

1 GLENN D. POMERANTZ (State Bar No. 112503)
glenn.pomerantz@mto.com

2 KELLY M. KLAUS (State Bar No. 161091)
kelly.klaus@mto.com

3 MELINDA E. LeMOINE (State Bar No. 235670)
melinda.lemoine@mto.com

4 ADAM I. KAPLAN (State Bar No. 268182)
adam.kaplan@mto.com

5 MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue

6 Thirty-Fifth Floor
Los Angeles, California 90071-1560

7 Telephone: (213) 683-9100
Facsimile: (213) 687-3702

8 Attorneys for Defendants
9 Warner/Chappell Music, Inc. and
Summy-Birchard, Inc.

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

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

14 Plaintiffs,

15 v.

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

18 Defendants.

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

**DECLARATION OF KELLY M.
KLAUS IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
REVIEW OF MAGISTRATE
JUDGE WILNER'S ORDER RE:
DISCOVERY MOTION DENYING
PLAINTIFFS' MOTION TO
OVERRULE DEFENDANTS'
CLAIM OF ATTORNEY-CLIENT
PRIVILEGE**

21 Date: September 15, 2014
22 Time: 9:30 a.m.
23 Judge: Hon. George H. King,
Chief Judge

24 Courtroom: 650
25 Disc. Cutoff: July 11, 2014
26 Pretrial Conf.: N/A
27 Trial Date: N/A
28 L/D File Jt. MSJ: Nov. 14, 2014

1 I, KELLY M. KLAUS, hereby declare:

2 1. I am a member of the firm Munger, Tolles & Olson LLP, counsel for
3 Defendants Warner/Chappell Music, Inc. and Summy-Birchard, Inc. (jointly,
4 “Warner/Chappell”). I am admitted to practice law in the State of California and
5 before this Court. I submit this declaration in support of Warner/Chappell’s
6 Opposition to Plaintiffs’ Motion for Review of Magistrate Judge Wilner’s Order Re:
7 Discovery Motion Denying Plaintiffs’ Motion to Overrule Defendants’ Claim of
8 Attorney-Client Privilege. Except as indicated in paragraphs 12 and 13 below, I
9 have personal knowledge of the facts stated herein. If called upon as a witness to
10 testify as to the contents of this declaration, I could and would competently do so.

11 2. On May 9, 2014, ASCAP produced about 600 pages of documents
12 pursuant to a third-party subpoena Plaintiffs had served. Included in that production
13 was a 1979 letter from the Vice President of Summy-Birchard Music (“Summy”) to
14 ASCAP’s General Counsel, attaching two legal memoranda (the “Coudert Memos”)
15 that Richard Wincor—an attorney at Coudert Brothers, a well-known firm that
16 served as Summy’s outside counsel—had sent to Summy’s president.
17 Warner/Chappell (including counsel) did not know at the time of ASCAP’s
18 production, or at any time prior to May 19, 2014, that ASCAP’s production included
19 the Coudert Memos.

20 3. On May 19, ASCAP informed Warner/Chappell that Plaintiffs had
21 sought ASCAP’s permission to remove the confidentiality designation from two
22 documents ASCAP had produced on May 9 with the control numbers ASCAP0095
23 through ASCAP0117. These documents were the Coudert Memos.

24 4. Warner/Chappell’s counsel reviewed the Coudert Memos on May 19
25 and recognized that ASCAP had produced materials subject to Warner/Chappell’s
26 privilege. Warner/Chappell’s counsel had neither seen nor known of the Coudert
27 Memos prior to the May 19 notification from ASCAP, and Warner/Chappell did not
28 authorize ASCAP to produce those documents in this litigation.

1 5. On May 20, consistent with Paragraph 11 of the parties' Protective
2 Order, Warner/Chappell instructed ASCAP to notify Plaintiffs that ASCAP had
3 produced materials subject to Warner/Chappell's attorney-client privilege. On May
4 22, ASCAP sent Plaintiffs a letter, via email, explaining that it had inadvertently
5 produced materials subject to Warner/Chappell's privilege, including the Coudert
6 Memos. On May 22, I spoke to Plaintiffs' counsel and told them that the Coudert
7 Memos were protected by Warner/Chappell's privilege. I further explained
8 Warner/Chappell's position that the 1979 correspondence from Summy did not
9 waive the privilege. On June 2, I sent a letter to Plaintiffs reiterating the bases of
10 Warner/Chappell's claim of privilege.

11 6. On May 22, Plaintiffs sent Warner/Chappell a letter, via email, stating
12 that Plaintiffs disputed "any purported claim of privilege" and would "investigate
13 and bring the matter to the Court's attention." Over the next six weeks, Plaintiffs
14 took discovery to support a motion to overrule Warner/Chappell's privilege claim
15 regarding the Coudert Memos. Plaintiffs took the deposition of Jeremy Blietz, a
16 Vice President in Warner/Chappell's Copyright Department, and also took a Rule
17 30(b)(6) deposition of ASCAP. ASCAP's corporate designee was Richard Reimer,
18 who had produced the Coudert Memos to Plaintiffs.

19 7. On July 1, Plaintiffs sent Warner/Chappell their portion of a stipulation
20 contesting Warner/Chappell's privilege claim over the Coudert Memos.
21 Warner/Chappell provided Plaintiffs its portion of the stipulation on July 15, and
22 Plaintiffs filed the stipulation and the parties' supporting declarations and exhibits
23 that same day. Dkt. Nos. 124, 135. On July 22, Plaintiffs and Warner/Chappell
24 filed supplemental memoranda and supporting declarations and exhibits. Dkt. Nos.
25 125-130.

26 8. Following a hearing on Plaintiffs' motion to overrule
27 Warner/Chappell's privilege claim, Magistrate Judge Wilner denied Plaintiffs'
28 motion in a nine-page order. Dkt. No. 132.

1 9. Warner/Chappell has concurrently filed an application to file under seal
2 two confidential exhibits attached to this declaration—Exhibits B and C—which,
3 under the Protective Order approved and entered by this Court on May 5, 2014, Dkt.
4 No. 98, were timely designated as “Confidential” at the time that Warner/Chappell
5 produced the documents. In accordance with the Local Rules, Warner/Chappell has
6 endeavored to narrowly tailor its application to file under seal so that only genuinely
7 sealable material is sought to be filed under seal.

8 10. All of the exhibits referenced below were part of the record before
9 Magistrate Judge Wilner. For the Court’s convenience, I have attached the exhibits
10 to this declaration and noted where each exhibit may be found in the record before
11 Magistrate Judge Wilner. The confidential exhibits requested to be filed under seal
12 as part of Warner/Chappell’s opposition to Plaintiffs’ motion for review of
13 Magistrate Judge Wilner’s July 25, 2014 Order were sealed by Order of Magistrate
14 Judge Wilner. See Dkt. No. 136.

15 11. Attached hereto as Exhibit A is a true and correct copy of excerpts of
16 the transcript of the deposition of Jeremy Blietz. Exhibit A, which was part of the
17 record before Magistrate Judge Wilner, was attached to the Sealed Document –
18 Declaration of Kelly M. Klaus in Support Of Defendant’s Opposition to Plaintiffs’
19 Motion for Order (i) Overruling Defendants’ Claim of Privilege in Documents
20 Produced By a Non-Party, or Permitting a Second Rule 30(b)(6) Deposition to
21 Determine the Factual Basis for that Claim; (ii) Granting Relief from the Discovery
22 Cutoff to Conduct that Deposition (“Sealed 7/15/14 Klaus Declaration”), Dkt. No.
23 136 (as Exhibit B).

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1 12. Attached hereto as Exhibit B is a true and correct copy of WB Music
2 Corp.'s 1976 membership agreement with ASCAP and a 1995 extension of that
3 agreement. WB Music Corp.'s 1976 agreement, with the amendments provided for
4 by the 1995 extension, constitutes Warner/Chappell's current membership
5 agreement with ASCAP. Exhibit B, which was part of the record before Magistrate
6 Judge Wilner, was attached to the Sealed 7/15/14 Klaus Declaration, Dkt. No. 136
7 (as Exhibit D). I am informed and believe that Warner/Chappell maintains these
8 documents as private and confidential.

9 13. Attached hereto as Exhibit C is a true and correct copy of Summy's
10 1976 membership agreement with ASCAP. Exhibit C, which was part of the record
11 before Magistrate Judge Wilner, was attached to the Sealed 7/15/14 Klaus
12 Declaration, Dkt. No. 136 (as Exhibit C). I am informed and believe that
13 Warner/Chappell maintains this document as private and confidential.

14 14. Attached hereto as Exhibit D is a true and correct copy of ASCAP's
15 Articles of Association. Exhibit D, which was part of the record before Magistrate
16 Judge Wilner, was attached to the Sealed 7/15/14 Klaus Declaration, Dkt. No. 136
17 (as Exhibit E).

18 15. Attached hereto as Exhibit E is a true and correct copy of excerpts of
19 the transcript of Mr. Reimer's deposition. Exhibit E, which was part of the record
20 before Magistrate Judge Wilner, was attached to the Sealed Document – Declaration
21 of Melinda E. LeMoine in Support of Defendants' Supplemental Brief, Dkt. No. 140
22 (as Exhibit A).

23 16. Attached hereto as Exhibit F is a true and correct copy of a declaration
24 that Jeremy Blietz submitted in support of Warner/Chappell's opposition to a
25 motion to compel that Plaintiffs filed on June 4 and withdrew on June 25. *See* Dkt.
26 No. 101-7 (Declaration of Jeremy Blietz); *see also* Dkt. Nos. 101-1 (joint stipulation
27 on Plaintiffs' June 4 motion), 114 (Plaintiffs' notice of withdrawal of June 4
28 motion). Warner/Chappell cited Exhibit F in its opposition to Plaintiffs' subsequent

1 privilege-contest motion before Magistrate Judge Wilner. Dkt. No. 135 at 13, 40,
2 43, 49-50 (citing Dkt. No. 101-7).

3 I declare under penalty of perjury under the laws of the United States
4 that the foregoing is true and correct. Executed this 25th day of August 2014, at San
5 Francisco, California.

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