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Interim Lead Class Counsel for Plaintiffs and Proposed Class

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

GOOD MORNING TO YOU) Lead Case No. CV 13-04460-GHK (MRWx)
PRODUCTIONS CORP., *et al.*,)
) **DECLARATION OF BETSY C.**
Plaintiffs,) **MANIFOLD IN SUPPORT OF**
) **PLAINTIFF' NOTICE OF MOTION**
v.) **AND MOTION FOR ORDER: (i)**
) **COMPELLING DEFENDANTS TO**
WARNER/CHAPPELL MUSIC,) **PRODUCE WITHHELD DOCUMENTS;**
INC., *et al.*,) **OR (ii) RELIEF FROM DISCOVERY**
) **CUTOFF TO CONDUCT COURT**
Defendants.) **REVIEW *IN CAMERA* OF WITHHELD**
) **DOCUMENTS**
)
) Date: June 25, 2014
) Time: 9:30 A.M.
) Judge: Mag. Michael R. Wilner
) Room: H-9th Floor

1 I, Betsy C. Manifold, hereby declare as follows:

2 1. I am an attorney duly licensed to practice law in the States of California,
3 New York, and Wisconsin, and before this Court. I am a partner with the law firm
4 Wolf Haldenstein Adler Freeman & Herz LLP, interim lead class counsel for
5 plaintiffs and the class. I have personal knowledge of the following facts, and if
6 called upon to do so, I could and would competently testify as to them.

7 2. I submit this declaration in support of the motion by plaintiffs Good
8 Morning To You Productions Corp., Robert Siegel, Rupa Marya d/b/a Rupa & The
9 April Fishes, and Majar Productions, LLC's ("Plaintiffs'") for an order: (i)
10 compelling defendants Warner/Chappell Music, Inc. and Summy-Birchard, Inc. (the
11 "Defendants'"), to produce all withheld documents, or in the alternative (ii) relief
12 from the discovery cutoff for the Court to conduct *in camera* review of the withheld
13 documents.

14 **Background**

15 3. Plaintiffs commenced this now consolidated class action seeking, *inter*
16 *alia*, a declaration, pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-
17 2202, that Defendants: (i) do not own any valid copyright to the world's most
18 popular song, *Happy Birthday to You* (the "Song"); (ii) that any copyright
19 Defendants do own is limited in scope; and (iii) that the Song itself is in fact
20 dedicated to public use and in the public domain (hereafter "Claim One"). *See*
21 *generally* Pls.' Fourth Amend. Consol. Class Action Compl. (Dkt. 95) (the "FAC").

22 4. Pursuant to the Court's suggestion and the parties' subsequent
23 agreement, Claim One of the FAC was bifurcated from the other claims and the
24 scope of discovery is therefore limited to the issues raised by Claim One only. *See*
25 Scheduling Order (Dkt. 92) annexed to the Joint Stipulation as Exhibit B.

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1 **Plaintiffs' Discovery Served on Defendants**

2 5. On February 12, 2014, Plaintiffs personally served the following
3 discovery requests upon counsel for Defendants at their Los Angeles and San
4 Francisco offices:

- 5 (1) Plaintiff Good Morning To You Productions Corp.'s
6 Interrogatories to Defendant Warner/Chappell;
7 (2) Plaintiffs' First Set of Requests for Production of Documents to
8 Defendants ("Document Requests"); and
9 (3) Plaintiffs' First Set of Requests for Admission to Defendants.

10 6. Defendants' responses to the discovery requests were due on or before
11 March 14, 2014 (*see* Fed. R. Civ. P. 31, 33- 34), but Plaintiffs granted Defendants an
12 extension of time to respond to all pending discovery requests. As is relevant here,
13 Plaintiffs received Defendants' Objections and Responses to Plaintiffs' Document
14 Requests on March 21, 2014 ("Defendants' "Response") with the understanding that
15 Defendants would produce the responsive documents shortly thereafter.

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

22 8. After almost 30 *more* days had passed, on May 9, 2014, Defendants
23 supplemented their Response by producing to Plaintiffs another 805 pages of
24 documents, bearing production numbers WC001104-WC001908, which included for
25 the first time, redacted documents. Concurrently with its supplemental production,
26 Defendants also produced a redaction log and a 42-page privilege log purportedly
27 invoking attorney-client or work product protection for 157 discrete documents. A
28 copy of the privilege log is attached as Exhibit A to the Joint Stipulation.

1 **Meet and Confer Letters**

2 9. On May 12, 2014, Plaintiffs' counsel wrote to Defendants' counsel
3 describing the deficiencies in Defendants' privilege log and requesting that the
4 parties meet and confer about these issues during the conference of counsel
5 previously scheduled for May 12, 2014. However, Defendants' counsel refused to
6 engage in any discussions regarding the deficiencies in Defendants' privilege log
7 until after Plaintiffs produced their own privilege log, which Plaintiffs agreed to
8 provide on or before May 22, 2014. Thus, Defendants refused Plaintiffs' request to
9 discuss certain discrete items on May 12 (the third day after Plaintiff received the
10 privilege log).

11 10. Even after Plaintiffs delivered their privilege log on May 19, 2014,
12 Defendants' counsel *again* refused to meet and confer until May 22 – the 10th and
13 last possible day on which they could do so.

14 11. Plaintiffs supplemented their letter request with another letter, dated
15 May 13, 2014. That letter notified Defendants that Plaintiffs found that the vast
16 majority of the entries on the privilege log do not contain sufficient information for
17 Plaintiffs or the Court to assess whether the documents are, in fact, subject to the
18 claimed privilege.

19 12. Plaintiffs further supplemented their May 12th and May 13th letters
20 with a letter dated May 14, 2014, which asserted that Defendants had waived the
21 privilege by their failure to provide a timely privilege log.

22 **L.R. 37-1 PRE-FILING CONFERENCE OF COUNSEL – MAY 22, 2014**

23 13. On May 22, 2014, the parties held a teleconference to discuss the
24 deficiencies in Defendants' privilege log. *First*, Plaintiffs explained that the
25 privilege log was untimely and all the privileges asserted therein are therefore
26 waived. *Second*, Plaintiffs explained that any purported privilege as to certain of the
27 documents identified in the privilege log has been waived because the documents
28 have been disclosed to third-parties. *Third*, Plaintiffs explained that the privilege log
is deficient in its description of the documents for which privilege is claimed, which

1 deprives Plaintiffs and the Court of the ability to determine whether any of the
2 documents are, in fact, privileged, and the privilege is therefore waived or the
3 deficiency otherwise must be remedied. For example, (i) the privilege log fails to
4 identify the authors or recipients for many of the documents; (ii) the privilege log
5 does not identify the attorney or the client for many (if not most) of the documents;
6 (iii) the phrase “relating to legal advice” used repeatedly in the privilege log is overly
7 vague and ambiguous, and (iv) the privilege log fails to identify everyone who may
8 have been shown the document in question or how they may relate to the Defendants
9 and give Defendants grounds to claim privilege. And *fourth*, Plaintiffs explained that
10 the privilege log failed to identify the specific document request(s) to which any of
11 the purportedly privileged documents relate.

12 14. Defendants disagreed that their privilege log was untimely and
13 disagreed that they waived any privilege as a result of the allegedly untimely log.
14 Defendants agreed to review only the purportedly privileged documents specifically
15 listed by number in the letter from Plaintiffs’ counsel on May 12, 2014, to see if
16 more non-privileged information can be provided, in which event Defendants will
17 supplement the log. Defendants also agreed to consider identifying the attorney and
18 client for documents as to which the attorney-client privilege is claimed, but only
19 with respect to the “historical communications.” When asked whether they would
20 identify everyone who has seen, or received the substance, of the withheld
21 documents, Defendants said they would not be able to do so.

22 **Delay in Privilege Log is Prejudicial**

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

