

# EXHIBIT 1

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10 **UNITED STATES DISTRICT COURT**

11 **CENTRAL DISTRICT OF CALIFORNIA**

12 **WESTERN DIVISION**

13 GOOD MORNING TO YOU  
PRODUCTIONS CORP., *et al.*,

14 Plaintiffs,

15 v.

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

18 Defendants.

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

) **[REDACTED] NOTICE OF MOTION  
) AND MOTION FOR ORDER: (i)  
) OVERRULING DEFENDANTS'  
) CLAIM OF PRIVILEGE IN  
) DOCUMENTS PRODUCED BY A  
) NON-PARTY, OR PERMITTING A  
) SECOND RULE 30(B)(6)  
) DEPOSITION TO DETERMINE THE  
) FACTUAL BASIS FOR THAT  
) CLAIM; (ii) GRANTING RELIEF  
) FROM THE DISCOVERY CUT-OFF  
) TO CONDUCT THAT DEPOSITION;  
) (iii); AND [PROPOSED] ORDER  
) THEREON**

) Date: July 30, 2014

) Time: 9:30 A.M.

) Judge: Hon. Michael R. Wilner

) Room: H-9th Floor

) Disc. Cutoff: July 11, 2014

) Pretrial Conf.: N/A

) Trial Date: N/A

) L/D File Jt. MSJ: 11/14/14

1           **TO THE COURT, ALL PARTIES, AND THEIR RESPECTIVE**  
2 **ATTORNEYS OF RECORD:**

3           **PLEASE TAKE NOTICE** that on July 30, 2014, at 9:30 a.m., or as soon  
4 thereafter as this matter may be heard before the Honorable Michael R. Wilner in  
5 Courtroom H-9th Floor of this Court, located at 111 N. Spring Street, Los Angeles,  
6 California, plaintiffs Good Morning To You Productions Corp., Robert Siegel, Rupa  
7 Marya d/b/a Rupa & The April Fishes, and Majar Productions, LLC (“Plaintiffs”),  
8 will, and hereby do, move this Court pursuant to Federal Rule of Civil Procedure  
9 25(b)(5)(B) for an order: (i) overruling the claim of privilege by defendants  
10 Warner/Chappell Music, Inc. and Summy-Birchard, Inc. (“Defendants”), to certain  
11 documents produced by non-party American Society of Composers, Authors and  
12 Publishers , or permitting a Rule 30(b)(6) deposition to determine the factual basis  
13 for that claim of privilege; and (ii) granting relief from the fact discovery deadline of  
14 July 11, 2014, to permit the relief sought by this Motion.

15           This Motion is based upon this notice of motion, the parties’ Local Rule 37-2  
16 Joint Stipulation, the declarations of Mark C. Rifkin and Betsy C. Manifold in  
17 Support of Plaintiffs’ Motion, all pleadings, discovery, memorandum of points and  
18 authorities, supplemental memoranda of law, oral or documentary evidence  
19 proffered in support thereof, arguments of counsel, and any other matters as the  
20 Court deems proper.

21           This Motion is made following the conference of counsel pursuant to Local  
22 Rule 37-1, which took place on June 16, 2014.

23 Dated: July \_\_, 2014

**WOLF HALDENSTEIN ADLER  
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By: \_\_\_\_\_  
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) Case No. CV 13-04460-GHK (MRWx)

) **[REDACTED] LOCAL RULE 37-2:**  
) **JOINT STIPULATION FOR ORDER:**  
) **(i) OVERRULING DEFENDANTS'**  
) **CLAIM OF PRIVILEGE IN**  
) **DOCUMENTS PRODUCED BY A**  
) **NON-PARTY, OR PERMITTING A**  
) **SECOND RULE 30(B)(6)**  
) **DEPOSITION TO DETERMINE THE**  
) **FACTUAL BASIS FOR THAT**  
) **CLAIM; (ii) GRANTING RELIEF**  
) **FROM THE DISCOVERY CUT-OFF**  
) **TO CONDUCT THAT DEPOSITION**

) Date: July 30, 2014

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**FEDERAL CASES**





1 to delay discovery, Defendants repeatedly raised baseless objections, confused the  
2 record, and manufactured obstacles in order for the initial discovery window to close  
3 without the necessary discovery sought.

4 As the Court is aware, the ownership and origin of the Song and the copyrights  
5 that Defendants claim in it are, at best, obscure. Despite more than a century of  
6 documented public performances, decades of disputed claims, and the Song's  
7 ubiquity, no court has ever determined whether Defendants (or any of their  
8 predecessors-in-interest) own any rights to the Song. Indeed, while the Song has  
9 been used and performed innumerable times over the past 80 years without  
10 Defendants' (or their predecessors') permission, no one has ever been sued for  
11 infringing any copyright to the Song. That uncertainty has been no accident. In fact,  
12 because Defendants and their predecessors-in-interest cannot prove they own the  
13 Song or the scope of the disputed copyrights in question, they have chosen instead to  
14 obfuscate the record for decades, relying upon empty threats of copyright  
15 infringement and the draconian penalties that such actions might impose, to  
16 intimidate Plaintiffs and countless others into paying for the right to use or perform a  
17 song that belongs to the public.

18 Defendants' obdurate conduct during discovery continues their customary  
19 effort to keep the historical record of their alleged ownership of any copyright to the  
20 Song and the scope of those copyrights shrouded in uncertainty. Citing no statute,  
21 rule, case law, or any other authority, Defendants opposed the deposition of their  
22 long-term employee Jeremy Blietz on the basis of an entirely *unrelated* privilege  
23 dispute despite their Rule 30(b)(6) deponent identified him as the primary source of  
24 his information in preparing for the deposition.<sup>1</sup> That privilege dispute, which is the  
25

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26  
27 <sup>1</sup> On June 30, 2014, Defendants finally consented to produce Mr. Blietz for his  
28 deposition, which is scheduled to take place on July 10, 2014, in Los Angeles, California.  
Manifold Decl., Ex. (attaching email from Defendants' counsel dated June 30, 2014).

1 subject of this Motion, concerns documents produced by a non-party, the American  
2 Society of Composers, Authors and Publishers (“ASCAP”), a performance rights  
3 society that grants non-exclusive blanket licenses for public performances of music  
4 on behalf of more than 500,000 different composers, authors, and publishers.

5 Plaintiffs served a document subpoena on ASCAP on March 28, 2014. Before  
6 producing any responsive documents, Richard H. Reimer, Esquire, ASCAP’s Senior  
7 Vice President – Legal Services, spoke by telephone with Mark C. Rifkin, Esquire,  
8 one of Plaintiffs’ counsel, to advise him that ASCAP was sending approximately 500  
9 pages of documents to Plaintiffs. Confidential Decl. of Mark C. Rifkin in Support of  
10 Pls.’ Mot. (“Rifkin Decl.”) at 3, ¶ 12. During the course of that call, Mr. Reimer told  
11 Mr. Rifkin that ASCAP was producing two documents in particular that provided  
12 detailed a analysis of the disputed ownership of the copyright that Plaintiffs would  
13 find very interesting. *Id.* Mr. Reimer’s comments made it clear that: (i) ASCAP  
14 intended to produce the documents to Plaintiffs; (ii) ASCAP did not regard them as  
15 privileged or confidential; and (iii) ASCAP wanted to be sure that Plaintiffs saw the  
16 particular documents in question.

17 Rule 26(b)(5)(B) also permits the receiving party to “present the information to  
18 the court under seal for a determination of the claim.” Fed. R. Civ. P. 26(b)(5)(B).  
19 *See, e.g., Larsen v. Coldwell Banker Real Estate Corp.*, No. 10-00401, 2012 U.S.  
20 Dist. LEXIS 12901, at \* 1 (C.D. Cal. Feb. 2, 2012) (after plaintiffs moved under Rule  
21 26(b)(5)(B), Court conducted *in camera* review of documents in which defendants  
22 asserted privilege). That is the purpose of this motion and Plaintiffs have accordingly  
23 submitted the ASCAP Documents under seal for such a determination. . Until the  
24 Court determines whether Defendants have any privilege in the ASCAP Documents,  
25 the documents remain sequestered and may not be used for any purpose, including in  
26 this litigation.

27 Plaintiffs believe the privilege dispute can best be resolved upon a fully  
28 developed factual record. To establish facts the Court may deem necessary to

1 determine whether any of the ASCAP Documents are privileged, Plaintiffs again  
2 noticed the deposition of Defendants pursuant to Rule 30(b)(6) for the corporation's  
3 testimony about the extent of ASCAP's interest (if any) in the Song and the royalties  
4 it collects for public performances of the Song and whether ASCAP produced the  
5 documents knowingly and intentionally.

6 **II. PLAINTIFFS' POSITION**

7 *Relevant Background Relating to Discovery in the Litigation*  
8

9 Historically, and in the early part of this case, Defendants (and their  
10 predecessors) have based their claim of copyright ownership only upon a single  
11 copyright, Reg. No. E51990, registered on December 6, 1935. That copyright  
12 covered a specific piano arrangement composed as a work for hire by Preston Ware  
13 Orem, a director and Vice President of the Clayton F. Summy Co. (one of  
14 Defendants' predecessors-in-interest) ("Summy Co."). According to the copyright  
15 records, the work also included "text." However, the copyright records do *not*  
16 indicate what "text" was included in the work or who wrote it, and there is no known  
17 copy of the work deposited with that registration. [REDACTED]

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 In any event, copyright Reg. No. E51990 was renewed by Summy Birchard  
24 Co. (another one of Defendants' predecessors-in-interest) ("Summy Birchard") on  
25 December 6, 1962, under Reg. No. R306186. Whatever work the original copyright

26 \_\_\_\_\_  
27 <sup>2</sup> Plaintiffs have filed an Application to File Under Seal as required by Rule  
28 26(b)(5)(B) and the Protective Order (Dkt. 98) pursuant to the Court's electronic filing  
protocols for the Pilot Program.

1 may have covered, that copyright (No. E51990) expired in 1963. According to the  
2 1962 Catalog of Copyright Entries (“Copyright Catalog”), the official publication of  
3 copyright registrations and renewals published by the United States Office of  
4 Copyright, the renewal copyright issued under No. R306186, is limited to Dr. Orem’s  
5 piano arrangement only, not any “text.” Declaration of Betsy C. Manifold in Support  
6 of Pls.’ Mot. (“Manifold Decl.”), Ex. 12 (a true and correct copy excerpts from the  
7 1962 U.S. Copyright Office Catalog of Copyright Entries, Musical Compositions).

8         Recently, because Defendants cannot prove the scope of either Reg. No.  
9 E51990 or Reg. No. R306186, they have begun to rely in this action upon a second  
10 copyright, Reg. No. E51988, also registered on December 6, 1935. That second  
11 copyright covered a different piano arrangement composed by R.R. Forman, another  
12 employee for hire of Summy Co. This work’s copyright claim also included “revised  
13 text.” A deposit copy does exist for the work registered under No. E51988, which  
14 includes as the “revised text,” an obscure second verse for the Song, apparently  
15 written by Mrs. Forman.

16         Copyright Reg. No. E51988 was also renewed on December 6, 1962, under  
17 Reg. No. R306185. And, like copyright Reg. No. E51990, the original copyright  
18 Reg. No. E51988 also expired in 1963. According to the 1962 Copyright Catalog,  
19 renewal copyright Reg. No. R306185 was claimed by Summy-Birchard Music, Inc.  
20 (by way of change of name from Summy Co.), for Mrs. Forman’s piano arrangement  
21 and the “revised text” she apparently wrote.

22         For example, as part of that effort, in response to a deposition notice issued by  
23 Plaintiffs under Federal Rule of Civil Procedure 30(b)(6) on April 23, 2014,  
24 subsequently amended on May 19, 2014 (Manifold Decl., Exs. 1 & 2), Defendants  
25 designated Mr. Thomas Marcotullio, Esquire, a mergers and acquisitions lawyer  
26 employed by Warner Music Group – not a party to this action; rather, a parent of  
27 defendant Warner/Chappell. On June 3, 2014, Defendants’ produced Mr.  
28 Marcotullio for deposition. [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
4 [REDACTED]  
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27 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
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1 [REDACTED] Plainly, Mr. Blietz has first-hand knowledge of  
2 relevant facts or where those facts might be obtained.

3 Defendants should have produced Mr. Blietz to testify as their Rule 30(b)(6)  
4 designee, if not in place of Mr. Marcotullio, then certainly in addition to him.  
5 Nonetheless, after Plaintiffs learned of Mr. Blietz’s identity, on June 5, 2014, they  
6 noticed his deposition under Rule 30(b)(1). For the next several weeks, Defendants  
7 refused to produce Mr. Blietz, even though he is a knowledgeable percipient witness,  
8 conjuring a fictitious and unsupportable objection to the deposition.

9 ASCAP Production of Documents Responsive to Plaintiffs’ Subpoena

10 Plaintiffs received ASCAP’s documents on May 9, 2014, as did Defendants.  
11 *Id. at 3, ¶ 13.* All of the documents were marked “Confidential” pursuant to a  
12 stipulated protective order approved by this Court on May 5, 2014. *See* Dkts. 97 and  
13 98. As Mr. Reimer had indicated to Mr. Rifkin, two of the documents, letters from  
14 Richard Wincor, Esquire, of Coudert Brothers to David K. Sengstack, President of  
15 Summy-Birchard Company (“Summy-Birchard”), Warner/Chappell’s predecessor-in-  
16 interest (collectively, the “Coudert Letters”), discussed in detail the Defendants’  
17 predecessors’ disputed ownership of the song. Rifkin Decl. at 3-4, ¶¶ 14-16. As  
18 required under Federal Rule of Civil Procedure 26(b)(5)(B), copies of the Coudert  
19 Letters are attached to the Rifkin Declaration as Exhibits B and C are filed  
20 concurrently under seal for a determination of Defendants’ claim of privilege.<sup>3</sup> *See*  
21 Fed. R. Civ. P. 26(b)(5)(B) (“After being notified, a party . . . may promptly present  
22 the information to the court under seal for a determination of the claim.”) Because  
23 this Motion discusses the Coudert Letters in detail, Plaintiffs also have sought  
24 permission to file an unredacted version of this Motion under seal. *See* n.1, *supra*.

25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 <sup>3</sup> *See* n.1, *supra*.

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED] [REDACTED]  
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25 [REDACTED] [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]



1 One week after receiving the documents from ASCAP, on May 16, 2014, Mr.  
2 Rifkin and Randall S. Newman, Esquire, one of Plaintiffs’ co-counsel, spoke by  
3 telephone with Mr. Reimer to ask ASCAP to withdraw the “Confidential”  
4 designation for the Coudert Letters. Rifkin Decl. at 3, ¶ 13. After a short  
5 conversation, Mr. Reimer said he would need to speak with the Defendants before  
6 agreeing to the request, but that he did not oppose withdrawing the “Confidential”  
7 designation for the Coudert Letters. Rifkin Decl. at 3-4, ¶¶ 14- 15.

8 Six days after that, Mr. Reimer advised Mr. Rifkin that Defendants claimed  
9 certain of the documents produced by ASCAP (the “ASCAP Documents”) were  
10 privileged and that “counsel for the defendants” would be contacting Mr. Rifkin  
11 directly “to provide the details as to the basis for *their clients*’ claim of privilege.”  
12 *Id.* at 6, ¶ 24 (emphasis added). Despite Defendants’ belated claim of privilege –  
13 made through ASCAP – none of the ASCAP Documents appeared on the privilege  
14 log produced by Defendants on May 9, 2014, or on Defendants’ amended privilege  
15 logs produced on June 2, 2014 and June 23, 2014. Manifold Decl., Ex. 7. As of July  
16 30, 2014, Defendants have not served a further amended privilege log to include any  
17 of the ASCAP Documents. *See id.*, ¶ 25; Manifold Decl. at 2, ¶ 11.

18 After receiving Mr. Reimer’s May 22nd letter, Plaintiffs’ counsel exchanged  
19 correspondence and participated in a series of telephone calls with Defendants’  
20 counsel regarding their belated claim of privilege. Rifkin Decl. at 6, ¶ 27. The  
21 parties vigorously dispute whether any of the ASCAP Documents, the Coudert  
22 Letters in particular, are privileged, in light of the fact that the ASCAP Documents  
23 were in the hands of a third-party (ASCAP) with whom Defendants share no  
24 common legal interest, and under circumstances plainly indicating that Defendants’  
25 purported privilege in the ASCAP Documents, if any, has been waived. Whether the  
26 ASCAP Documents are privileged depends, among other things, upon the nature of  
27 the relationship between ASCAP and Summy-Birchard Co. (the Defendants’  
28 predecessor-in-interest), their respective interests (if any) in the Song’s copyright,

1 their understanding (if any) regarding the documents, the reason(s) why the  
2 documents were created, the reason(s) why Summy-Birchard Co. sent the documents  
3 to ASCAP, and the circumstances under which ASCAP produced the ASCAP  
4 Documents to Plaintiffs.<sup>4</sup>

5 On May 27, 2014, Defendants opposed the Rule 30(b)(6) deposition notice  
6 pursuant to Rule 30(b)(6) on various grounds. Manifold Decl., Ex. 6. Among other  
7 objections, Defendants refused to “produce a witness to testify about any information  
8 protected by the attorney-client privilege, the attorney work product, or any other  
9 privilege or protection from disclosure.” *Id.* Defendants also objected to the  
10 deposition that it is purportedly “beyond the scope of discovery contemplated by the  
11 Federal Rules of Civil Procedure and/or by the Court’s Order regarding the scope of  
12 discovery in the first phase of this matter.” *Id.* Finally, Defendants objected to the  
13 deposition on the basis that it purportedly “not permitted by Rule 26(b)(5)(B).” *See*  
14 *id.*

15 Plaintiffs also subpoenaed ASCAP under Rules 45 and 30(b)(6) for the  
16 deposition of a representative of ASCAP most knowledgeable about the scope or  
17 validity of any copyright to the Song, disputes regarding the scope and validity of any  
18 copyright to the Song, the distribution of fees or royalties from the Song, the nature  
19 of the relationship between ASCAP and Summy-Birchard Co., the services provided  
20 by ASCAP to Summy-Birchard Co., and the circumstances surrounding ASCAP’s  
21 production of the Documents to Plaintiffs pursuant to the document subpoena.  
22 ASCAP first moved to quash the subpoena, but the parties resolved that dispute and  
23 ASCAP withdrew its motion to quash. *See* Manifold Decl., Ex. 8 (Motion), Ex. 9  
24 (Reimer Declaration), and Ex. 10 (Letter withdrawing Motion). ASCAP’s deposition  
25 will take place in New York on July 11, 2014. *Id.* at 3, ¶ 13.

---

26  
27 <sup>4</sup> Recently, ASCAP admitted in a filing in the Southern District of New York that Mr.  
28 Reimer knowingly and intentionally produced the ASCAP Documents to Plaintiffs. *See*  
Manifold Decl., Ex. 11 (attaching ASCAP’s Reply Memo. Mot. Quash).

1           **A. Defendants’ Privilege Claims in the ASCAP Documents Are Wholly**  
2                           **Unsupported**

3           Under Rule 26(b)(5)(B), a party producing discovery may notify the receiving  
4 party that the discovery is subject to a claim of privilege. After Plaintiffs asked  
5 ASCAP to withdraw the “Confidential” designation from the ASCAP Documents,  
6 ASCAP notified Plaintiffs that Defendants – not ASCAP – claimed a privilege in the  
7 documents. As a result, Plaintiffs were required by Rule 26(b)(5)(B) to “return,  
8 sequester, or destroy the specified information and any copies it has” and “must not  
9 use or disclose the information until the claim is resolved.” Fed. R. Civ. P.  
10 26(b)(5)(B). Plaintiffs sequestered the ASCAP Documents to comply with Rule  
11 26(b)(5)(B), and promptly notified both ASCAP and Defendants that they had done  
12 so.

13                           **1. Defendants Waived Any Privilege in the ASCAP**  
14   **Documents by Voluntarily Sharing Them With ASCAP**

15           As a general matter, the attorney-client privilege is not absolute or permanent.  
16 It may be waived by the client at any time. Significantly, the burden of proving that  
17 the attorney-client privilege applies is on the party asserting it. The party asserting  
18 the attorney-client privilege must “prove that it has not waived the privilege” to carry  
19 its burden. *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25  
20 (9th Cir. 1981) (*citing U.S. v. Landof*, 591 F.2d 36, 38 (9th Cir. 1978) (quotation  
21 omitted)).

22           There is an express waiver of the attorney-client privilege “when a party  
23 discloses privileged information to a third party who is not bound by the privilege, or  
24 otherwise shows disregard for the privilege by making the information public.”  
25 *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003) (citations omitted).

26           That is exactly what happened here: Defendants (or their successors-in-  
27 interest) expressly waived any privilege they may have had in the ASCAP  
28 Documents. [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]

18 Simply stated, Summy-Birchard expressly waived any privilege it may have  
19 had in the Coudert Letters when Ms. Sengstack gratuitously sent courtesy copies of  
20 them to Mr. Korman in 1979.

21 **2. Defendants and ASCAP Do Not Share Any Common**  
22 **Interest That Would Preserve Any Privilege Defendants**  
23 **Had in the ASCAP Documents**

24 During the meet-and-confer process, Defendants asserted that any privilege  
25 they had was not waived because they (or their predecessors-in-interest) share a  
26 “common interest” with ASCAP.

27 “The common interest privilege, or joint defense privilege, is an extension of  
28 the attorney client privilege.” *In re Fresh & Process Potatoes Antitrust Litig.*, No.

1 10-md-2186, 2014 U.S. Dist. LEXIS 74936, at \*28-29 (D. Idaho May 30, 2014)  
2 (“*Potatoes Antitrust Litig.*”) (citing *U.S. v. Gonzalez*, 669 F.3d 974, 978 (9th Cir.  
3 2012) (“*Gonzalez*”)) . The common interest privilege allows “persons who share a  
4 common interest in litigation [to] be able to communicate with their respective  
5 attorneys and with each other to more effectively prosecute or defend their claims.”  
6 *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990). Although the  
7 privilege is not limited to situations in which litigation has commenced, there must at  
8 least be some ***common legal effort in furtherance of anticipated litigation*** for the  
9 privilege to apply. See *Potatoes Antitrust Litig.*, *supra*, at \*29; *In re Grand Jury*  
10 *Subpoenas*, 902 F.2d at 249; *U.S. v. Schwimmer*, 892 F.2d 237, 244 (2nd Cir. 1989);  
11 *Gonzalez*, 669 F.3d at 980; *MGA Entm’t, LLC v. Nat’l Prods. LTD.*, No. 10-07083,  
12 2012 U.S. Dist. LEXIS 108408, at \*15 (C.D. Cal. Aug. 2, 2012) (citing *Metro*  
13 *Wastewater Reclamation v. Continental Cas.*, 142 F.R.D. 471, 476 (D. Colo. 1992))  
14 (same); *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007)  
15 (same).

16 Even when a common legal interest is established, the doctrine only protects  
17 communications made in furtherance of that shared legal interest. See, e.g., *FSP*  
18 *Stallion 1, LLC v. Luce*, No. 08-01155, 2010 U.S. Dist. LEXIS 110617, at \*59 (“the  
19 common legal interest exception requires that the communication at issue be  
20 designed to further that legal effort.” (citing *Nidec*, 249 F.R.D. at 579); *MGA Entm’t*,  
21 2012 U.S. Dist. LEXIS 108408, at \*15 (citing *Metro Wastewater Reclamation*, at  
22 476).

23 This narrow extension of the attorney-client privilege was extremely well  
24 summarized in a very recent decision in *Potatoes Antitrust Litig.*, *supra*. Relying  
25 upon 9th Circuit and Northern District of California precedent, the Honorable Candy  
26 W. Dale explained the common interest privilege in a thorough and well-reasoned  
27 decision:  
28

1 The common interest privilege, or joint defense privilege, is an  
2 extension of the attorney client privilege. *U.S. v. Gonzalez*, 669  
3 F.3d 974, 978 (9th Cir. 2012). The privilege applies if “(1) the  
4 communication is made by separate parties in the course of a matter  
5 of common [legal] interest; (2) the communication is designed to  
6 further that effort; and (3) the privilege has not been waived.”  
7 *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D.Cal.  
8 2007).

9  
10 The rationale for the rule is to allow “persons who share a common  
11 interest in litigation [to] be able to communicate with their  
12 respective attorneys and with each other to more effectively  
13 prosecute or defend their claims.” *In re Grand Jury Subpoenas*, 902  
14 F.2d 244, 249 (4th Cir. 1990). Although the privilege is not limited  
15 to situations in which litigation has commenced or is in progress,  
16 ***there must be some common legal effort in furtherance of***  
17 ***anticipated litigation.*** *In re Grand Jury Subpoenas*, 902 F.2d at  
18 249; *U.S. v. Schwimmer*, 892 F.2d 237 244 (2nd Cir. 1989);  
19 *Gonzalez*, 669 F.3d at 980; *Nidec Corp. v. Victor Co. of Japan*, 249  
20 F.R.D. 575, 578 (N.D.Cal. 2007).

21  
22 But the doctrine does not extend the privilege to communications  
23 about a joint business strategy that happens to include a concern  
24 about litigation. *FSP Stallion 1, LLC v. Luce*, 2010 U.S. Dist.  
25 LEXIS 110617, 2010 WL 3895914 \*18 (D. Nev. Sept. 30, 2010).  
26 In practice, the parties must demonstrate ***cooperation in***  
27 ***formulating a common legal strategy.*** *Id.* And, even if the parties  
28 do share a common legal interest, for the privilege to apply, the

1 communication at issue must be designed to further that legal  
2 effort. *Id.* “The fact that the parties may have been developing a  
3 business deal that included a desire to avoid litigation ‘does not  
4 transform their interest and enterprise into a legal, as opposed to a  
5 commercial matter.’” *Id.* (quoting *Bank of Am. v. Terra Nova Ins.*  
6 *Co., LLT*, 211 F.Supp.2d 493, 497 (S.D.N.Y. 2002).

7 *Potatoes Antitrust Litig.*, 2014 U.S. Dist. LEXIS 74936, at \*28-30 (emphases added).

8 Two important points emerge from Judge Dale’s excellent summary of the  
9 common interest privilege. *First*, the privilege is highly fact-dependent. These facts  
10 include not just the nature of the communication in question, but also the nature of  
11 the relationship between the parties sharing the communication, their respective  
12 interests in the subject-matter of the communication, the purpose of the  
13 communication, and the context in which the communication was shared.

14 *Second*, the privilege is very narrow. It applies only to communications made  
15 in the course of a matter of common legal – as opposed to business – interest. While  
16 that legal interest need not be actual litigation, some litigation must at least be  
17 anticipated. If that condition is met, the privilege protects only a communication that  
18 is designed to further that effort. Thus, for the privilege to apply there must be (i) a  
19 common legal effort; (ii) actual or anticipated litigation; and (iii) a communication in  
20 furtherance of that common legal effort. For the reasons that follow, none of those  
21 three requirements is met here.

22 Warner/Chappell also argues that the ASCAP Documents, and the Coudert  
23 Letters in particular, remained privileged even after they were sent voluntarily to a  
24 third-party, ASCAP, under the common interest privilege because ASCAP was its  
25 putative “agent” for the purpose of collecting royalties on the song *Happy Birthday to*  
26 *You*. However, according to a declaration from ASCAP’s Senior Vice President of  
27 Legal Services, Richard H. Reimer, Esquire, submitted in support of ASCAP’s  
28 motion to quash the deposition subpoena served upon it, “ASCAP is a voluntary

1 membership association that represents more than 500,000 composers, songwriters,  
2 lyricists and music publishers, and licenses on a non-exclusive basis the public  
3 performance rights in the musical works owned or administered by its members.”  
4 Manifold Decl., Ex. 9 (attaching Declaration of Richard H. Reimer) (hereafter  
5 referred to as the “Reimer Decl.”) at 3, ¶ 5. Warner/Chappell is but one of those  
6 500,000 members – many of whom have no interest (or even a competing interest) in  
7 the song *Happy Birthday to You* – and the Song itself is one of millions for which  
8 ASCAP collects royalties.

9 Most importantly, ASCAP has denied sharing any common interest with  
10 Warner/Chappell in the Song or in any royalties derived from it. As Mr. Reimer has  
11 stated, “ASCAP does not have any ownership interest in any of the musical works it  
12 licenses on behalf of its members” and it does not “have any interest in the fees or  
13 royalties it collects on behalf of its members.” Reimer Decl., ¶ 5. In light of these  
14 undisputed – and indisputable – facts, it is all but impossible to imagine that ASCAP  
15 shares any common legal interest with Warner/Chappell in the song *Happy Birthday*  
16 *to You*.

17 Leaving apart the fact that Warner/Chappell’s argument misconstrues its  
18 limited, non-exclusive relationship with ASCAP, Warner/Chappell’s agency  
19 argument was rejected in *Potatoes Antitrust Litig.*, and it should be rejected here for  
20 the exact same reasons. In *Potatoes Antitrust Litig.*, the defendants argued that  
21 Potandon was a “marketing agent in common” under the Capper-Volstead Act, which  
22 regulated how its relationship with the potato growers could be structured. Potandon  
23 argued there was no waiver of the privilege when it shared communications  
24 containing legal advice purportedly concerning “the parties’ common legal interest in  
25 structuring their entities and business relationships to comply” with the statute.

26 Judge Dale disagreed, holding the “mere fact that the parties were working  
27 together to achieve a common *commercial* goal cannot by itself result in an identity  
28 of interest between the parties.” 2014 U.S. Dist. LEXIS 73964, at \*31 (quoting



1 *Terra Nova*, 211 F. Supp. 2d at 497) (emphasis added). Judge Dale further  
2 explained: “There is no evidence of any concern regarding pending or threatened  
3 litigation raised during the time period of these communications. Even if there was a  
4 general consensus to avoid litigation by maintaining compliance with Capper-  
5 Volstead, “a business strategy which happens to include a concern about litigation is  
6 not a ground for invoking the common interest rule.” *Id.* at \*31-32 (quoting *In re*  
7 *FTC*, No. M18-304, 2001 U.S. Dist. LEXIS 5059, at \*13 (S.D.N.Y. Apr. 19, 2001)).

8 Judge Dale’s decision rejecting the common interest privilege applies with  
9 even greater force to the facts of this this case. Here, as in *Potatoes Antitrust Litig.*,  
10 Warner/Chappell argues that ASCAP was its agent for the purpose of collecting  
11 royalties for the Song and that the two companies shared a common interest in the  
12 Song or its copyright. Arguably, Potandon shared at least some interest with the  
13 potato growers to comply with the Act, which Judge Dale found was not a sufficient  
14 shared legal interest to warrant protection under the common interest privilege. Here,  
15 Warner/Chappell and ASCAP do not share any interest, as ASCAP has denied having  
16 **any** interest in the Song, the copyright, or any royalties derived from it.

17 As Mr. Reimer’s declaration states, ASCAP had no legal interest in the Song,  
18 and there is no evidence in the record that it had any responsibility for protecting any  
19 interest Summy-Birchard had in the Song. *See* Reimer Decl. At most, Summy-  
20 Birchard and ASCAP shared a **commercial** interest in the Song, not a legal interest in  
21 it. But even that shared common interest is unlikely, given that ASCAP also had no  
22 interest in the royalties collected on the song. Even if Summy-Birchard and ASCAP  
23 had shared a commercial interest, that commercial interest would be insufficient to  
24 invoke protection under the common interest privilege. “The common-interest  
25 privilege saves an otherwise privileged communication from waiver only where the  
26 communication is shared with the third-party in order to further a matter of common  
27 **legal** interest. It does not protect communications made in furtherance only of a  
28

1 common *business* interest.” *Lenz v. Universal Music Corp.*, 07-3783, 2009 U.S.  
2 Dist. LEXIS 105180, at \*4 (N.D. Cal. Oct. 29, 2009) (internal citations omitted).

3 In rejecting the common interest privilege, Judge Dale distinguished *Hewlett-*  
4 *Packard Co. v. Baush & Lomb, Inc.*, 115 F.R.D. 308, 309-312 (N.D. Cal. 1987),  
5 where the issue was whether Bausch & Lomb waived the attorney-client privilege  
6 when it voluntarily disclosed its attorney’s opinion letter to a non-party with whom it  
7 was negotiating the sale of a business. The letter in question in that case “involved  
8 the threat of impending litigation if the third party entered into the business deal,” in  
9 which case both the purchaser and the seller “would end up defending the same  
10 patent in one lawsuit that plaintiff could be expected to bring” against both parties.  
11 *Id.* at 310. It seemed “quite likely” to the Court that both parties would be sued by  
12 the same plaintiff, in which case both parties “would be identically aligned, fighting  
13 to protect interests distinguished only the time frame in which the marketing took  
14 place.” *Id.* Thus, as the Northern District of California found, “the threat of  
15 litigation rose to a level greater than a mere desire to avoid the remote possibility of  
16 litigation – both parties ‘anticipated litigation in which they would have a common  
17 interest.’” *Id.*

18 The parties in *Hewlett-Packard* undoubtedly shared a common legal interest in  
19 the patent defense. A similar *legal* interest was shared in this case, for example,  
20 between Summy-Birchard and its successor, Warner/Chappell. If Summy-Birchard  
21 had sent a copy of the Coudert Letters to Warner/Chappell while they were  
22 negotiating the sale of the business in 1988, the analysis in *Hewlett-Packard* would  
23 apply to protect the privilege in that communication. However, the *Hewlett-Packard*  
24 decision has no bearing on Summy-Birchard’s voluntary disclosure of the Coudert  
25 Letters to ASCAP in 1979, with whom it was not negotiating the sale of any business  
26 and, more importantly, who would never be aligned with it in one lawsuit fighting to  
27 protect the same copyright ownership interest in the Song.

28

1           In *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996), the  
2 Federal Circuit held that the common interest privilege applies when “the same  
3 attorney represents the interests of two or more entities on the same matter.” In that  
4 case, the University of California and Eli Lilly and Co. worked together to develop  
5 patents for the production of human growth hormone. The technology was  
6 developed by the University of California and was optioned by Lilly, which gave  
7 them “a common legal interest in gaining sound patent rights to this technology.” *Id.*  
8 at 1389-90. In addition, Lilly’s lawyers “advised and consulted frequently with UC  
9 counsel on matters relating to UC’s patents.” *Id.* at 1390. Under those  
10 circumstances, the Federal Circuit concluded that the common interest privilege  
11 protected communications between Lilly, the University of California, and Lilly’s  
12 lawyers concerning the parties’ common legal interest in the patents.

13           The facts here could not be more different than in *Regents*. Here, ASCAP  
14 claims no interest in the underlying music and in royalties earned from the music.  
15 Thus, ASCAP shared no common legal interest in the Song with Summy-Birchard  
16 when the Coudert Letters were written and it has no common legal interest with  
17 Warner/Chappell today. The record does not indicate that Coudert communicated  
18 with ASCAP at any time, or even was aware of ASCAP or had any knowledge that  
19 the Coudert Letters would be shared with ASCAP at any time, nor is there any  
20 indication that it had any expectation that a subsequent communication would be  
21 privileged. Likewise, there is no indication that ASCAP knew of the work done by  
22 Coudert until Ms. Sengstack gratuitously send courtesy copies of Mr. Wincor’s  
23 letters to Mr. Korman *three years later*. Plainly, ASCAP – which knowingly and  
24 intentionally produced the ASCAP Documents to Plaintiffs and claims no privilege in  
25 them – did not regard the Coudert Letters as privileged when it received them in 1979  
26 and still does not regard them as privileged.

27           In *Schwimmer, supra*, 892 F.2d at 237, the Second Circuit considered whether  
28 information that Schwimmer provided to an accountant hired by the lawyer

1 representing Schwimmer's co-defendant in a joint defense was privileged. The  
2 Second Circuit explained that the "common interest rule . . . protect[s] the  
3 confidentiality of communications passing from one party to the attorney for another  
4 party where a joint defense effort or strategy has been decided upon and undertaken  
5 by the parties and their respective counsel." *Id.* at 243 (citing *U.S. v. Bay State*  
6 *Ambulance and Hosp. Rental Serv.*, 874 F.2d 20, 28 (1st Cir. 1989)). The Second  
7 Circuit found that the information Schwimmer provided to the accountant was  
8 privileged because the accountant was hired by the co-defendant's lawyer on behalf  
9 of both defendants, with an express understanding that any information provided to  
10 the accountant to aid the joint defense would remain privileged. *Id.* at 244.

11 Again, the facts here could not be more different. *First*, the Coudert Letters  
12 did not pass from one party to the attorney for the other party; rather, one party  
13 (Summy-Birchard) voluntarily sent a letter from its lawyer to another party  
14 (ASCAP). *Second*, there is no evidence of any joint defense effort or strategy in  
15 place at any time: either when the Coudert Letters were written or when Summy-  
16 Birchard voluntarily sent them to ASCAP three years later. And *third*, there is no  
17 evidence of any agreement or understanding that the Coudert Letters would remain  
18 confidential. As discussed above, ASCAP did not regard them as privileged when  
19 they were received and it does not regard them as privileged now.

20 Finally, the decision in *Major League Baseball Props. v. Salvino, Inc.*, No. 00-  
21 2805, 2003 U.S. Dist. LEXIS 14390 (S.D.N.Y. Aug. 20, 2003), does not support  
22 Defendants' argument that the Coudert Letters are privileged. In a short decision, the  
23 Southern District of New York found that information provided by the major league  
24 baseball clubs to in-house counsel for an entity they created to register and enforce  
25 their intellectual property rights was protected under the common interest privilege.  
26 *Id.* at \*2. After recognizing that the privilege requires the parties to share a common  
27 legal interest in the matter, the court found the requirements of the privilege were  
28

1 met.<sup>5</sup> Here, the relationship between Defendants and ASCAP is far more limited.  
2 Defendants have no ownership or legal interests in ASCAP, it is not Defendants’  
3 exclusive agent for licensing the Song, ASCAP has no legal interest in the Song or in  
4 any royalties it collects from the Song, and it provides no service to Defendants other  
5 than distributing shares of the blank license fees it collects. Moreover, Summy-  
6 Birchard did not provide any information to ASCAP’s counsel to further a shared  
7 legal interest, which the court in *MLB Props.* found was also a necessary condition  
8 for the common interest privilege to apply. *Id.* Thus, *MPB Props.* does not support  
9 applying the common interest privilege in this case.

10 **B. The Discovery Cutoff Date Should Be Extended for the Limited**  
11 **Purpose of Conducting Another Rule 30(b)(6) Deposition**

12 **1. Plaintiffs Should Be Given Leave to Conduct a Rule**  
13 **30(b)(6) Deposition on the Privilege Issues**

14 The issue of common interest is a fact specific analysis which looks at the  
15 “identity of interests” in the context asserted. For example, the identity of ASCAP’s  
16 licensing interests with regard to music publishers, such as Warner/Chappell Music,  
17 was recently discussed in *In Re Petition of Pandora Media, Inc.*, Case No. 12 Civ  
18 8036 (S.D.N.Y.) related to *U.S. v. American Society of Composers, Authors and*  
19

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20  
21 <sup>5</sup> According to a later summary judgment opinion in this same case, the entities at  
22 issue all shared a common legal interest as follows: “MLBP is a wholly owned subsidiary of  
23 Major League Baseball Enterprises, Inc. (“MLBE”), an entity in which each of the current  
24 30 MLB clubs (the “Clubs”) owns an equal interest. MLBP is, with limited exceptions, the  
25 exclusive worldwide agent for licensing the use of all names, logos, trademarks, service  
26 marks, trade dress, and other intellectual property owned or controlled by the MLB  
27 Clubs, MLB’s Office of the Commissioner (“BOC”) and the MLBP (collectively “MLB  
28 Intellectual Property”), on retail products. MLBP also acts as agent for the Clubs with  
respect to, inter alia, trademark protection, quality control, design services, royalty  
accounting and auditing.” *Major League Baseball Props.*, 542 F.3d 390, 294 (2nd Cir.  
2008).

1 *Publishers*, Case No. 41 Civ. 1395 (S.D.N.Y.) (“*Pandora Antitrust Litigation*”).<sup>6</sup>  
2 Universal Music Publishing, Inc. (“Universal”), a music publisher, sought to  
3 intervene, among others, in Pandora’s motion for summary judgment to define its  
4 licensing rights under the antitrust consent decree with ASCAP. Universal argued  
5 that ASCAP and the music publisher has “some interests in common,” but as to the  
6 publisher’s right to assert the validity of certain licenses, Universal and ASCAP do  
7 not share an “an identity of interest.” *Pandora Antitrust Litigation*, Dkt. 105, at 5 of  
8 12 (“Universal and ASCAP have some interests in common, but the issues  
9 underlying this Motion and the Order – the extent to which Universal may withdraw  
10 certain rights from ASCAP in order to exclusively license to digital services – are not  
11 issues as to which ASCAP and Universal share “identity of interest[s]” or the “same  
12 ultimate objective” and that “ASCAP and Universal do not share “identity of  
13 interest[s]” in upholding the validity of the withdrawal of some but not all of  
14 Universal’s rights from ASCAP.”)

15 Plaintiffs believe the present record should be sufficient for the Court to  
16 overrule Defendants’ claim of privilege in the ASCAP Documents. However, should  
17 the Court deem it necessary to have a more fully-developed factual record to  
18

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19  
20 <sup>6</sup> In the *Pandora Antitrust Litigation*, Pandora Media, Inc. (“Pandora”), a provider of  
21 internet radio, sought a blanket, through to the audience, license from the American Society  
22 of Composers, Authors & Publishers (“ASCAP”) for a five year period beginning January  
23 1, 2011 and obtained an antitrust consent decree under which ASCAP operates. The  
24 antitrust consent decree requires ASCAP to license Pandora to perform for five years all of  
25 the works in the ASCAP repertory as of January 1, 2011, even though certain music  
26 publishers beginning in January 2013 have purported to withdraw from ASCAP the right to  
27 license their compositions to “New Media” services such as Pandora. Based on the  
28 language of the consent decree, the Court granted Pandora’s summary judgment motion  
with regard to the “withdrawing” publishers in its repertory even if it purports to lack the  
right to license them to a subclass of New Media entities. Order re Mot. Summ. J., *Pandora  
Antitrust Litig.*

1 determine whether Defendants have any privilege in the documents, then Plaintiffs  
2 should be granted leave to take the deposition of the representative of Defendants  
3 most knowledgeable on factual questions surrounding the privilege. These questions  
4 include the nature of the relationship between Summy-Birchard and ASCAP, what  
5 interest (if any) Summy-Birchard and ASCAP shared in the Song or its copyright  
6 (*i.e.*, the subject-matter of the communications), what understanding (if any) Summy-  
7 Birchard and ASCAP had regarding whether the communications would be  
8 privileged, what steps Summy-Birchard took to maintain the confidentiality of the  
9 communications, whether Summy-Birchard shared those communications with any  
10 other third-parties, when Defendants learned that ASCAP intended to provide the  
11 documents to Plaintiffs, and what steps (if any) Defendants took to preserve any  
12 privilege they claim in the ASCAP Documents.

13  
14 **2. The Fact Discovery Cut-Off Should be Extended to Allow**  
15 **Time for the Second Rule 30(b)(6) Deposition**

16 Federal Rule of Civil Procedure 16(b) provides that a scheduling order may be  
17 modified upon a showing of “good cause,” which focuses on the reasonable diligence  
18 of the moving party. *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1174 (9th Cir. 2007)  
19 (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992)).  
20 Here, Plaintiffs have been reasonably diligent in seeking the second Rule 30(b)(6)  
21 deposition, and good cause exists for extending the fact discovery cut-off.

22 Specifically, Plaintiffs noticed the second Rule 30(b)(6) deposition to take  
23 place prior to the fact discovery cut-off and were willing to take the deposition on  
24 *any* date prior to the deadline. Plaintiffs met and conferred with Defendants  
25 regarding the deposition to address their concerns so that the appropriate designee  
26 could be deposed before the discovery cut-off. Defendants refused to designate a  
27 witness to testify on any topic or in response to the Rule 30(b)(6) notice. Once  
28 Plaintiffs learned that Defendants unilaterally refused to designate a witness for

1 deposition on the privilege claim, Plaintiffs began the Local Rule 37-2 process to  
2 bring this dispute before the Court as soon as possible.

3 Plaintiffs have not delayed seeking the resolution of the complex discovery  
4 disputes presented in this motion. Therefore, they have satisfied their burden to show  
5 good cause under Rule 16(b) for extending the fact discovery cut-off.

6 **II. DEFEDANTS' POSITION**

7  
8  
9 **IT IS SO STIPULATED.**

10  
11  
12 Dated: July \_\_, 2014

**WOLF HALDENSTEIN ADLER  
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