

1 FRANCIS M. GREGOREK (144785)
 2 gregorek@whafh.com
 3 BETSY C. MANIFOLD (182450)
 4 manifold@whafh.com
 5 RACHELE R. RICKERT (190634)
 6 rickert@whafh.com
 7 MARISA C. LIVESAY (223247)
 8 livesay@whafh.com
 9 **WOLF HALDENSTEIN ADLER**
 10 **FREEMAN & HERZ LLP**
 11 750 B Street, Suite 2770
 12 San Diego, CA 92101
 13 Telephone: 619/239-4599
 14 Facsimile: 619/234-4599

Interim Lead Class Counsel for Plaintiffs and Proposed Class

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

13	GOOD MORNING TO YOU	)	Lead Case No. CV 13-04460-GHK (MRWx)
14	PRODUCTIONS CORP., <i>et al.</i> ,)	
15		)	REDACTED] DECLARATION OF
16	Plaintiffs,	)	MARK C. RIFKIN IN SUPPORT OF
17	v.	)	PLAINTIFFS' MOTION FOR REVIEW
18		)	OF MAGISTRATE JUDGE WILNER'S
19	WARNER/CHAPPELL MUSIC,	)	ORDER RE: DISCOVERY MOTION
20	INC., <i>et al.</i>,	)	DENYING PLAINTIFFS' MOTION TO
21		)	OVERRULE DEFENDANTS' CLAIM
22	Defendants.	)	OF ATTORNEY-CLIENT PRIVILEGE
23		)	[FED. R. CIV. P. 72(a); L.R. 72-2.1]
24		)	Date: September 15, 2014
25		)	Time: 9:30 A.M.
26		)	Judge: Hon. George H. King
27		)	Room:
28)	Disc. Cutoff: July 11, 2014
)	Pretrial Conf.: N/A
)	Trial Date: N/A
)	L/D File Jt. MSJ: 11/14/14

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I, Mark C. Rifkin, hereby declare as follows:

1. I am an attorney duly licensed to practice law in the State of New York, and am admitted before this Court *pro hac vice* in the above-entitled matter. I am a partner with the law firm Wolf Haldenstein Adler Freeman & Herz LLP, interim lead class counsel for Plaintiffs and the proposed class. I have personal knowledge of the following facts, and if called upon to do so, I could and would competently testify as to them.

2. I submit this declaration in support of the motion by plaintiffs Good Morning To You Productions Corp., Robert Siegel, Rupa Marya d/b/a Rupa & The April Fishes, and Majar Productions, LLC's ("Plaintiffs") for review of the Order Re: Discovery Motion ("Order") of Magistrate Judge Michael R. Wilner filed on July 25, 2014 (Dkt. 132), denying Plaintiffs' motion to overrule the claim of attorney-client privilege by Defendants Warner/Chappell Music, Inc. and Summy-Birchard, Inc., in certain documents produced by non-party American Society of Composers, Artists, and Publishers ("ASCAP").

MAGISTRATE JUDGE WILNER'S ORDER

3. Plaintiffs sought an order overruling Defendants' claim of privilege pursuant to Rule 26(b)(5)(B). On July 15, 2014, the parties submitted a Joint Stipulation to Magistrate Judge Wilner (Dkt. No. 123). After some additional discovery on the privilege, both parties submitted supplemental briefs to Magistrate Judge Wilner on July 22, 2014. *See* Dkt. Nos. 125, 126, 127, and 129 (Plaintiffs); and Dkt. Nos. 128, 130 (Defendants). Magistrate Judge Wilner heard argument on Plaintiffs' Discovery Motion on an expedited basis on July 25, 2014, and filed the Order later that day. (Dkt. No. 132). A true and correct copy of the July 25, 2014 Hearing Transcript is attached hereto as Exhibit J. Written notice of the order was served on July 28, 2014 (Dkt. No. 132). This Motion was filed within 14 days of

1 service of the written notice and is timely. *See* CDCA L.R. 72-2.1.

2 APPLICATION TO FILE UNDER SEAL

3 4. Plaintiffs have concurrently filed an application to file under seal certain
4 confidential exhibits attached to this declaration. All of the exhibits referenced
5 below were part of the record before the Magistrate Judge. For the Court’s
6 convenience in reviewing the relevant portions of the record, I have attached the
7 exhibit to this declaration and noted where the exhibit may be found in the record
8 before the Magistrate Judge. The confidential exhibits requested to be filed under
9 seal as part of this Motion were sealed by the Magistrate Judge. *See* Dkt. 135, 137
10 and 138.

11 FACTUAL AND PROCEDURAL SUMMARY

12 13 5. Plaintiffs seek, *inter alia*, a declaration pursuant to the Declaratory
14 Judgment Act, 28 U.S.C. §§ 2201-2202, that: (i) Defendants do not own any valid
15 copyright to the song *Happy Birthday to You* (the “Song”); (ii) any copyright to the
16 Song that Defendants do own is limited in scope to just specific piano arrangements
17 and an obscure second verse; and (iii) the Song itself is dedicated to public use and in
18 the public domain (hereafter “Claim One”). *See generally* Fourth Amend. Consol.
19 Class Action Compl. (“FAC”) Dkt. 95, filed Apr. 24, 2014 by Dkt. 96.

20 6. The Court has bifurcated Claim One from Plaintiffs’ other claims and
21 the scope of discovery was limited to the issues raised by Claim One only. *See*
22 Scheduling Conf. and Order Entering Scheduling Dates (Dkt. 92, Mar. 24, 2014)
23 (“Scheduling Order”). The Court initially set the fact discovery deadline for June 27,
24 2014. *Id.* at 1. ¶ 2. On June 9, 2014, Magistrate Judge Wilner extended the fact
25 discovery deadline to July 11, 2014. Minute Order (Dkt. 106, June 9, 2014).

26 7. The ownership and origin of the Song and the copyrights that
27 Defendants claim in it are, at best, obscure. Despite more than a century of
28 documented public performances, decades of disputed claims, and the Song’s

1 ubiquity, no court has ever determined whether Defendants (or any of their
2 predecessors-in-interest) own any rights to the Song. Indeed, while the Song has
3 been used and performed innumerable times over the past 80 years without
4 Defendants' (or their predecessors') permission, no one has ever been sued for
5 infringing any copyright to the Song.

6 8. Defendants (and their predecessors) based their claim of copyright
7 ownership only upon a single copyright, Reg. No. E51990, registered on December
8 6, 1935. That copyright covered a specific piano arrangement composed as a work
9 for hire by Preston Ware Orem, a director and Vice President of the Clayton F.
10 Summy Co. (one of Defendants' predecessors-in-interest) ("Summy Co.").
11 According to the copyright records, the work also included "text."

12 9. However, the copyright records do *not* indicate what "text" was
13 included in the work or who wrote it, and there is no known copy of the work
14 deposited with that registration. [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED].

25 10. Without that deposit copy, Defendants cannot prove what work was
26 protected by that copyright registration. In any event, copyright Reg. No. E51990
27 was renewed by Summy Birchard Co. (another one of Defendants' predecessors-in-
28 interest) on December 6, 1962, under No. R306186. Whatever work the original

1 copyright (No. E51990) may have covered, that copyright expired in 1963.
2 According to the 1962 Catalog of Copyright Entries (“Copyright Catalog”), the
3 official publication of copyright registrations and renewals published by the United
4 States Office of Copyright, the renewal copyright (No. R306186) covers Dr. Orem’s
5 piano arrangement only, not any “text.” See Exhibit B (a true and correct copy of the
6 1962 Copyright Catalog). Exhibit B was attached to the Declaration of Betsy C
7 Manifold In Support of Plaintiffs’ Motion for Order for (i) Overruling Defendant’s
8 Claim of Privilege in Documents Produced by a Non-Party, or Permitting a Second
9 Rule 30(b)(6) Deposition to Determine the Factual Basis for that Claim; (ii) Granting
10 Relief from the Discovery Cutoff to Conduct that Deposition [Fed. R. Civ. P.
11 26(b)(5)(B) & Civ. L.R. 79-5.1]] (“Manifold Declaration”), Dkt. 123-1 as Exhibit 12.

12
13 11. Recently, Defendants have begun to rely upon a second copyright, No.
14 E51988, also registered on December 6, 1935. That second copyright covered a
15 different piano arrangement, composed by R.R. Forman, another employee for hire
16 of Summy Co. That work’s copyright claim also included “revised text.” A deposit
17 copy does exist for the work registered under No. E51988, which includes as the
18 “revised text,” an obscure second verse for the Song, apparently written by Mrs.
19 Forman. Copyright No. E51988 was also renewed on December 6, 1962, under No.
20 R306185. And, like copyright No. E51990, the original copyright (No. E51988) also
21 expired in 1963. According to the 1962 Copyright Catalog, renewal copyright No.
22 R306185 was claimed by Summy-Birchard Music, Inc. (by way of change of name
23 from Summy Co.), for Mrs. Forman’s piano arrangement and the “revised text” she
24 apparently wrote.

25 DEPOSITIONS

26 12. During discovery, Defendants produced two witnesses, Thomas J.
27 Marcotullio, Esquire, and Jeremy Blietz, to testify on their behalf concerning the
28 historical record of their alleged ownership of any copyright to the Song and the

1 scope of those copyrights shrouded in uncertainty. [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 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 15. Defendants should have produced Mr. Blietz to testify as their Rule
24 30(b)(6) designee, if not in place of Mr. Marcotullio, then certainly in addition to
25 him. Nonetheless, after Plaintiffs learned of Mr. Blietz's identity, on June 4, 2014,
26 they noticed his deposition under Rule 30(b)(1). For the next several weeks,
27 Defendants refused to produce Mr. Blietz. Eventually, Defendants relented and
28 allowed Mr. Blietz to testify on July 10, 2014, the next-to-last day for discovery.

1 Like Mr. Marcotullio, Mr. Blietz knew almost nothing of substance about *Happy*
2 *Birthday* or its origin. [REDACTED]

3 [REDACTED]
4 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
5 [REDACTED]
6 ASCAP PRODUCTION

7 16. On March 28, 2014, Plaintiffs issued a subpoena to be served upon non-
8 party ASCAP seeking documents relevant to their claims. ASCAP objected to the
9 document subpoena but did not seek to quash it.

10 17. On April 22, 2014, Randall S. Newman, Esquire, one of my co-counsel,
11 and I spoke by telephone with Richard H. Reimer, Esquire, ASCAP's Senior Vice
12 President – Legal Services, regarding the document subpoena. During that call, Mr.
13 Reimer informed us that ASCAP would produce documents in response to the
14 subpoena.

15 18. Shortly thereafter, Mr. Reimer and I again spoke by telephone. During
16 that second call, Mr. Reimer told me that he was sending approximately 500 pages of
17 responsive documents to me. Mr. Reimer also told me that ASCAP was producing
18 two documents in particular that provided a detailed analysis of the disputed
19 ownership of the copyright that Plaintiffs would find very interesting. He did not
20 identify those documents any other way.

21 19. On May 9, 2014, I received approximately 500 pages of ASCAP
22 documents from Mr. Reimer, as did Defendants' counsel's office. All of the
23 documents were marked "Confidential" by ASCAP pursuant to the stipulated
24 protective order entered in this action on May 5, 2014. I have maintained all of the
25 "Confidential" documents produced by ASCAP accordance with the Court's May 5,
26 2014, stipulated protective order.

27 20. As Mr. Reimer told me during our second phone call, [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED], that provided a
3 detailed discussion of the disputed copyright ownership.

4 21. In his first letter, dated May 27, 1976 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 [REDACTED] A true and correct copy of [REDACTED] May
15 27, 1976, letter is attached hereto as Exhibit C. Exhibit C is attached to the Sealed
16 Declaration, Dkt. 137 (Ex B).

17 22. In his second letter, dated June 2, 1978, [REDACTED]
18 [REDACTED]
19 [REDACTED] A true and correct copy of [REDACTED]
20 June 2, 1978, letter is attached hereto as Exhibit D. Exhibit D is attached to the
21 Sealed Declaration, Dkt. 137 (Ex.C).

22 23. Although Mr. Reimer had not identified the [REDACTED] when we
23 spoke, I recognized them as the documents to which he referred in our second phone
24 call. I understood from Mr. Reimer's comments and ASCAP's production of the
25 [REDACTED] that: (a) ASCAP intended to produce the [REDACTED] to
26 Plaintiffs; (b) ASCAP did not regard them as privileged or confidential; and (iii)
27 ASCAP wanted to be sure that Plaintiffs saw the [REDACTED]. ASCAP has since
28

1 confirmed to me that it does not assert any privilege regarding the [REDACTED] or
2 any of the other documents that Defendants claim are privileged.

3 24. ASCAP also produced a letter from Arlene M. Sengstack, then Vice
4 President of Summy-Birchard Co., to Bernie Korman of ASCAP, on October 17,
5 1979, in which Ms. Sengstack forwarded the [REDACTED] to Mr. Korman more
6 than three years after the first letter were written and one year after the second letter
7 was written. ASCAP has marked Ms. Sengstack's letter forwarding the [REDACTED]
8 [REDACTED] to Mr. Korman as "Confidential." A true and correct copy of the letter from
9 Ms. Sengstack to Mr. Korman is attached hereto as Exhibit E. A copy of Exhibit E is
10 attached to the Sealed Declaration, Dkt. 137 (Ex. D).

11 25. ASCAP also produced a letter dated November 9, 1940, from [REDACTED]
12 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
13 [REDACTED] concerning
14 a dispute between Summy and ASCAP over the use of the Song by telegraph
15 companies. A true and correct copy of [REDACTED] letter to [REDACTED] is
16 attached hereto as Exhibit F. A copy of Exhibit F is attached to the Sealed
17 Declaration, Dkt. 137 (Ex. E).

18 26. ASCAP also produced a draft letter from [REDACTED] to [REDACTED]
19 [REDACTED], concerning disputes over [REDACTED]
20 [REDACTED] A true and correct copy of the draft
21 letter is attached hereto as Exhibit G. A copy of Exhibit G is attached to the Sealed
22 Declaration, Dkt. 137 (Ex. F).

23 27. On May 16, 2014, Mr. Newman and I again spoke by telephone with
24 Mr. Reimer. During that call, I asked ASCAP to withdraw the "Confidential"
25 designation for two of the documents. Although I did not mention the [REDACTED]
26 [REDACTED] at first, Mr. Reimer asked if I was referring to them, which I confirmed.

27 28. Mr. Reimer told Mr. Newman and me that he would not oppose
28 withdrawing the "Confidential" designation, but only if Plaintiffs intended to use the

1 [REDACTED] only in connection with the California Action and not seek to publish
2 the letters outside the litigation. Mr. Newman and I confirmed that Plaintiffs would
3 not seek to publish the letters outside the litigation, but I reminded Mr. Reimer that
4 the California Action had received worldwide media coverage and that any public
5 filing might be reported by the media. Mr. Reimer said he was not concerned about
6 any media attention that a filing in the litigation might attract.

7 29. At the end of the call, Mr. Reimer told Mr. Newman and me that he
8 would need to speak with others before agreeing to the request, but that he would
9 not oppose withdrawing the “Confidential” designation.

10 30. On May 22, 2014, Mr. Reimer sent me a letter in which he asserted that
11 certain of the documents ASCAP that produced to Plaintiffs (the “ASCAP
12 Documents”) “are subject to a claim of attorney-client or attorney work product
13 privilege, and therefore were inadvertently produced.” Mr. Reimer also stated that
14 “counsel for the defendants” in would be contacting me directly “to provide the
15 details as to the basis for their clients’ claim of privilege.” A true and correct copy of
16 Mr. Reimer’s May 22, 2014, letter is attached hereto as Exhibit H. A copy of Exhibit
17 was attached to the Sealed Declaration, Dkt. 137 (Ex. G).

18 31. Despite Defendants’ claim of privilege, none of the ASCAP documents,
19 including the [REDACTED], appeared on the privilege log produced by the
20 Defendants on May 9, 2014, on Defendants’ amended privilege log produced on June
21 2, 2014, or on Defendants’ second amended privilege log produced on June 23, 2014.
22 Defendants have not produced any other privilege log including any of the disputed
23 ASCAP Documents.

24 32. In response to Mr. Reimer’s May 22, 2014, letter, I sequestered the
25 ASCAP Documents in accordance with Federal Rule of Civil Procedure 26(b)(5)(B).
26 I notified Defendants’ counsel and Mr. Reimer that I sequestered the ASCAP
27 Documents by email on May 22, 2014 and subsequently filed the Discovery Motion
28 heard by the Magistrate Judge on July 25, 2014. The ASCAP Documents remain

1 sequestered and have not been disclosed or used in any way (including in this
2 litigation) since I received Mr. Reimer's letter on May 22, 2014.

3 ASCAP MOTION TO QUASH AND DEPOSITION

4 33. In light of the factual issues raised by the claim of privilege by the
5 Defendants, Plaintiffs issued a deposition subpoena to ASCAP, pursuant to Rules 45
6 and 30(b)(6), for deposition about the circumstances surrounding ASCAP's receipt
7 of the ██████████ in 1979 and its production of those letters to Plaintiffs in 2014.

8 34. ASCAP initially moved to quash the subpoena in the Southern District
9 of New York. In support of ASCAP's motion, Mr. Reimer submitted a declaration,
10 dated June 6, 2012, ("Reimer Decl."), in which he stated that: (a) "ASCAP is a
11 voluntary membership association that represents more than 500,000 composers,
12 songwriters, lyricists and music publishers, and licenses on a non-exclusive basis the
13 public performance rights in the musical works owned or administered by its
14 members" (§ 5), (b) ASCAP possesses no interest in the music it licenses (*id.*); and
15 (c) ASCAP possesses no interests in the fees or royalties it collects for its members
16 from the blanket licenses it issues (*id.*). *See* Exhibit K (ASCAP's Reply Memo. June
17 26, 2014). A copy of Exhibit K was attached to Manifold Decl., Dkt. 126 as Exhibit
18 9.

19 35. On June 30, 2014, ASCAP agreed to withdraw its motion to quash and
20 to produce a witness to testify on its behalf. Plaintiffs served a second Rule 30(b)(6)
21 deposition notice on Defendants on May 22, 2014, in order to inquire about the facts
22 bearing on the legitimacy of Defendants' privilege claims, including whether the
23 ASCAP Documents are privileged depends, among other things, upon the nature of
24 the relationship between ASCAP and Summy-Birchard Co. (the Defendants'
25 predecessor-in-interest), their respective interests (if any) in the Song's copyright,
26 their understanding (if any) regarding the documents, the reason(s) why the
27 documents were created, the reason(s) why Summy-Birchard Co. sent the documents
28 to ASCAP, and the circumstances under which ASCAP produced the ASCAP

1 Documents to Plaintiffs. See Exhibit I attached hereto. Exhibit I was attached to the
2 Supplemental Manifold Declaration on July 22, 2014 (Dkt. 126-1).

3 I declare under the penalty of perjury that the foregoing is true and correct.
4 Executed this 11th day of August 2014, in the City of New York, State of New York.

5 By: 
6 MARK C. RIFKIN

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