongly against
12 waiver. Warner/Chappell’s privilege log is detailed and thorough, and “provides
13 much more than a boilerplate objection.” *Jumping Turtle Bar & Grill v. City of San*
14 *Marcos*, No. 10-CV-270-IEG (BGS), 2010 WL 4687805, at *3 (S.D. Cal. Nov. 10,
15 2010); *Carl Zeiss Vision Int’l GmbH v. Signet Armorlite Inc.*, No. 07-CV-0894-DMS
16 (POR), 2009 WL 4642388, at *3 (S.D. Cal. Dec. 1, 2009); *see also Humphreys v.*
17 *Regents of the Univ. of Cal.*, No. C 04-03808 SI, 2006 WL 1409336, at *1 (N.D.
18 Cal. May 23, 2006) (refusing to find waiver where “privilege log lack[ed] any sort
19 of description of the subject of many of the documents” but “contain[ed] sufficient
20 information to constitute a good faith effort”). Warner/Chappell’s log contains *at*
21 *least* as much descriptive information as the logs in these cases, and it in fact fully
22 satisfies the requirements established under Ninth Circuit law, as discussed below.

23 The second factor, “the timeliness of the objection and accompanying
24 information about the withheld documents,” *Burlington*, 408 F.3d at 1149, also
25 weighs against waiver. To begin with, as described above, Plaintiffs’ claim that
26 Warner/Chappell’s privilege log was “more than two months late” ignores both the
27 parties’ agreement regarding the extension of discovery deadlines and the fact that
28 Plaintiffs did not object when Warner/Chappell discussed the timing of the

1 production of the log with Plaintiffs, and Plaintiffs did not object when Warner-
2 Chappell explained that the log would take additional time to complete. *Burlington*
3 itself emphasized that agreements among the parties weigh in the application of its
4 factors. *Id.*

5 Warner/Chappell's service of its privilege log just twenty-eight days after its
6 document production was not unreasonable, especially in light of the parties'
7 communications regarding the log's production, the fact that Warner/Chappell's
8 privileged documents date back to the 1940s, and the fact that it took Plaintiffs even
9 longer to serve their own log—which described just a handful of documents dating
10 back only a year. *See Best Buy*, 2011 WL 2433655, at *8 (“Given that the delay in
11 the production of defendant’s privilege log is at least partially due to the parties’
12 stipulation, fairness requires that such delay not be construed against defendant or
13 be deemed to support a waiver of defendant’s privileges.”); *Jumping Turtle*, 2010
14 WL 4687805, at *3 (finding that the production of a privilege log asserting privilege
15 for the first time 1.5 months late was not unreasonable); *Carl Zeiss*, 2009 WL
16 4642388, at *4 (refusing to find waiver where a privilege log was nine months late);
17 *Coal. for a Sustainable Delta v. Koch*, No. 1:08-CV-00397 OWW GSA, 2009 WL
18 3378974, at *4-5 (E.D. Cal. Oct. 15, 2009) (discussing that document requests
19 sought information dating back thirty years in explaining the reasonableness of a
20 delayed privilege log). Again, although Plaintiffs suggest that the short discovery
21 schedule ordered by the Court somehow supports waiver, their position is belied by
22 the fact that Plaintiffs did not suggest Warner/Chappell’s log was late until May 1,
23 when they requested that Warner/Chappell produce its log by May 9—which
24 request Warner/Chappell complied with. Klaus Decl. ¶¶8-9. It is also undermined
25 by Plaintiffs’ inexplicable delay in producing their own redaction log.

26 The third factor, “the magnitude of the document production,” *Burlington*,
27 408 F.3d at 1149, likewise weighs against waiver because Warner/Chappell had to
28 review nearly 5,000 pages of documents, produce nearly 2,000 pages of documents,

1 and ultimately withhold less than 325 pages of documents. Klaus Decl. ¶¶10-11.
2 As the Court noted in *Burlington*, “particularly in discovery-intensive litigation,
3 compiling a privilege log within 30 days may be exceedingly difficult, even for
4 counsel who are sophisticated, experienced, well-funded, and acting in good faith.”
5 408 F.3d at 1149 n.3; *see also Jumping Turtle*, 2010 WL 4687805, at *4 (allegedly
6 dilatory party did not appear to be engaging in gamesmanship where it produced
7 about 10,000 pages and withheld about 500 pages). Although Plaintiffs question the
8 number of documents Warner/Chappell has withheld, that number is in no way
9 surprising that given that Plaintiffs’ broad requests target topics that inevitably
10 would have been the subject of privileged communications that have taken place
11 since the 1800s (*e.g.*, “all documents constituting, creating, describing, or relating
12 to” various intellectual property rights; “[a]ll documents relating to any litigation
13 over” intellectual property rights; “[t]he due diligence file and all other documents
14 ... in connection with Warner/Chappell’s acquisition of Birchtree Limited”). Klaus
15 Decl. ¶10.

16 Finally, the fourth factor, “other particular circumstances of the litigation that
17 make responding to discovery unusually easy ... or unusually hard,” *Burlington*,
18 408 F.3d at 1149, also cuts against waiver. The difficulty of Warner/Chappell’s
19 privilege review was exacerbated not only by the breadth and scope of Plaintiffs’
20 requests, but also because of the age and condition of the documents and the fact
21 that counsel had to ascertain privilege acquired from predecessors in transactions
22 dating back decades. Klaus Decl. ¶10; *see Jumping Turtle*, 2010 WL 4687805, at
23 *4 (“[I]t is clear that the City has not been sitting on its hands and engaging in
24 tactical delay. The compilation of that privilege log required the City to review
25 hundreds of documents for the application of those privileges. This, no doubt, took
26 considerable time and effort.”).

27 In short, application of the factors discussed in *Burlington* shows that waiver
28 here would be an inappropriate and unjustifiable sanction. *Khasin*, 2014 WL

1 690278, at *6; *see also Schleicher v. Wendt*, No. 1:02-CV-1332-WTL-TAB, 2010
2 WL 1948218, at *2 (S.D. Ind. May 14, 2010) (“[C]ourts are reluctant to find a
3 blanket waiver of privilege because of mere technical inadequacies in a privilege
4 log. Instead, courts reserve the sanction of waiver for situations in which the author
5 of the privilege log displays willfulness, bad faith, or fault.”) (citations omitted).

6 **B. Warner/Chappell’s Privilege Log Provided Sufficient Information,
7 and Its Revised Log Now Provides Even More Detail**

8 Warner/Chappell’s May 9 privilege log contained not only the core categories
9 of information required under Ninth Circuit law, but went further than that. In
10 particular, the log—which Warner/Chappell supplemented on June 2, and which is
11 further supported by the attached declarations of Kelly M. Klaus and Jeremy
12 Blietz—identifies the attorneys involved in a given communication, the nature of the
13 documents, all persons or entities shown on the document to have received or sent
14 the document, and the date the document was prepared or dated. That is what the
15 Ninth Circuit has held is required. *In re Grand Jury Investigation*, 974 F.2d at 1071.
16 Additionally, “[Warner/Chappell’s] privilege log went beyond the [Ninth Circuit]
17 standards to provide information on the subject matter of each document.” *Id.*

18 Plaintiffs’ complaints about the information provided in Warner/Chappell’s
19 privilege log are unpersuasive. First, Plaintiffs assert that the privilege log does not
20 identify either the attorney or the client. Warner/Chappell’s log *did* indicate each
21 attorney shown on the document to have received or sent it. Warner/Chappell
22 included “Esq.” after the name of any individual Warner/Chappell knew to be an
23 attorney, and further indicated, to the extent known, the individual’s company and
24 title—*e.g.*, “Don Biederman, Esq. (Senior Vice President, Legal and Business
25 Affairs, Warner/Chappell Music, Inc.)”; “Andrew M. Manshel, Esq. (Administrative
26 Director and Counsel, Birch Tree Group Ltd.)”; “C. Lyman Emrich, Jr., Esq.
27 (Brown, Jackson, Boettcher & Dienner).” Klaus Decl. at Ex. B. In spite of
28 Plaintiffs’ purported suspicion, and as is clear from the context of the entries in

1 Warner/Chappell’s May 9 log, the attorneys listed on Warner/Chappell’s log were
2 not Warner/Chappell’s or its predecessors’ opposing counsel. In any event,
3 Warner/Chappell’s supplemented log explicitly identifies which attorneys were
4 serving as outside counsel and which attorneys were employees of
5 Warner/Chappell, its agents, or parties with whom it shared common legal interests.
6 Further, in the vast majority of log entries it is clear from the context who the client
7 is in a given communication. And to the extent that Plaintiffs suggest that both an
8 attorney and a client needs to appear in each log entry, they ignore the fact that the
9 attorney-client privilege applies even where an attorney is not a party to the
10 communication. *See MGA Entm’t, Inc. v. Nat’l Prods. Ltd.*, No. CV 10-07083 JAK
11 (SSx), 2012 WL 3150532, at *3 (C.D. Cal. Aug. 2, 2012) (“A document need not
12 be authored or addressed to an attorney in order to be properly withheld on attorney-
13 client privilege grounds.”) (citation omitted).⁶ Warner/Chappell’s log appropriately
14 describes the communications at issue as concerning the provision of or request for
15 legal advice.

16 Second, Plaintiffs contend that the phrase “reflecting legal advice
17 regarding...” is “ambiguous and potentially misleading.” But “reflecting legal
18 advice” means just what it says: the communication at issue reflects legal advice on
19 the particular topic(s) described. Indeed, courts routinely use this very phrase in
20 describing privileged communications. In *In re Sulfuric Acid Antitrust Litig.*, for

21 ⁶ *See also FTC v. Boehringer Ingelheim Pharm., Inc.*, 286 F.R.D. 101, 111 (D.D.C. 2012)
22 (“[C]ommunications among employees of a client are still afforded the protection of the
23 privilege, so long as the communications concern legal advice sought or received that was
24 intended to be confidential.”) (citing *Long v. Anderson Univ.*, 204 F.R.D. 129 (S.D. Ind.
25 2001) and *Johnson v. Sea-Land Serv. Inc.*, No. 99-civ-9161, 2001 WL 897185, at *2
26 (S.D.N.Y. Aug. 9, 2011)); *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 433 (N.D.
27 Ill. 2006) (“Plaintiffs’ insistence that an attorney must be involved as a participant in the
28 communication before it can be found to reflect a client confidence or legal advice is
misplaced.”); *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. 242, 254 (N.D. Ill. 2000)
 (“Management should be able to discuss amongst themselves the legal advice given to
them as agents of the corporation with an expectation of privilege.”).

1 example, the court noted that privilege log entries were “adequately described as
2 either relating to legal advice regarding customer transactions and/or proposed
3 contracts and reflecting communications or conversations between attorney and
4 client [or] ... reflecting legal advice regarding potential acquisitions.” 235 F.R.D. at
5 433-34; *see also In re Application for an Order for Judicial Assistance in a Foreign*
6 *Proceeding in the Labor Court of Brazil*, 244 F.R.D. 434, 441 (N.D. Ill. 2007)
7 (“Documents Reflecting Legal Advice Regarding Petitioners’ Stock Options (Log
8 entries 7–11, 15–16, 46–51, and 58–59) are Privileged”); *Shire Dev. Inc. v. Cadila*
9 *Healthcare Ltd.*, No. 10-581-KAJ, 2012 WL 5247315, at *5 (D. Del. June 15, 2012)
10 (“[P]ages reflecting legal advice regarding formulation strategies are privileged, but
11 purely factual information is not.”).

12 Third, Plaintiffs complain that Warner/Chappell’s privilege log does not
13 identify who was shown the documents other than the people whose names appear
14 on the documents themselves and are logged accordingly. However, precedent
15 requires only that Warner/Chappell identify “persons or entities shown on the
16 document to have received or sent the document”—which Warner/Chappell did—
17 and “persons or entities *known* to have been furnished the document or informed of
18 its substance”—and there are no such persons. *In re Grand Jury Investigation*, 974
19 F.2d at 1071 (emphasis added). As Warner/Chappell explained to Plaintiffs during
20 the parties’ May 22 meet and confer, Warner/Chappell is not aware of the
21 communications on the log being provided to persons not listed as recipients or cc’s
22 on the documents themselves (and therefore on the log). Klaus Decl. ¶15.

23 Finally, the sufficiency of information provided in a privilege log must be
24 considered in context. Here, many of the challenged entries are half a century old
25 and involve communications among Warner/Chappell’s predecessors, or its
26 predecessors’ predecessors, and their counsel, agents, subpublishers and/or
27 performing rights societies. “[T]he courts retain some discretion to permit less
28 detailed disclosure in appropriate cases.” *SEC v. Thrasher*, No. 92 CIV. 6987

1 (JFK), 1996 WL 125661, at *1 (S.D.N.Y. Mar. 20, 1996). “[N]ot every case
2 requires strict adherence to the list of items that should be part of a privilege log as
3 identified in” Ninth Circuit precedent. *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615,
4 637 (D. Nev. 2013). As the Advisory Committee Notes make clear, Rule 26(b)(5)
5 “does not attempt to define for each case what information must be provided when a
6 party asserts a claim of privilege or work product protection.” Fed. R. Civ. P.
7 26(b)(5) advisory committee notes. “[T]he Advisory Committee foresaw that
8 individual circumstances called for different reactions.” *Phillips*, 290 F.R.D. at 638
9 (quoting 8 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L.
10 Marcus, *Federal Practice and Procedure* § 2016.1 (3d ed. 2012)). Warner/Chappell
11 has carefully reviewed its files to determine the bases for privilege assertions
12 acquired from predecessors-in-interest and dating back decades,⁷ and
13 Warner/Chappell’s privilege log provides more than enough information to allow
14 the assessment of the claims.

15 **C. The Privilege Has Not Been Waived as to the Documents Plaintiffs**
16 **Claim Were Shared with Third Parties**

17 Plaintiffs contend that privilege was “destroyed” for 33 documents allegedly
18 shared with third parties. This argument fails because the documents at issue either
19 (1) were not shared with unaffiliated “third parties” at all; (2) were shared with
20 parties who held a common legal interest with Warner/Chappell or its predecessors;
21 and/or (3) were shared with agents and/or representatives of Warner/Chappell or its
22 predecessors.
23
24
25

26 ⁷ *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 349 (1985) (where a
27 company is acquired, the attorney-client privilege is transferred to the acquiring company);
28 *City of Rialto v. U.S. Dep’t of Defense*, 492 F. Supp. 2d 1193, 1201 (C.D. Cal. 2007)
(same).

1 **1. The Majority of the Challenged Communications Were Not**
2 **Shared with Unaffiliated “Third Parties” At All**

3 Plaintiffs contend in their portion of the stipulation that, “[t]here is no dispute
4 that the 33 documents in question were either prepared by or provided to third-
5 parties.” That is wrong. The majority of the challenged documents were *not* either
6 prepared by or provided to unaffiliated “third parties.”

7 The attorney-client privilege applies to (1) communications (2) between
8 privileged persons (3) in confidence (4) for the purpose of obtaining or providing
9 legal assistance. Restatement (Third) of Law Governing Lawyers, § 68. Privileged
10 persons include the client, the lawyer, and agents of either the lawyer or the client
11 who help facilitate either the communications or the lawyer’s representation. *Id.* §
12 70. In particular, the privilege “includes communications involving corporate
13 officers and agents who possess the information requested by the attorney or who
14 will act on the legal advice.” *MGA Entm’t*, 2012 WL 3150532, at *2. Further,

15 [a] document need not be authored or addressed to an attorney in order to be
16 properly withheld on attorney-client privilege grounds. First, in instances
17 where the client is a corporation, documents subject to the privilege may be
18 transmitted between non-attorneys to relay information requested by
attorneys. Second, documents subject to the privilege may be transmitted
between non-attorneys (especially individuals involved in corporate decision-
making) so that the corporation may be properly informed of legal advice and
act appropriately.

19 *Id.* at *3 (quoting *Santrade, Ltd. v. General Elec. Co.*, 150 F.R.D. 539, 545
20 (E.D.N.C. 1993). Applying these principles, it is clear the majority of the
21 challenged documents were not shared outside a privileged setting.

22 **(a) Specific Documents Challenged in This Category**

23 Entries 6, 54, 32, 87-89, 97, 107-114, 123, 129, 130 and 140 were not shared
24 with “third parties,” and in particular not unaffiliated “third parties” who could
25 break the privilege:

26 Entries 6 and 54 each contain a request for legal advice from a
27 Warner/Chappell affiliate to a Warner/Chappell employee who worked closely with
28 Warner/Chappell’s legal department and who was expected to discuss that request

1 with legal counsel (Entry 54 is also copied to Warner/Chappell's general counsel).
2 Declaration of Jeremy Blietz ("Blietz Decl.") ¶4. These intercompany
3 communications amongst affiliates are not shared with "third parties," and the
4 privilege is maintained. *See MGA Entm't*, 2012 WL 3150532, at *2-3.

5 Entry 32 is a communication from a consultant working for Warner/Chappell
6 (David Sengstack, the former President of Defendants' predecessor) to
7 Warner/Chappell and its outside counsel, and it contains a discussion of legal advice
8 provided to Warner/Chappell's predecessor. Blietz Decl. ¶5 (citing agreement under
9 which Sengstack was engaged by Warner/Chappell as a "consultant in the field of
10 printed music"). Because Sengstack himself was conveying this legal advice to the
11 party who had succeeded to the privilege over the advice, there was no disclosure to
12 a third party. *See United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996) (former
13 employees cannot waive corporation's attorney-client privilege).⁸ And there is no
14 dispute that Warner/Chappell as a matter of fact succeeded to the privileges
15 formerly held by its predecessor-in-interest. *Commodity Futures Trading Comm'n*,
16 471 U.S. at 349 (where a company is acquired, the attorney-client privilege is
17 transferred to the acquiring company); *City of Rialto*, 492 F. Supp. 2d at 1201
18 (same).

19 Entries 87, 97, 107-110, 112, 123, 130 and 140 are all communications
20 between outside counsel for Warner/Chappell or its predecessors and employees or
21 in-house counsel for Warner/Chappell or its predecessors, which contain legal
22 advice or a request for legal advice. Klaus Decl. ¶11; *see also MGA Entm't*, 2012
23 WL 3150532, at *2-3.

24 Entries 88, 89, 113 and 129 are communications (containing legal advice)
25 between different firms serving as outside counsel for Warner/Chappell's

26 ⁸ As discussed below, the communication between Sengstack and Warner/Chappell *also*
27 did not waive privilege because Sengstack was at that time a consultant for, and
28 functionally an employee of, Warner/Chappell.

1 predecessor (Entry 113 is also copied to Warner/Chappell’s predecessor). Klaus
2 Decl. ¶11.

3 Entry 111 consists of the notes of outside counsel to Warner/Chappell’s
4 predecessor, which contain that counsel’s mental impressions and which were
5 provided to Warner/Chappell’s predecessor. *Id.*

6 Entry 114 consists of a memorandum to the files of Warner/Chappell’s
7 predecessor, which on its face appears to provide information to Warner/Chappell’s
8 predecessor for the formulation of legal advice.

9 Because none of these communications were shared outside of the privileged
10 context of either (1) intercompany communications; or (2) communications between
11 company and outside counsel—none were shared with any third party who vitiates
12 the privilege.

13 **2. Sharing Otherwise Privileged Communications with Those**
14 **Who Share a Common Legal Interest Does Not Waive the**
15 **Privilege**

16 Plaintiffs’ complaints are not about the unaffiliated third parties listed
17 above—and they could not be. No argument can be made that intercompany
18 exchanges or exchanges with outside counsel “waive” the privilege. Plaintiffs’
19 primary complaint is that documents shared with licensing agents, performing rights
20 organizations (“PROs”), and subpublishers waive the privilege. This is wrong. A
21 communication shared with such a third party does not necessarily dictate waiver.
22 The entities about which Plaintiffs complain are entities with whom
23 Warner/Chappell often shares a common legal interest, which protects against
24 waiver. Blietz Decl. ¶¶ 10, 20.

25 “The ‘common interest’ rule protects communications made when a nonparty
26 sharing the client’s interests is present at a confidential communication between
27 attorney and client.” *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987),
28 *overruled on other grounds by United States v. Jose*, 131 F.3d 1325 (9th Cir.1997).
This rule provides an exception to the general rule that disclosing privileged

1 communications outside the privileged relationship waives the privilege, and it
2 applies where “the parties sharing the communication are engaged in a discussion of
3 common interest.” *In re Mortgage & Realty Trust*, 212 B.R. 649, 652 (Bankr. C.D.
4 Cal. 1997). “[A] party claiming the common interest privilege bears the burden of
5 showing ‘(1) the communication is made by separate parties in the course of a
6 matter of common [legal] interest; (2) the communication is designed to further that
7 effort; and (3) the privilege has not been waived.’” *Love v. Permanente Med. Grp.*,
8 No. C-12-05679 DMR, 2014 WL 644948, at *2 (N.D. Cal. Feb. 19, 2014) (citation
9 omitted).

10 Plaintiffs challenge the application of the common interest doctrine here. In
11 particular, Plaintiffs offer the example of Warner/Chappell’s relationship with HFA,
12 a licensing agent, and ASCAP, one of the PROs, contending that, on occasion,
13 Warner/Chappell’s interests run adverse to these entities. That contention reflects a
14 misunderstanding of the law. “The common interest privilege does not require a
15 complete unity of interests among the participants. The privilege applies where the
16 interests of the parties are not identical, and it applies even where the parties’
17 interests are adverse in substantial respects.” *In re Mortgage & Realty Trust*, 212
18 B.R. at 653 (citing *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965)).

19 Plaintiffs next claim that licensing agents and performing rights societies (like
20 ASCAP or the foreign rights societies discussed below) and their members (like
21 Warner/Chappell or its subpublishers) share only a *commercial* and not a legal
22 interest. That is incorrect on the facts, Blietz Decl. ¶¶13-20, and the law. Courts
23 have found the common interest rule applicable in similar circumstances. *See*
24 *United States v. Am. Soc’y of Composers, Authors & Publishers*, CIV. 13-95
25 (WCC), 1996 WL 633220, at *1-2 (S.D.N.Y. Nov. 1, 1996) (holding that
26 discussions among cable service suppliers were privileged because “the
27 circumstances in which the [suppliers’] meetings were held reflect that the
28 participants were conducting these discussions to serve a common legal and

1 economic interest—the minimization of music performance rights fees”); *see also*
2 *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974)
3 (“The fact that there may be an overlap of a commercial and a legal interest for a
4 third party does not negate the effect of the legal interest in establishing a
5 community of interest.”). The ruling in *Major League Baseball Properties, Inc. v.*
6 *Salvino, Inc.*, No. 00 CIV.2855 JCF, 2003 WL 21983801 (S.D.N.Y. Aug. 20, 2003),
7 is particularly instructive. There, the court found that MLBP, “an entity created by
8 the major league baseball clubs (the ‘Clubs’) to register and enforce the intellectual
9 property rights of the Clubs,” shared with the Clubs “a common legal interest in
10 enforcement of the Clubs’ trademark rights.” *Id.* at *1. Accordingly, the court held
11 that communications between the Clubs and counsel for MLBP that were related to
12 the subject of the parties’ shared legal interest were privileged. *Id.*
13 Warner/Chappell and the PROs share a similar legal interest in the enforcement of
14 Warner/Chappell’s copyright rights, and their communications concerning the
15 provision of or request for legal advice regarding such rights are likewise privileged.
16 Blietz Decl. ¶¶13-20.⁹

17 Precedent also supports the conclusion that Warner/Chappell’s predecessors
18 and Keith Prowse Music Publishing Co. Ltd (“Prowse”), the exclusive subpublisher
19 of *Happy Birthday to You!* In the United Kingdom, shared common legal interests.
20 In *In re Regents of Univ. of Cal.*, 101 F.3d 1386 (Fed. Cir. 1996), for example, the
21 court held that a patent applicant and its potentially exclusive licensee “had the same
22 interest in obtaining strong and enforceable patents,” and so their communications
23 relating to the patents were privileged. *Id.* at 1390. Here, it is even more obvious
24

25 ⁹ Under the 1935, 1965, and 1976 agreements between Warner/Chappell’s predecessors
26 and ASCAP, Warner/Chappell’s predecessors granted ASCAP the exclusive “right to
27 enforce and protect such rights of public performance under any and all copyrights” and
28 appointed ASCAP as the predecessors’ “true and lawful attorney ... to do all acts, take all
proceedings, [etc.]” Blietz Decl. ¶¶15.

1 that Warner/Chappell’s predecessors and Prowse shared common legal interests
2 with respect to the *Happy Birthday to You!* copyright because Prowse was, in fact,
3 the predecessors’ assignee with exclusive rights to license the song in the United
4 Kingdom. Blietz Decl. ¶17. And once again, Plaintiffs’ argument that the common
5 interest rule does not apply because the performing rights society for the United
6 Kingdom (“PRS”) and Prowse might have been adverse at times is unavailing. The
7 rule “applies even where the parties’ interests are adverse in substantial respects.”
8 *In re Mortgage & Realty Trust*, 212 B.R. at 653 (citing *Hunydee*, 355 F.2d at 185).

9 **(a) Specific Documents Challenged in This Category**

10 Privilege log entries 12-13, 101, 103, 105-106, and 135-136 are all privileged,
11 and the common interest rule shields against any finding of waiver.

12 Entries 12 and 105 are communications, which contain legal advice, sent from
13 PRS to Prowse. These parties shared a common legal interest in the validity of the
14 *Happy Birthday to You!* Copyright (which PRS licensed on Prowse’s behalf), in the
15 collection of royalties for the use of that song, and in stopping infringing uses of that
16 song. Blietz Decl. ¶¶13-20. Warner/Chappell’s predecessors shared these same
17 common legal interests with both PRS and with Prowse.

18 Entry 13 is a communication, which contains legal advice, from a French
19 performing rights society to a related organization, both of which share the common
20 legal interests described above with Warner/Chappell’s predecessors. *See id.*

21 Entry 103 is a communication from Prowse’s successor-in-interest, EMI, to
22 PRS, which forwards information for the provision of legal advice. *See id.*

23 Entry 106 is a communication from EMI to counsel for Warner/Chappell,
24 which contains legal advice and includes Entry 103 as an enclosure. Again, these
25 parties shared the same common legal interests that PRS and Prowse shared. *See id.*

26 Entries 135 and 136 are communications, which contain legal advice, from
27 counsel for Warner/Chappell’s predecessor to counsel for Harry Fox Agency, the
28 predecessors’ licensing agent. *Id.* ¶¶ 7-10.

1 And Entry 101 is a communication, which contains legal advice, from outside
2 counsel for Warner/Chappell’s predecessor to Clearing House Ltd., another one the
3 predecessors’ licensing agents. Warner/Chappell’s predecessor and Harry Fox
4 Agency (or Clearing House Ltd.) share certain common legal interests, including in
5 ensuring that works were properly attributed to the correct set of writers, in ensuring
6 that copyright owners were compensated for the licensing at the appropriate rate,
7 and in avoiding and resolving disputes between publishers and other copyright
8 holders as to the appropriate “splits” or attribution of authorship for a particular
9 work. *Id.* ¶¶ 7-12. The applicability of the common interest rule to these
10 communications is supported by the cases cited above. These cases also
11 demonstrate that, contrary to Plaintiffs’ suggestion, application of the common
12 interest rule is not precluded by the fact that Warner/Chappell’s predecessors shared
13 commercial interest with Harry Fox Agency or that Warner/Chappell’s predecessors
14 and Harry Fox Agency at times could have been adverse to one another.

15 **3. Sharing Documents with Agents and/or Representatives Does**
16 **Not Waive the Privilege**

17 Finally, Plaintiffs contend (without citation to caselaw) that Warner/Chappell
18 or its predecessors waived privilege by communicating with parties, like HFA and
19 PROs, with whom they allegedly shared only a “[a] routine business relationship.”
20 This argument misconstrues the relationship between Warner/Chappell or its
21 predecessors and its licensing agents and subpublishers (as well as the relationship
22 between those agents or subpublishers and domestic or foreign PROs). Blietz Decl.
23 ¶¶7-20.¹⁰ The argument also misconstrues the law. “In addition to clients and
24 lawyers, the definition of privileged persons includes agents of the client and the

25 ¹⁰ The agency relationship between publishers and PROs is exemplified by the agreements
26 between Warner/Chappell’s predecessors and ASCAP, which granted ASCAP the
27 exclusive “right to enforce and protect such rights of public performance under any and all
28 copyrights” and appointed ASCAP as the predecessors’ “true and lawful attorney ... to do
all acts, take all proceedings, [etc.]” Blietz Decl. ¶15.

1 lawyer who assist in the representation.” David M. Greenwald, et al., *Testimonial*
2 *Privileges* § 1:28 (2012). The presence of third party agents, including paralegals
3 and investigators, “does not waive the privilege if their presence was to permit the
4 client and lawyer to communicate effectively or to further the representation in some
5 way.” *Id.* “The attorney-client privilege may extend to communications with third
6 parties who have been engaged to assist the attorney in providing legal advice.”
7 *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011). Further, where
8 corporate counsel communicates with a non-employee “who [is] intimately familiar
9 with or play[s] a significant role in the corporation’s business,” those
10 communications may be privileged. *Testimonial Privileges* § 1:31; *In re Bieter Co.*,
11 16 F.3d 929, 938 (8th Cir. 1994) (a company’s corporate attorney-client privilege
12 extends to a consultant who is “in all relevant respects the functional equivalent of
13 an employee”); *see also United States v. Graf*, 610 F.3d 1148, 1158-59 (9th Cir.
14 2010) (adopting *Bieter* standard and discussing district court decisions within the
15 Ninth Circuit finding communications between an outside consultant and corporate
16 counsel covered by the entity’s attorney-client privilege).

17 **(a) Specific Documents Challenged in This Category**

18 Privilege log entries 1, 2, 12, 32, 101, 103, 105-106 and 135-136 are all
19 privileged communications involving Warner/Chappell’s or its predecessor’s agents
20 and no other third parties.¹¹ Entries 1 and 2 are reports prepared by a copyright
21 research company, Thomson & Thomson, at the direction of Warner/Chappell’s
22 counsel to facilitate counsel’s provision of legal advice. *See* Blietz Decl. ¶¶21-23.
23 Because Thomson & Thomson was Warner/Chappell’s agent and it assisted
24 Warner/Chappell’s rendition of legal advice, these communications are privileged.
25 *See United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (attorney-client
26

27 ¹¹ As discussed above, privilege log entries 12, 101, 103, 105-106 and 135-136 are also
28 privileged under the common interest doctrine.

1 privilege extends to communications made to agents assisting counsel); *see also*
2 *MPT, Inc. v. Marathon Labels, Inc.*, No. 1:04 CV 2357, 2006 WL 314435, at *3-5
3 (N.D. Ohio Feb. 9, 2006) (holding that prior art search report prepared by patent
4 search firm was privileged).

5 Entry 32 is a communication from David Sengstack, the former President of
6 Warner/Chappell's predecessor, to Warner/Chappell and Warner/Chappell's outside
7 counsel, and it contains a discussion of legal advice provided to Warner/Chappell's
8 predecessor. Sengstack was a consultant for Warner/Chappell at that point, and
9 functionally an employee, so his communication with Warner/Chappell at this time
10 did not waive privilege. Blietz Decl. ¶5 (citing agreement under which Sengstack
11 was engaged by Warner/Chappell as a "consultant in the field of printed music");
12 *see also Graf*, 610 F.3d at 1158-59; *In re Bieter Co.*, 16 F.3d at 938; *Gen-Probe Inc.*
13 *v. Becton, Dickinson & Co.*, No. 09CV2319 BEN (NLS), 2012 WL 1155709, at *3
14 (S.D. Cal. Apr. 6, 2012) ("Under *Bieter* and *Graf*, the attorney-client privilege
15 extends to communications between independent contractors (here, RELA
16 employees), and the corporation's (Gen-Probe) counsel."); *Twentieth Century Fox*
17 *Film Corp. v. Marvel Enters., Inc.*, No. 01 CIV. 3016 (AGS)H, 2002 WL 31556383,
18 at *2 (S.D.N.Y. Nov. 15, 2002) (because independent contractors working on film
19 "were the functional equivalent of employees, disclosure of otherwise privileged
20 documents to them" did not waive privilege).

21 Entries 12 and 105 are communications, which contain legal advice, sent from
22 PRS to Prowse and subsequently conveyed to Warner/Chappell's predecessor. PRS
23 served as Prowse's licensing agent, and Prowse, in turn, served as the agent for
24 Warner/Chappell's predecessor by exploiting the predecessor's copyright rights in
25 the United Kingdom. Blietz Decl. ¶¶13-20.

26 Entry 103 is a communication from Prowse's successor-in-interest, EMI, to
27 PRS, its licensing agent, which forwards information for the provision of legal
28 advice. *See id.* Entry 106 is a communication from EMI to counsel for

1 Warner/Chappell, which contains legal advice and includes Entry 103 as an
2 enclosure. *See id.* Each of these communications is privileged as a result of the
3 chain of agency/representative relationships that run from Warner/Chappell or its
4 predecessor to the dedicated foreign subpublisher to the licensing agent for that
5 subpublisher. *Id.*; *see also Twentieth Century*, 2002 WL 31556383, at *2 (“The fact
6 that the nature of the industry dictates the use of independent contractors over
7 employees should not, without more, create greater limitations on the scope of the
8 attorney-client privilege.”); *Gen-Probe Inc.*, 2012 WL 1155709, at *3 (attorney-
9 client privilege applied to communications between corporate counsel and an
10 independent contractor with two degrees of separation from the company).

11 Entry 101 is a communication, which contains legal advice, from outside
12 counsel for Warner/Chappell’s predecessor to Clearing House Ltd., one the
13 predecessor’s licensing agents. Klaus Decl. ¶11; Blietz Decl. ¶¶ 11-12.

14 Entries 135-136 are communications, which contain legal advice, from
15 counsel for Warner/Chappell’s predecessor to counsel for Harry Fox Agency, the
16 predecessor’s licensing agent.¹² Communications between Warner/Chappell’s
17 predecessor and Clearing House Ltd. or Harry Fox Agency are privileged because
18 these licensing agents served as agents and representatives for Warner/Chappell’s
19 predecessors. Blietz Decl. ¶¶ 7-10. Warner/Chappell’s predecessor relied on Harry
20 Fox Agency and Clearing House Ltd. to exercise their legal rights, and they shared
21 privileged information with these parties with the expectation that the information
22 would be kept confidential. *Id.*; *see Gen-Probe*, 2012 WL 1155709, at *3; *MPT*,
23 2006 WL 314435, at *5 (communications between nonlawyer patent agents and
24 corporation were privileged); *Twentieth Century*, 2002 WL 31556383, at *2 (“The
25 fact that the nature of the industry dictates the use of independent contractors over
26

27 ¹² As discussed above, Warner/Chappell withdrew its privilege claim to a small number of
28 withheld documents upon further review.

1 employees should not, without more, create greater limitations on the scope of the
2 attorney-client privilege.”).

3 **D. Plaintiffs Cannot Justify *In Camera* Review**

4 Plaintiffs’ argument for *in camera* review of Warner/Chappell’s withheld
5 documents is unpersuasive. For the reasons discussed above, Warner/Chappell’s
6 privilege log is sufficient and, respectfully, there is no cause for the Court to review
7 the documents at issue. “Once the privilege applies, ‘it is [not] necessary to dissect
8 the document to separately evaluate each of its components. It is enough that the
9 overall tenor of the document indicates that it is a request for legal advice or
10 services.’” *MPT*, 2006 WL 314435, at *5 (quoting *In re Spalding Sports*
11 *Worldwide, Inc.*, 203 F.3d 800, 806 (Fed. Cir. 2000)).

12 Moreover, “*in camera* review is generally disfavored. . . . [A] district court
13 should not conduct *in camera* review ‘solely because a party begs it to do so.’”
14 *Ideal Elec. Co. v. Flowserve Corp.*, 230 F.R.D. 603, 610 (D. Nev. 2005) (citation
15 omitted); *see also Newport Pac. Inc. v. Cnty. of San Diego*, 200 F.R.D. 628, 633
16 (S.D. Cal. 2001) (citing this legal standard and declining to conduct an *in camera*
17 review). As the Supreme Court has observed, “[a] blanket rule allowing *in camera*
18 review as a tool for determining [privilege issues] . . . would place the policy of
19 protecting open and legitimate disclosure between attorneys and clients at undue
20 risk,” would raise due process concerns, and would place undue burdens on district
21 courts. *United States v. Zolin*, 491 U.S. 554, 571 (1989).¹³

22
23 ¹³ However, should the court for some reason determine that some of the documents listed
24 on Defendant’s privilege log may not be protected by the attorney-client privilege and/or
25 the work product doctrine, the court should first review these documents *in camera* before
26 ordering any disclosure of the documents. *Cf. In re Grand Jury Proceedings #5*, 401 F.3d
27 247, 255 (4th Cir. 2005) (court abused its discretion in ordering disclosure of documents
28 under crime-fraud exception without reviewing documents or detailed summaries *in*
camera); *Procter & Gamble Co. v. Haugen*, 427 F.3d 727, 744 (10th Cir. 2005)
(suggesting that a district court should review documents *in camera* for privilege before
(footnote continued)

1 **V. CLOSING STATEMENTS**

2 **A. Plaintiffs' Conclusion**

3 For the reasons described herein, Defendants have waived the privileges
4 claimed in the documents listed in Defendants' Privilege Log. Therefore, Plaintiffs
5 seek an Order of this Court: (i) pursuant to Rule 37, compelling Defendants to
6 produce all documents improperly withheld and identified in its deficient privilege
7 log either on the basis of attorney-client privilege or attorney work product doctrine;
8 or (ii) for relief from the June 27, 2014, discovery deadline so the Court may
9 conduct an *in camera* review and inspection of the purportedly privileged
10 documents to rule on the Motion.

11 **B. Defendants' Conclusion**

12 Warner/Chappell respectfully requests the Court deny Plaintiffs' Motion in its
13 entirety. Plaintiffs' arguments that Warner/Chappell delayed unreasonably in
14 producing its privilege log, and produced a log that was insufficiently detailed, are
15 supported by neither the facts nor law. Plaintiffs' contention that Warner/Chappell
16 or its predecessors waived privilege by sharing certain communications with third
17 parties also fails. Most of the documents at issue simply were not shared with third
18 parties, and the rest involved communications with parties who shared common
19 legal interests with Warner/Chappell (or its predecessors) and/or were
20 Warner/Chappell's (or its predecessors') agents or representatives.

21 **IT IS SO STIPULATED.**

22 Dated: June 4, 2014

**WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP**

23 Bv: /s/Betsy C. Manifold
24 BETSTY C. MANIFOLD

25 FRANCIS M. GREGOREK
gregorek@whafh.com
26 BETSY C. MANIFOLD

27 _____
28 ordering them produced); *Ideal Elec.*, 230 F.R.D. at 608 (*in camera* review is an
"acceptable means" to determine whether privilege covers documents, if necessary).

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manifold@whafh.com
RACHELE R. RICKERT
rickert@whafh.com
MARISA C. LIVESAY
livesay@whafh.com
750 B Street, Suite 2770
San Diego, CA 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599

**WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP**

MARK C. RIFKIN (pro hac vice)
rifkin@whafh.com
JANINE POLLACK (pro hac vice)
pollack@whafh.com
BETH A. LANDES (pro hac vice)
landes@whafh.com
GITI BAGHBAN (284037)
baghban@whafh.com
270 Madison Avenue
New York, NY 10016
Telephone: 212/545-4600
Facsimile: 212-545-4753

Interim Lead Counsel for Plaintiffs

RANDALL S. NEWMAN PC
RANDALL S. NEWMAN (190547)
rsn@randallnewman.net
37 Wall Street, Penthouse D
New York, NY 10005
Telephone: 212/797-3737

**HUNT ORTMANN PALFFY NIEVES
DARLING & MAH, INC.**

ALISON C. GIBBS (257526)
gibbs@huntortmann.com
OMEL A. NIEVES (134444)
nieves@nieves-law.com
KATHLYNN E. SMITH (234541)
smith@huntortmann.com
301 North Lake Avenue, 7th Floor
Pasadena, CA 91101
Telephone: 626/440-5200
Facsimile: 626/796-0107

**DONAHUE GALLAGHER
WOODS LLP**

WILLIAM R. HILL (114954)
rock@donahue.com
ANDREW S. MACKAY (197074)
andrew@donahue.com
DANIEL J. SCHACHT (259717)
daniel@donahue.com

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1999 Harrison Street, 25th Floor
Oakland, CA 94612-3520
Telephone: 510/451-0544
Facsimile: 510/832-1486

**GLANCY BINKOW &
GOLDBERG LLP**
LIONEL Z. GLANCY (134180)
lglancy@glancylaw.com
MARC L. GODINO (188669)
mgodino@glancylaw.com

1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: 310/201-9150
Facsimile: 310/201-9160

Attorneys for Plaintiffs

Dated: June 4, 2014

MUNGER TOLLES & OLSON LLP

Bv: /s/ Kelly M. Klaus
KELLY M. KLAUS

*Attorneys for Defendants Warner/Chappell
Music Inc. and Summy-Birchard, Inc.*