EXHIBIT 11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: GOOD MORNING TO YOU PRODUCTIONS CORP.; ROBERT SIEGEL; RUPA MARYA; and MAJAR PRODUCTIONS, LLC, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. WARNER/CHAPPELL MUSIC, INC.; and SUMMY-BIRCHARD, INC., Defendants.	No. 1:14-mc-00179-P1 Subpoena issued in CASE NO: 2:13-cv-04460-GHK-MRW (United States District Court for the Central District of California)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO QUASH PLAINTIFFS' RULE 45 SUBPOENA SERVED ON NON-PARTY AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

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TABLE OF AUTHORITIES

Non-party American Society of Composers, Authors and Publishers ("ASCAP") respectfully submits this reply memorandum of law in further support of its motion to quash the deposition subpoena served on ASCAP by plaintiffs in the above-captioned action pending in the United States District Court for the Central District of California (the "California Action").[1]

PRELIMINARY STATEMENT

In their opposition papers, plaintiffs misstate the relevant legal standard for a motion to quash a non-party deposition subpoena, and do not dispute the key facts establishing that their deposition subpoena directed at ASCAP is unduly burdensome in that it: (1) seeks testimony that is irrelevant to the claims pending in the California Action; (2) seeks testimony relating to events that occurred 40 years ago about which no one at ASCAP has any knowledge; (3) seeks testimony that would merely be duplicative of information that has already been provided in documents produced by ASCAP in the California Action; and (4) seeks testimony as to facts that can be more easily, and less burdensomely, obtained from defendants in the California Action. And plaintiffs offer no justification as to why they cannot wait until after they have deposed defendants on the very same issues before subjecting ASCAP to the burden of a deposition that may ultimately prove to be unnecessary.

For these reasons, as detailed below and in ASCAP's moving papers, ASCAP respectfully requests that the Court enter an order quashing the subpoena.

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[1] Contrary to the suggestion in plaintiffs' opposition brief (Plaintiffs' Memorandum of Law in Opposition to Motion to Quash ("Opp.") at 4, n.1), ASCAP did not attempt to evade service of the subpoena, nor did it ever refuse to accept service of the subpoena.

ARGUMENT

I. PLAINTIFFS MISSTATE THE RELEVANT LEGAL STANDARD

Plaintiffs' opposition brief repeatedly misstates the relevant legal standard that applies here. It is not correct, as plaintiffs contend, that motions to quash non-party depositions are "rarely granted." (Opp. at 6.) Both of the cases to which plaintiffs cite for that proposition involved motions for a protective order to bar the deposition of a party in the case, not motions to quash non-party depositions. Those cases are inapposite here. As ASCAP noted in its moving brief, courts in this Circuit give "special weight" to the burden on non-parties from subpoenas, and are "particularly sensitive to weighing the probative value of the information sought against the burden of production on the non-party." (Memorandum of Law in Support of Motion to Quash ("ASCAP Br.") at 5-6.)

It also is not correct, as plaintiffs suggest, that non-parties are somehow precluded—despite the clear language of Fed. R. Civ. P. 45(d)(1)—from quashing a deposition subpoena, and instead must submit to the subpoena and "assert their objections ***during the deposition***." (Opp. at 6 (emphasis in original).) Once again, the purported authority cited by plaintiffs does not involve a subpoena to take a non-party deposition, and thus does not support the proposition advanced by plaintiffs. Indeed, Rule 45(d)(1) makes plain that it not only is appropriate for a non-party to move to quash a subpoena, but where—as here—the subpoena is unduly burdensome, the court "*must* quash or modify" the subpoena. (ASCAP Br. at 6.)

Nor is it necessary, as plaintiffs suggest, to identify some specific "manner and extent" in which compliance with the subpoena would be onerous in order for a non-party recipient to satisfy the "undue burden" standard. (Opp. at 6, 9.) As ASCAP established in its moving brief, a non-party subpoena that "pursues material with little apparent or likely relevance to the subject matter [as is the case with many of the topics in the subpoena at issue here] is

likely to be quashed as unreasonable even where the burden of compliance would not be onerous." *Kirschner* v. *Klemons*, No. 99 Civ. 4828 (RCC), 2005 WL 1214330, at *2 (S.D.N.Y. May 19, 2005) (citations and quotations omitted).

As discussed below, and in ASCAP's moving papers, the circumstances here are more than sufficient to support quashing the subpoena.

II. THE SUBPOENA SEEKS TESTIMONY THAT IS IRRELEVANT TO PLAINTIFFS' CLAIMS AND OUTSIDE THE AGREED SCOPE OF DISCOVERY IN THE UNDERLYING LITIGATION

Plaintiffs do not dispute that the testimony sought by subpoena topics 1, 3, 4, 5 and 6 is irrelevant to the claims pending in the California Action, and instead focused on the basis for privilege claims made by defendants—not ASCAP—in the California Action. And plaintiffs offer no justification for why that issue should not, at least initially, be resolved between plaintiffs and defendants in that action, or—at the very least—why plaintiffs cannot wait until after they have deposed defendants on the very same issues before subjecting ASCAP to the burden of a deposition that may ultimately prove to be unnecessary.

Instead, plaintiffs misleadingly suggest that they have already attempted to depose defendants about the "issues in the litigation," and that defendants' designated witness had "virtually no substantive knowledge" of those issues other than what is stated on the face of the documents produced by defendants. (Opp. at 12.) What plaintiffs fail to disclose, however, is that the deposition described in their opposition papers related to an entirely different set of topics than those set forth in the ASCAP subpoena. As ASCAP noted in its moving papers (and as plaintiffs do not dispute in their opposition), topics 1, 3, 4, 5 and 6 in the ASCAP subpoena are identical to the topics in a separate 30(b)(6) notice that plaintiffs recently served on defendants. (ASCAP Br. at 7; June 6, 2014 Declaration of Richard Reimer ("Reimer Decl.") ¶¶ 7-9.) That deposition has not yet taken place. (*Id.*) Indeed, as ASCAP noted in its moving brief,

there is an ongoing dispute in the California Action as to plaintiffs' right to conduct such discovery (*Id.*)—a point not even addressed by plaintiffs in their brief. Plaintiffs should not be permitted to end-run around that pending dispute by subjecting ASCAP to the burden and expense of a deposition on the very same topics when plaintiffs' right to conduct such discovery has not yet been established.

Plaintiffs also claim that they need deposition testimony from ASCAP to "substantiate" whether the documents at issue are, in fact, privileged. (Opp. at 8.) But the plain language of Fed. R. Civ. P. 26(b)(5)(B), and the Advisory Committee Notes thereto, make clear that, if plaintiffs wish to dispute defendants' privilege claim, they must submit the purportedly privileged material under seal to the court in the California Action for a determination of the dispute. Neither the rule—nor any of the cases applying the rule—suggest that plaintiffs are authorized to conduct discovery—much less non-party discovery—on the claim of privilege in advance of the court's determination.

Accordingly, the subpoena should be quashed as related to topics 1, 3, 4, 5 and 6.

III. THE SUBPOENA SEEKS TESTIMONY RELATING TO EVENTS FROM 40 YEARS AGO ABOUT WHICH ASCAP HAS NO KNOWLEDGE

ASCAP's moving papers established that subpoena topics 1, 3, 4, 5, 6 and 8 seek testimony relating to events that occurred 40 years ago, that ASCAP has already produced any and all non-privileged documents it has relating to those issues, and that there is no longer anyone at ASCAP who was involved in those events, or otherwise has any knowledge of those issues. (ASCAP Br. at 8, Reimer Decl. ¶ 10.)

Nonetheless, plaintiffs speculate in their opposition—without any basis whatsoever—that ASCAP must possess "some" relevant knowledge about those long-ago events. (Opp. at 10.) That simply is not correct. As Mr. Reimer clearly and unambiguously

stated in his declaration, "there is no one at ASCAP who had any involvement in, or is otherwise capable of testifying about, those events." (Reimer Decl. ¶ 10.) Plaintiffs do not—and cannot—identify any good faith basis to doubt Mr. Reimer's representations, made under penalty of perjury, as to ASCAP's lack of any knowledge of these topics.

The subpoena therefore should be quashed as related to topics 1, 3, 4, 5, 6 and 8.

IV. THE SUBPOENA SEEKS TESTIMONY THAT IS DUPLICATIVE OF INFORMATION THAT HAS ALREADY BEEN PROVIDED

ASCAP's moving papers also established that subpoena topics 1, 3, 4, 5, 6, 7, 8, 9, 10 and 11 seek testimony that is duplicative of information that has already been provided in documents produced by ASCAP in the California Action, and that the only information that ASCAP has as to those topics is clearly and unambiguously set forth on the face of those documents previously produced. (Reimer Decl. ¶ 11.) Accordingly, any deposition testimony by an ASCAP witness as to those same facts would be redundant.[2]

Notably, plaintiffs do not dispute that the subpoena seeks testimony that is duplicative of information that has already been provided in documents produced by ASCAP in the California Action. Plaintiffs claim, however, that they "now seek deposition testimony from ASCAP that clarifies and otherwise bears on the documents it has produced." (Opp. at 8.) But plaintiffs fail to identify a single document produced by ASCAP about which they have a single follow-up question. And even if they were to identify such a document or question, it would not change the fact—as Mr. Reimer has declared—that ASCAP has no information about those topics beyond that which is clearly and unambiguously set forth on the face of those documents.

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[2] Plaintiffs argue that a "subpoena for testimony on a topic about which the serving party has already received information via another discovery device is perfectly permissible." (Opp. at 9.) But neither case that plaintiffs cite for that proposition actually involved a subpoena for non-party testimony. Accordingly, those cases do not support the entirely duplicative non-party testimony sought by plaintiffs here.

Equally meritless is plaintiffs' suggestion—without any basis in fact or logic—that simply because the documents produced do not answer certain questions, ASCAP must have additional knowledge that will allow it to answer those questions. (Opp. at 10.) That argument is nonsensical, and unsupported by the specific examples identified in plaintiffs' opposition brief. For example, the documents previously produced by ASCAP clearly identify the copyright owners of the song "Happy Birthday" and those who have an interest in royalties collected for the song, and plainly evidence that ASCAP has no copyright interest or royalty interest in the song (just as ASCAP has no copyright interest or royalty interest in any of the works it licenses). Likewise, ASCAP has no information as to any "disputes regarding the Happy Birthday copyright" other than that which has already been provided to plaintiffs.[3] There simply is no good faith basis for plaintiffs to claim—contrary to the declaration provided by Mr. Reimer—that ASCAP possesses any information concerning topics 1, 3, 4, 5, 6, 7, 8, 9, 10 and 11 beyond what is clearly and unambiguously set forth on the face of the documents already produced to plaintiffs.

The subpoena thus should be quashed as to topics 1, 3, 4, 5, 6, 7, 8, 9, 10 and 11.

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[3] The only other example provided in plaintiffs' opposition—"how [ASCAP] allocates the royalties it collects" (Opp. at 10)—is not one of the topics in the subpoena, and thus is irrelevant for purposes of this motion. To the extent that plaintiffs intended to reference topic 7 in the subpoena (which seeks testimony concerning the license fees collected and distributed by ASCAP for the song "Happy Birthday"), ASCAP (as explained in its moving brief) has not yet produced documents concerning or reflecting that information based on ASCAP's understanding—again, not disputed by plaintiffs in their opposition papers—that the court in the California Action has bifurcated the case into separate liability and damages phases, and that, as a result, discovery of licensee fees and royalties has been deferred. (ASCAP Br. at 9, n.1.) Accordingly, any deposition testimony as to topic 7 should likewise be deferred.

V. THE SUBPOENA SEEKS TESTIMONY AS TO FACTS THAT CAN BE MORE EASILY, AND LESS BURDENSOMELY, OBTAINED FROM DEFENDANTS

ASCAP's moving papers also established that subpoena topics 1, 3, 4, 5, 6, 7, 8, 9, 10 and 11 seek testimony as to facts that can be obtained more easily, and less burdensomely, from defendants in the California Action. Plaintiffs do not dispute that the topics in their 30(b)(6) notice of deposition on defendants are identical to topics 1, 3, 4, 5 and 6 in their subpoena to ASCAP. Plaintiffs claim, however, that certain information is exclusively in ASCAP's possession. (Opp. at 12.) That is simply not correct.

First, defendants—the putative owners of the copyright in "Happy Birthday"—are equally (if not more) capable of confirming that ASCAP has no copyright interest or royalty interest in the song (topics 9 and 10). In any event, as explained above, the answers to those questions are clearly set forth in the documents already produced by ASCAP.

Second, defendants are much more likely to have information about the ownership, scope or validity of the copyright in the song and any disputes concerning the ownership, scope or validity of the copyright in the song (topics 8 and 11). And to the extent that any such information were provided to ASCAP, it would invariably, as provided by ASCAP's rules and regulations, also be sent to the actual copyright owner(s) of the work—in this case, defendants. In any event, as explained above, ASCAP has no information as to any disputes regarding "Happy Birthday" other than that which has already been provided to plaintiffs.

Third, although plaintiffs have not explained how the "knowing" or "intentional" production of certain documents has any bearing on the claims at issue in the California Action, Mr. Reimer has already informed plaintiffs that the documents were produced "knowingly." Thus a deposition as to that issue is not only unnecessary (to the extent it was relevant in the first

place), but also irrelevant to the issue of whether those documents are subject to defendants' claim of privilege—an issue to be resolved in the California Action.

Fourth, as discussed above, discovery of licensee fees and royalties (topic 7) has been deferred in the California Action, and thus it is premature for plaintiffs to seek discovery about "how ASCAP distributed the royalties it has collected." (Opp. at 12.)

Fifth, that one of defendants' designated witnesses was purportedly unable to answer certain unidentified questions during the 30(b)(6) deposition of defendants on an entirely different set of topics than those set forth in the ASCAP subpoena does not mean that ASCAP is any better situated to answer those same unidentified questions.

Sixth, that ASCAP purportedly produced certain documents that defendants did not produce (or log) does not change the fact—as stated in Mr. Reimer's declaration—that ASCAP has no further information about the content of those documents beyond what is clearly and unambiguously set forth on their face.

Finally, nowhere in plaintiffs' opposition papers is there any suggestion that there is a dispute between the parties in the California Action as to the authenticity of any of the documents produced by ASCAP, and thus plaintiffs have not established that a deposition of ASCAP is necessary to authenticate those documents.

In sum, there is no reason to believe that ASCAP has any unique or superior knowledge of topics 1, 3, 4, 5, 6, 7, 8, 9, 10 and 11.

VI. THE SUBPOENA SEEKS TESTIMONY AS TO COUNSEL'S MENTAL IMPRESSIONS

In their opposition brief, plaintiffs represent—for the first time—that they are not seeking testimony as to counsel's protected mental impressions in selecting and reviewing the documents produced by ASCAP in the California Action, but instead simply want to know

whether the documents that are currently the subject of the privilege dispute in the California Action "were produced knowingly and intentionally or by accident." (Opp. at 14.) If that is truly all plaintiffs need to know concerning those documents, then a deposition is not required to obtain the answer. Mr. Reimer has already informed plaintiffs that the documents were produced "knowingly." Any further inquiry as to Mr. Reimer's thought processes in determining which documents to produce on behalf of ASCAP must inevitably traverse privileged terrain—although, for reasons previously stated, any such inquiry is irrelevant to the issue of whether the documents at issue are subject to defendants' privilege claims. For these reasons, the subpoena should be quashed as to topic 2.[4]

CONCLUSION

For these reasons, and those set forth in its moving papers, non-party ASCAP respectfully requests that its motion to quash be granted.

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[4] In the alternative, plaintiffs suggest that, even if they did intend to inquire as to counsel's mental impressions, such information would not be protected from discovery by the work product doctrine because ASCAP is not a party in the underlying lawsuit. (Opp. at 14.) That is not correct. It is well-settled that work-product protection applies even where—as here—the attorney whose thought process is at issue is not a party to the litigation in which the discovery of those mental impressions is sought. *See, e.g., Schomburg* v. *N.Y.C. Police Dep't.*, No. 12 Civ. 7161 (RWS), 2014 WL 998415, at *3-4 (S.D.N.Y. Mar. 14, 2014); *Allied Irish Banks, P.L.C.* v. *Bank of America, N.A.*, 252 F.R.D. 163, 172-75 (S.D.N.Y. 2008); *In re Cardinal Health, Inc. Sec. Litig.*, No. C2 04 575 ALM, 2007 WL 495150, at **3-4, 6 (S.D.N.Y. Jan. 26, 2007). Moreover, the broadly drafted subpoena topics leave open the possibility that plaintiffs' counsel will ask questions implicating the attorney-client privilege.

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Respectfully submitted,

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