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

11  
 12 GOOD MORNING TO YOU  
 PRODUCTIONS CORP., *et al.*,  
 13  
 14 Plaintiffs,

15 v.

16  
 17 WARNER/CHAPPELL MUSIC,  
 INC., *et al.*  
 18  
 19 Defendants.

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

) **PLAINTIFFS' *EX PARTE***  
 ) **APPLICATION TO HAVE**  
 ) **MOTION TO COMPEL HEARD**  
 ) **AFTER DISCOVERY CUTOFF**  
 ) **DATE**

) Judge: Hon. George H. King, Chief Judge  
 ) Courtroom: 650

) Fact Discovery Cutoff: July 11, 2014  
 ) Expert Reports: July 25, 2014  
 ) Rebuttal Expert Reports: August 25, 2014  
 ) Expert Discovery Cutoff: Sept. 26, 2014  
 ) L/D File Jt. MSJ: November 14, 2014  
 ) Pretrial Conference: N/A  
 ) Trial: N/A

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1 **I. INTRODUCTION**

2 Plaintiffs make this *ex parte* application for an extension of the current fact  
3 discovery cut-off deadline of July 11, 2014. The extension is warranted in order to  
4 permit Plaintiffs' motion under Fed. R. Civ. P. 26(b)(5)(B) for an order: (i)  
5 overruling the claim of privilege by defendants Warner/Chappell Music, Inc. and  
6 Summy-Birchard, Inc. ("Defendants"), to certain documents produced by non-party  
7 American Society of Composers, Authors and Publishers ("ASCAP"), or, in the  
8 alternative, permitting a Rule 30(b)(6) deposition to determine the factual basis for  
9 the claimed privilege to be fully briefed and heard by Magistrate Judge Michael R.  
10 Wilner ("the Motion").

11 The Court initially set the fact discovery deadline for June 27, 2014. (Dkt 92).  
12 On June 9, 2014, the fact discovery deadline was extended by Magistrate Judge  
13 Wilner, in consultation with this Court, and at the request of both parties, to July 11,  
14 2014 in order to successfully resolve an outstanding discovery dispute relating to  
15 Defendants' privilege log. Plaintiffs have made every effort to complete discovery  
16 prior to July 11, 2014 and to resolve this narrow, but important, privilege issue.  
17 However, despite Plaintiffs' diligence, Defendants have manufactured unnecessary  
18 obstacles in order for the discovery window to close without the necessary resolution  
19 of this remaining discovery dispute.

20 As to the Motion, the pre-filing conference of counsel has already occurred and  
21 Plaintiffs, prior to the filing of this *ex parte* application, provided Defendants'  
22 counsel with Plaintiffs' portion of Local Rule 37-2.2 Joint Stipulation and noticed the  
23 Motion for July 30, 2014, the first available date under the Local Rules. A redacted  
24 copy of Plaintiffs' section of the Local Rule 37-2.3 Joint Stipulation (without the  
25 supporting declarations) is attached as Exhibit 1 to the Declaration of Betsy C  
26 Manifold provided in support of this *ex parte* application. Plaintiffs do not seek to  
27 litigate the merits of their Motion here but simply to inform the Court of their

1 significance, the diligence with which the discovery was sought, and the need for a  
2 decision on the merits. Absent this relief, under Local Rule 37-2, the Joint  
3 Stipulation and Supplemental Memorandum process cannot be fully completed and  
4 the motion heard prior to the discovery cut off. Plaintiffs are not at fault in the need  
5 for this *ex parte* relief and good cause exists for an extension of the discovery cut-off  
6 deadline for this limited purpose.

7 **II. CONTACT INFORMATION FOR OPPOSING COUNSEL**

8 Pursuant to Local Rule 7-19, Plaintiffs provide the following contact information  
9 for opposing counsel:

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1 Pursuant to Local Rule 7-19.1, on July 2, 2014, at 9:27 A.M., Plaintiffs informed  
2 counsel for Defendants (Adam Kaplan) that they intended to file this application on  
3 July 3, 2014. By email dated July 2, 2014, Defendants advised that they intend to file a  
4 written response, and then Plaintiffs' served a copy of this *ex parte* application and  
5 supporting papers electronically on Defendants' counsel prior to filing. See Declaration  
6 of Betsy C. Manifold ("Manifold Decl."), ¶ 3. No hearing date is requested, but, if the  
7 Court determines that a hearing would be helpful, Plaintiffs could appear at any time  
8 convenient for the Court.

### 9 **III. LEGAL STANDARD**

10 An application for *ex parte* relief is granted when (1) the moving party would be  
11 "irreparably prejudiced if the underlying motion is heard according to regular noticed  
12 motion procedures" and (2) the moving party is without fault in creating the situation  
13 requiring *ex parte* relief. *Mission Power Engineering Co. v. Continental Casualty Co.*,  
14 883 F. Supp. 488, 492 (C.D. Cal. 1995).

15 A pre-trial scheduling order may be modified "upon a showing of good cause."  
16 Fed. R. Civ. P. 16(b)(4); *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080,  
17 1087 (9th Cir. 2002). Good cause is shown if the schedule "cannot reasonably be met  
18 despite the diligence of the party seeking the extension." *Photomedex, Inc. v. Irwin*, No.  
19 04-CV-0024, 2007 U.S. Dist. LEXIS 56774, at \*4.

20 Plaintiffs meet the requirements both for *ex parte* relief and for the underlying  
21 request to permit its motion to be heard after the cutoff, and therefore respectfully  
22 request that the Court grant this application.

### 23 **IV. PLAINTIFFS ACTED DILIGENTLY IN BRINGING ITS MOTION TO** 24 **COMPEL, WHICH HAS BEEN PROVIDED TO DEFENDANTS** 25 **UNDER LOCAL RULE 37-2.**

26 This narrow discovery dispute (Defendants' belated claim of privilege over  
27 certain ASCAP documents) is important and the discovery at issue was sought and  
28 received by Plaintiffs from non-party ASCAP, without any claim of privilege by

1 Defendants, on a timely basis, well before the original discovery cut-off of June 27,  
2 2014. Defendants first asserted a claim of privilege in late May of 2014, some three  
3 weeks after the initial production of documents by ASCAP. Thereafter, Plaintiffs  
4 acted promptly and diligently to resolve the disputed claim of privilege with both  
5 Defendants and ASCAP but the delay in resolving this dispute resulted from both  
6 ASCAPs' and the Defendants' failure to cooperate in this process.

7 **A. The Discovery Sought to Be Compelled is Important and Was**  
8 **Properly and Promptly Served During the Discovery Period**

9 Plaintiffs served a document subpoena on ASCAP on March 28, 2014. Before  
10 producing any responsive documents, Plaintiffs' counsel spoke with Richard H.  
11 Reimer, Esquire, ASCAP's Senior Vice President – Legal Services, and learned that  
12 ASCAP was sending approximately 500 pages of documents to Plaintiffs (the  
13 “ASCAP Documents”). Plaintiffs received the ASCAP Documents on May 9, 2014,  
14 all marked “Confidential,” as did Defendants.<sup>1</sup> Manifold Decl., ¶¶ 7 and 8. One  
15 week after receiving the ASCAP Documents, on May 16, 2014, Plaintiffs' counsel  
16 asked ASCAP's counsel, Mr. Reimer, to withdraw the “Confidential” designation for  
17 the ASCAP Documents and was advised that Mr. Reimer would need to speak with  
18 the Defendants before agreeing to the request, but that he did not oppose the  
19 request. *Id.*

20 Six days after that, Mr. Reimer advised Plaintiffs that Defendants claimed  
21 certain of the ASCAP Documents were privileged and that counsel for the  
22 Defendants would be contacting Plaintiffs directly to provide the details as to the  
23 basis for *their clients'* claim of privilege. Manifold Decl., ¶ 10. Two of the ASCAP  
24 Documents, letters from Richard Wincor, Esquire, of Coudert Brothers to David K.  
25 Sengstack, President of Summy-Birchard Company (“Summy-Birchard”),  
26 Warner/Chappell's predecessor-in-interest (collectively, the “Coudert Letters”),

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27 <sup>1</sup> All of the documents were marked “Confidential” pursuant to a stipulated protective  
28 order approved by this Court on May 5, 2014. *See* Dkts. 97 and 98.

1 discussed in detail the Defendants’ predecessors’ disputed ownership of the  
2 song. *Id.* As required under Fed. R. Civ. P. 26(b)(5)(B), copies of the Coudert  
3 Letters were sequestered by Plaintiffs’ counsel and will be submitted to the  
4 Magistrate Judge under seal for a determination of Defendants’ claim of  
5 privilege. Manifold Decl., ¶ 11; *see also* Fed. R. Civ. P. 26(b)(5)(B) (“After being  
6 notified, a party . . . may promptly present the information to the court under seal for  
7 a determination of the claim.”). To date, none of the ASCAP Documents appeared  
8 on the privilege logs produced by Defendants. *Id.*

9 **B. Plaintiffs Diligently Attempted to Meet and Confer with**  
10 **Defendants and To Create a Factual Record with Regard to**  
11 **the Defendants’ Claim of Privilege**

12 After receiving Mr. Reimer’s May 22nd letter, Plaintiffs’ counsel exchanged  
13 correspondence and participated in a series of telephone calls with Defendants’  
14 counsel regarding their belated claim of privilege. Manifold Decl., ¶ 12. The parties  
15 vigorously dispute whether any of the ASCAP Documents, the Coudert Letters in  
16 particular, are privileged, in light of the fact that the ASCAP Documents were in the  
17 hands of a third-party (ASCAP) with whom Defendants share no common legal  
18 interest, and under circumstances plainly indicating that Defendants’ purported  
19 privilege in the ASCAP Documents, if any, has been waived. Whether the ASCAP  
20 Documents are privileged depends, among other things, upon the nature of the  
21 relationship between ASCAP and Summy-Birchard Co. (the Defendants’  
22 predecessor-in-interest), their respective interests (if any) in the Song’s copyright,  
23 their understanding (if any) regarding the documents, the reason(s) why the  
24 documents were created, the reason(s) why Summy-Birchard Co. sent the documents  
25 to ASCAP, and the circumstances under which ASCAP produced the ASCAP  
26 Documents to Plaintiffs.

27 To establish facts the Court may deem necessary to determine whether any of  
28 the ASCAP Documents are privileged, on May 22, 2014, Plaintiffs noticed the

1 deposition of Defendants pursuant to Fed. R. Civ. P. 30(b)(6) for the corporation's  
2 testimony about the extent of ASCAP's interest (if any) in the Song and the royalties  
3 it collects for public performances of the Song and whether ASCAP produced the  
4 documents knowingly and intentionally. Manifold Decl., ¶ 13. On May 27, 2014,  
5 Defendants opposed the Fed. R. Civ. P. 30(b)(6) deposition notice on  
6 various grounds and declined to produce a witness. Manifold Decl., ¶ 14. Plaintiffs  
7 also subpoenaed ASCAP under Fed. R. Civ. P. 45 and 30(b)(6) for the deposition of a  
8 representative of ASCAP most knowledgeable about the scope or validity of any  
9 copyright to the Song, disputes regarding the scope and validity of any copyright to  
10 the Song, the distribution of fees or royalties from the Song, the nature of the  
11 relationship between ASCAP and Summy-Birchard Co., the services provided by  
12 ASCAP to Summy-Birchard Co., and the circumstances surrounding ASCAP's  
13 production of the Documents to Plaintiffs pursuant to the document  
14 subpoena. Manifold Decl., ¶ 15. ASCAP first moved to quash the subpoena, but the  
15 parties resolved that dispute and ASCAP withdrew its motion to quash. Manifold  
16 Decl., ¶¶ 16 and 17. ASCAP's deposition will take place in New York on July 11,  
2014. *Id.* at ¶ 17.

17 Plaintiffs have moved to determine whether Defendants have any privilege in  
18 the documents in question, or whether Defendants (or their predecessors-in-interest)  
19 waived any privilege they may have had in the documents when they voluntarily  
20 produced the documents to a third-party, ASCAP, with whom they did not share any  
21 privilege. The Magistrate Judge may also determine that this privilege dispute can  
22 best be resolved upon a fully developed factual record (such as a deposition) and an  
23 extension of the discovery cut-off for this limited purpose is also warranted. *See*  
24 Manifold Decl., Ex. 1.

25 **C. The Motion Will Be Fully Briefed and Ready to Be Heard by**  
26 **Magistrate Judge Wilner on July 30, 2014**

27 Since Plaintiff's Motion cannot be filed and argued prior to the discovery cut-off,

1 the Magistrate Judge will likely consider the Motion to be untimely absent an  
2 appropriate extension of the discovery cut-off date to permit the motion to be heard and  
3 decided. Plaintiffs seek this *ex parte* relief so the motion may be heard on July 30, 2014  
4 and the relief therein granted or denied by the Magistrate Judge.

5 **D. Defendants Will Not Be Prejudiced By This Motion, and *Ex***  
6 ***Parte* Relief Is Necessary**

7 As set forth above, Plaintiffs acted diligently in serving its discovery requests  
8 and deposition notices, meeting and conferring with Defendants and ASCAP, and  
9 filing its motion to compel. *Ex parte* relief is required so that, if leave is granted, the  
10 motion may be heard by Judge Wilner on July 30, and so that any discovery ordered  
11 by Judge Wilner will be disclosed well in advance of the deadline for summary  
12 judgment motions.

13 There is no prejudice to Defendants in having this motion heard now. The  
14 information sought is very limited in scope, and has already been produced by  
15 ASCAP.

16 **V. CONCLUSION**

17 For the reasons stated above, Plaintiffs respectfully submit that this *Ex Parte*  
18 Application should be granted, and requests that Plaintiffs be permitted to have its  
19 motion to compel fully briefed and heard by Magistrate Judge Wilner.

20 Respectfully submitted,

21 Dated: July 3, 2014

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