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**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA –
 WESTERN DIVISION**

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

Plaintiffs,

v.

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

Defendants.

) Lead Case No. CV 13-04460-GHK (MRWx)
)
) **REPLY IN FURTHER SUPPORT OF**
) **PLAINTIFFS’ MOTION TO EXCLUDE**
) **EVIDENCE; DECLARATION OF MARK C.**
) **RIFKIN IN SUPPORT OF AND EXHIBITS**
) **ATTACHED THERETO**
)
) Date: February 9, 2015
) Time: 9:30 a.m.
) Room: 650
) Judge: Hon. George H. King,
) Chief Judge

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION 1

II. ARGUMENT..... 3

 A. Defendants Admit That Exhibits 101-104 Are Not
 The Copyright Certificates 3

 B. Defendants’ Other Arguments Regarding Exhibits 101-104
 Are Factually Incorrect And Legally Irrelevant..... 5

 C. Exhibit 106 Is Not Self-Authenticating 6

 D. Exhibit 106 Is Not What Defendants Claim It To Be 9

 E. Defendants Still Have Not Authenticated Exhibit 11911

 F. The “Ancient Records” Exception To The Hearsay Rule Does
 Not Apply To Exhibit 11913

III. CONCLUSION14

1 **TABLE OF AUTHORITIES**

2
3 **Cases**

4 *American Visuals Corp. v. Holland,*
5 239 F.2d 740 (2d Cir. 1956) 8

6 *Columbia First Bank, F.S.B. v. United States,*
7 No. 95-510 C, 2003 U.S. Claims
8 LEXIS 310 (Fed. Cl. Oct. 31, 2003) 13, 14

9 *Jim Marshall Photography, LLC v. John Varvatos of California,*
10 No. C-11-06702 DMR, 2013 U.S. Dist.
11 LEXIS 92471 (N.D. Cal. June 28, 2013) 8

12 *Rohauer v. Friedman,*
13 306 F.2d 933 (9th Cir. 1962) 3

14 *Source Search Techs., LLC v. Lending Tree, LLC,*
15 No. 04-4420 (DRD), 2008 U.S. Dist.
16 LEXIS 52473 (D.N.J. July 8, 2008) 8

17 *United States v. Bellucci,*
18 995 F.2d 157 (9th Cir. 1993) 12

19 **Statutes**

20 17 U.S.C.
21 § 101 7
22 § 209 3

23 **Rules**

24
25 Fed. R. Evid.
26 602 13
27 803 adv. comm. n. (1972 Proposed Changes) 13
28 803(16) 2
901(b)(4) 2, 11
901(b)(8) 12, 13

1	902(1)(A)	3
2	902(1)(B).....	3
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
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1 Plaintiffs hereby submit this reply brief in further support of their motion to
2 exclude Defendants’ Exhibits 101-104 (Manifold Decl., Exs. 101-104 at 146-168), 106
3 (*id.* at 160-161), and 119 (*id.* at 164-166) from the Appendix, and to strike all references
4 to those exhibits as well as the arguments based upon them from the Joint Brief and the
5 SOF.¹ For the additional reasons set forth below, Exhibits 101-104, 106, and 119, are
6 inadmissible and should be stricken from the Appendix along with all references to
7 those exhibits in the Joint Brief and the SOF.

8 **I. INTRODUCTION**

9 Plaintiffs have moved to exclude Defendants’ Exhibits 101-104, 106, and 119 and
10 to strike all references to them from the summary judgment record. Defendants now
11 admit that Exhibits 101-104 are *not* copies of the registration certificates for the original
12 copyrights E51988 and E51990 or for the renewal copyrights R306185 and 306186.
13 Rather, as Defendants also now admit, Plaintiffs’ Exhibits 44, 48, 67, and 68, *are* the
14 registration certificates for those copyrights.

15 In the summary judgment briefing, Defendants relied almost entirely on Exhibits
16 101-104 – which they now admit are *not* the registration certificates – leaving
17 Defendants very little upon which to argue they own the *Happy Birthday* copyright.
18 Therefore, in opposing Plaintiffs’ motion to exclude Exhibits 101-104, Defendants
19 argue that the registration certificates are inconsequential because there is supposed
20 “independent” evidence (which is supposedly “undisputed”) that either Mildred Hill or
21 Patty Hill (or perhaps both of them) wrote the Song, and supposed evidence that their
22 sister Jessica Hill purportedly “allowed Summy to publish and sell *Happy Birthday* in
23 the early 1930s.” Defs. Br. at 3:16. There is no such evidence.

24
25
26 ¹ Plaintiffs incorporate by reference any and all definitions set forth in Plaintiffs’
27 Notice of Motion and Motion To Exclude Evidence (Dkts. 197-198, Dec. 22, 2014)
28 (“Mot.”) as though fully set forth herein unless otherwise specified.

1 Defendants' argument is little more than an attempt to supplement the summary
2 judgment briefing and to confuse the record with still more unsubstantiated factual
3 assertions. As Plaintiffs have shown in their motion for summary judgment, there is no
4 such evidence. Whether Mildred or Patty Hill wrote *Happy Birthday* or any part of it,
5 there is no evidence of any kind that either of them gave any rights to the Song to
6 Summy. Indeed, Summy admitted it acquired only rights to "*various piano*
7 *arrangements* of the said musical composition 'Good Morning to All'" from Jessica in
8 1934 and 1935. *See* Decl. Mark C. Rifkin In Supp. Reply In Further Supp. Pls.' Mot.
9 ("Rifkin Decl."), Ex. 51 at 11-12, ¶ 18 (App'x, Ex. 51 at 3:684-685) (emphasis added).
10 There is no evidence – *none* – that Summy acquired any other rights from Jessica. And
11 there is no evidence – *none* – that Jessica knew Summy was publishing sheet music
12 with the Song's familiar lyrics, much less that she consented to any publication of the
13 sheet music or that she had any right to do so. All of this is irrelevant to the motion to
14 exclude Defendants' Exhibits 101-104.

15 Plaintiffs also have moved to exclude Exhibits 106 and 119 and to strike all
16 references to those exhibits from the summary judgment record. The two exhibits are
17 not self-authenticating under Rule 901(b)(4): nothing about the exhibits satisfies the
18 requirement that Defendants convince the Court that the exhibits are what Defendants
19 claim them to be. Nor does the "ancient documents" exception to the rule against
20 hearsay, Rule 803(16), entitle Defendants to rely upon the content of Exhibits 106 or
21 119 to prove the truth of the matters stated in them.

22 For these reasons, the Court should grant Plaintiffs' motion to exclude
23 Defendants' Exhibits 101-104 (which is now undisputed), 106, and 119, and strike all
24 references to them from the summary judgment record.

1 **II. ARGUMENT**

2 **A. Defendants Admit That Exhibits 101-104 Are Not The Copyright**
3 **Certificates**

4 Plaintiffs have moved to exclude Defendants' Exhibits 101 and 103, the
5 purported "registration certificates" for the 1935 original copyrights (E51988 and
6 E51990) upon which Defendants principally rely, from the summary judgment record.
7 Faced with overwhelming evidence that their proffered exhibits are *not* the official
8 registration certificates for any of the copyrights at issue, Defendants now admit "the
9 Copyright Office deems summary judgment Exhibits 48 and 44 (and not Exhibits 101
10 and 103) to be the registration certificates for E51990 and E51988," Defs. Br. at 1:10-
11 12, and they "erred in identifying Exhibits 101 and 103 as the official registration
12 certificates," Defs. Br. at 4:17-18. That same overwhelming evidence has led
13 Defendants to admit that Plaintiffs' Exhibits 44 and 48 are, in fact, the registration
14 certificates for E51988 and E51990. *Id.*²

15 In a last-ditch effort to keep Exhibits 101 and 103 in the record, Defendants ask
16 the Court to accept them as certified copies of registration records maintained by the
17 Copyright Office. *See* Defs. Br. at 5. *First*, they were not certified. Under Rule
18 902(1)(A) and (B), sealed documents of a department or agency of the United States
19 (such as the Copyright Office) must include a signature of an official purporting to be an
20 execution or attestation. Exhibits 101 and 103 contain no signature of anyone attesting
21

22 ² In an apparent attempt to demonstrate their good faith basis for making a false
23 claim that Exhibits 101 and 103 were the registration certificates for E51988 and
24 E51990 (upon which they based most of their summary judgment argument),
25 Defendants devote three pages of their explaining how they obtained the documents
26 from the Copyright Office in late 2013. *See* Defs. Br. at 5-7. To minimize their own
27 embarrassment, Defendants even blame Plaintiffs for not producing the genuine
28 registration certificates earlier in the litigation. Defs. Br. at 5 & n.7. This is sheer
nonsense. Defendants claim to own the copyrights in question. If anyone should have
had the actual registration certificates for the copyrights, surely it was Defendants
themselves.

1 to their authenticity. *Cf.* Manifold Decl., Exs. 44 and 48 (original exhibits lodged with
2 the Court on Dec. 18, 2014 (*See* Pls. Not. Lodging, Dkt. 195) which include signature of
3 Registrar attesting to their authenticity). *Second*, and more importantly, Exhibits 101
4 and 103 have no legal significance. Defendants argue in the summary judgment brief
5 that they are entitled to a presumption of ownership from registration *certificates*, not
6 some other copyright records. *See, e.g.*, Jt. Br. at 35. The limited presumption arises
7 from the *certificates*. *See* 17 U.S.C. § 209 (certificate is “*prima facie* evidence of the
8 facts stated therein”); *Rohauer v. Friedman*, 306 F.2d 933, 935 (9th Cir. 1962)
9 (presumption from certificate). Whatever they may be, Exhibits 101 and 103 are not
10 registration certificates. And Defendants offer no argument that those documents have
11 *any* legal significance.

12 Since there no longer is any dispute that Exhibits 101 and 103 are *not* what
13 Defendants had claimed them to be, the Court should grant Plaintiffs’ motion to exclude
14 Exhibits 101 and 103 and strike all references to them from the summary judgment
15 record.

16 Plaintiffs also have moved to exclude Defendants’ Exhibits 102 and 104, the
17 purported “registration certificates” for the 1962 renewal copyrights (R306185 and
18 R306186). In their response, Defendants admit that those exhibits, too, are *not* genuine
19 copies of the registration certificates for the renewal copyrights. Defs. Br. at 7:8-9. As
20 Defendants also admit, Plaintiffs’ Exhibits 67 and 68 are the registration certificates for
21 those renewal copyrights. *Id.* It is now undisputed that the actual registration
22 certificates for R306185 and R306186 are Plaintiffs’ Exhibits 67 and 68, not
23 Defendants’ Exhibits 102 and 104.

24 Thus, the Court should also grant Plaintiffs’ motion to exclude Defendants’
25 Exhibits 102 and 104 and strike all references to them from the summary judgment
26 record.

1 **B. Defendants’ Other Arguments Regarding Exhibits 101-104 Are**
2 **Factually Incorrect And Legally Irrelevant**

3 Forced to admit that Exhibits 101-104 are not the registration certificates for any
4 copyright, Defendants have reversed course and now argue that the registration
5 certificates and any rebuttable presumption the Court may draw from them no longer
6 matters. Defendants’ argument in this regard has *nothing* to do with whether the Court
7 should exclude Defendants’ Exhibits 101-104 and strike them from the summary
8 judgment record. Plainly, and now admittedly, the Court should do so.

9 Since they have admitted that Defendants’ Exhibits 101-104 are *not* registration
10 certificates for any copyrights, Defendants use much of their response to this motion to
11 exclude evidence to supplement their summary judgment argument. Having relied
12 almost entirely upon a rebuttable presumption from the purported registration
13 certificates for E51988 and E51990 – which they have admitted are not registration
14 certificates at all – Defendants now argue that Exhibits 101-104 do not really matter
15 because “the evidence is uncontroverted that Jessica Hill, another Hill sister, allowed
16 Summy to publish and sell *Happy Birthday to You* in the early 1930s.” Defs. Br. at 3:15-
17 16.

18 That argument is pure fantasy on Defendants’ part. Worse, it is directly
19 contradicted by undisputed and indisputable evidence in the summary judgment record
20 before the Court. In particular, in litigation by the Hill Foundation against Summy in
21 1942 over Summy’s unauthorized use of *Good Morning*, on December 29, 1942,
22 Summy judicially admitted that Jessica Hill assigned it only rights to “*various piano*
23 *arrangements* of the said musical composition ‘Good Morning to All.’” See Rifkin
24 Decl., Ex. 51 at 11, ¶ 18 (emphasis added). Seventy-three years later, based only upon
25 sheer speculation, Defendants are trying to re-write history to make it appear that
26 Jessica owned the rights to the entire Song itself, and that she transferred all those rights
27 to Summy.

1 The fact is, Jessica did not allow Summy to publish and sell *Happy Birthday to*
2 *You* in the early 1930s, as Defendants argue, and no evidence suggests otherwise. The
3 evidence conclusively proves that Jessica only gave Summy rights to “*various piano*
4 *arrangements*” of *Good Morning*.

5 Even if the Court were to give any consideration to Defendants’ 13th-hour
6 arguments why they own the *Happy Birthday* copyright, those arguments are fatally
7 factually flawed in any event. If Mildred Hill or Patty Hill (or both of them, as
8 Defendants surmise) wrote the familiar *Happy Birthday* lyrics, they did not do so as
9 employees-for-hire of Summy or in any other capacity for Summy, and there is no
10 evidence that Mildred or Patty Hill assigned the Song to Summy before 1935 when the
11 copyrights were registered.³ In 1934 and 1935, Jessica Hill assigned only limited rights
12 to “*various piano arrangements*” of *Good Morning* to Summy. The record simply does
13 not support Defendants’ argument in any way.

14 C. Exhibit 106 Is Not Self-Authenticating

15 Plaintiffs also have moved to exclude Defendants’ Exhibit 106, a copy of sheet
16 music purportedly protected by E51990, on the basis that it has not been properly
17 authenticated. Defendants apparently intended to rely upon Exhibit 106 to prove what
18 work was covered by E51990. Defendants no longer contend that Exhibit 106 is a copy
19 of the work that was deposited with the application for that copyright. Instead, they now
20 rely upon Exhibit 106 to prove what was published in 1935. Defs. Br. at 8. Defendants
21 have not offered any evidence to authenticate Exhibit 106 as a copy of the work that
22 was covered by E51990.

23 Instead, Defendants argue that Exhibit 106 is self-authenticating under Rule
24 901(b)(4) because it appears to be “sheet music for *Happy Birthday to You!* that

25 ³ In the summary judgment brief, Plaintiffs explained that a copyright assignment
26 cannot have retroactive effect. Jt. Br. at 30 (citing *Kronigsberg Int’l, Inc. v. Rice*, 16
27 F.3d 355, 357 (9th Cir. 1994)). Defendants have cited no authority to support their
28 argument that the Hill Foundation’s assignment of certain rights in 1944 could have
conferred the 1935 copyrights upon Summy.

1 contains the copyright notice ‘Copyright 1935 by Clayton F. Summy Co. International
2 Copyright.’” Defs. Br. at 9:12-14. That observation alone does not entitle Defendants to
3 rely upon Exhibit 106 to prove either what was filed with the application for E51990 or
4 what was published in 1935. Because no one can testify that Exhibit 106 is an exact
5 copy of the work deposited with the application for E51990, Defendants are left to argue
6 it is admissible because “it shows that sheet music for *Happy Birthday to You!*,
7 containing only the ‘familiar lyrics’ of the song, was **published** with the following
8 copyright notice: ‘Copyright 1935 by Clayton F. Summy Co. International Copyright.’”
9 Defs. Br. at 8:6-9 (emphasis added). While the Court may infer that Exhibit 106 was
10 **printed** at some point in time, there is no proof it was ever **published**, much less **when** it
11 was printed or published.⁴ The fact that Exhibit 106 was **printed** at some point in time
12 is irrelevant.

13 Under the Copyright Act, “publication” means “to distribute copies or
14 phonorecords of the work to the public by sale or other transfer of ownership, or by
15 rental, lease, or lending.” 17 U.S.C. § 101. A mere public performance of a work “does
16 not of itself constitute publication.” *Id.* Under the 1909 Copyright Act, which was in
17

18 ⁴ The fact that Exhibit 106 bears the legend “Copyright 1935 by Clayton F. Summy
19 Co. International Copyright” does not even prove it was printed in 1935. A copyright
20 notice is supposed to contain the claimed first date of publication of a work, no matter
21 when that particular edition was printed or published. For example, Exhibit D (attached
22 to the Rifkin Decl. at 19-20) appears to be *Happy Birthday* sheet music that includes a
23 copyright date of 1935, but it cannot have been printed before 1957 since the publisher,
24 identified as “Summy-Birchard Music,” did not exist before 1957. *See* SOF at 78, ¶
25 P173 (undisputed that the name of “Summy Publishing Company was changed to
26 Summy-Birchard Publishing Company”). The exclusive print rights agent identified in
27 the legend, Alfred Publishing Co., Inc., was not hired until later than that. Likewise,
28 Exhibit C (attached to the Rifkin Decl. at 17-18) appears to be another version of *Happy
Birthday* sheet music which also includes an original copyright date of 1935, but that
sheet music could not have been printed before 1979 since it also includes the later
copyright date of 1979 for the music arrangement. While this does not prove what was
copyrighted in 1935 (or at any time thereafter), it establishes that Exhibit 106 is not self-
authenticating as a version of the Song that was either printed or published in 1935.

1 effect in 1935, “publication” was dependent upon a number of factors, including the
2 number of copies that were made and distributed, the geographical area in which the
3 distribution was made, and other similar factors. *See American Visuals Corp. v.*
4 *Holland*, 239 F.2d 740 (2d Cir. 1956). Defendants have offered ***no evidence*** regarding
5 any of these factors. While they may be correct that Exhibit 106 was printed (and may
6 even be correct that it was printed in 1935), the record is completely devoid of facts
7 necessary for the Court to find that Exhibit 106 was “published” in 1935 – the limited
8 purpose for which they now claim to offer it. For that additional reason, the Court
9 should exclude Exhibit 106 and strike all references to it from the summary judgment
10 record.

11 The two cases cited by Defendants do not support their argument. In *Jim*
12 *Marshall Photography, LLC v. John Varvatos of California*, No. C-11-06702 DMR,
13 2013 U.S. Dist. LEXIS 92471, at *11-12 n.5 (N.D. Cal. June 28, 2013), the court took
14 judicial notice of photographs published in three editions of *Rolling Stone* magazine and
15 used as cover art on record albums released by Warner Bros. Records and CBS Records.
16 The magazines were introduced into evidence and copies of the album covers were
17 lodged with the court. *Id.* Here, by contrast, Defendants offer no evidence that Exhibit
18 106 was actually published anywhere – only that it was printed – and they have lodged
19 nothing with the Court to prove that Exhibit 106 was ever published.

20 The narrow holding in the other case cited by Defendants, *Source Search Techs.,*
21 *LLC v. Lending Tree, LLC*, No. 04-4420 (DRD), 2008 U.S. Dist. LEXIS 52473 (D.N.J.
22 July 8, 2008), is just as irrelevant. There, the court held that when actual publication is
23 not questioned, “then there is no requirement that additional evidence, beyond the
24 copyright date, be presented as proof of publication for books, articles, or trade
25 publications.” *Id.* at *81-82 n.8 (citations omitted). Here, Plaintiffs dispute whether
26 Exhibit 106 ever was published for purposes of the Copyright Act, and it is not a book,
27 article, or trade publication in any event. *See id.*

28

1 Apart from the obvious fact that Exhibit 106 was printed at some time, *nothing* in
2 the record permits the Court to conclude it is a true and correct copy of anything that
3 was *published* in 1935 or at any other time, or that it was *filed* with the Copyright
4 Office with the application for E51990.⁵ Other than the fact that it now exists, nothing
5 else is known about Exhibit 106.

6 Defendants still have offered no proof that Exhibit 106 ever was published, as
7 that term is used in copyright law, much less that it was published in 1935. Thus, there
8 is still nothing in the record to authenticate Exhibit 106. Defendants' other arguments on
9 this exhibit as well are irrelevant to the issues raised in this motion. Therefore, the Court
10 should grant Plaintiffs' unopposed motion to exclude Exhibit 106 and strike all
11 references to it from the summary judgment record.

12 For this reason alone, the Court should grant Plaintiffs' motion to exclude Exhibit
13 106 and strike all references to it from the summary judgment record.

14 **D. Exhibit 106 Is Not What Defendants Claim It To Be**

15 As the Court is aware, the parties vigorously dispute the scope of E51990.
16 Plaintiffs contend that the copyright covers only the piano arrangement composed by
17 Summy's employee-for-hire, Preston Ware Orem, whom Defendants judicially admit
18 did *not* write the familiar *Happy Birthday* lyrics. *See* SOF at 52, ¶ P120. No one has
19 said, and no one can say, what work was done by Orem (Summy's employee-for-hire)
20 in 1935, what work was deposited with the Copyright Office with the application for
21 E51990, or what work was covered by that copyright. Defendants' Brief answers *none*
22 of these questions.

23
24 ⁵ Defendants seek to rely upon the sequential engraving plate numbers for Exhibit
25 43 (3076) and Exhibit 106 (3075) to prove that Exhibit 106 was *published* at the same
26 time as Exhibit 43. Defs. Br. at 11:7-13. There is no doubt that Exhibit 43 was
27 "published" as that term is used under the Copyright Act, since it bears the stamp from
28 the Copyright Office as the deposit copy for E51988. *See* Klaus Decl., Ex. 43 at 40.
The mere fact that the engraving plates appear to be sequentially numbered proves very
little, and certainly does not prove the "publication" of Exhibit 106.

1 Despite admitting that Orem did not write the Song’s familiar lyrics, Defendants
2 argue that the copyright covers not just Orem’s piano arrangement, but also the lyrics.
3 The Court also is aware that there is no deposit copy for E51990.⁶ The deposit copy for
4 E51990 no longer exists. Apparently in an attempt to prove what work was covered by
5 E51990, Defendants have proffered Exhibit 106, which, unlike Exhibit 43, has no stamp
6 on it showing that it was ever submitted to the Copyright Office.

7 Defendants now admit that Exhibit 106 is *not* a “copy of the sheet music Summy
8 deposited in the Copyright Office in connection with E51990.” Defs. Br. at 10.
9 Therefore, Defendants are left to argue that Exhibit 106 is merely “*consistent* with . . .
10 what Summy deposited with the Copyright Office in December 1935,” *id.* (emphasis
11 added), without specifying whether they are referring to what was deposited with the
12 application for E51988 or with the separate application for E51990, *see id.*

13 Trying to exploit the fact that the application for E51988 (covering Mrs.
14 Forman’s piano arrangement and revised lyrics) and the application for E51990

15
16 ⁶ By contrast, Exhibit 43 is the stamped deposit copy of the work submitted with
17 the application for E51988; the Copyright Office’s stamp “E51988” appearing on
18 Exhibit 43 establishes that fact. Klaus Decl., Ex. 43 at 40 (App’x at 3:623). On its face,
19 E51988 expressly covers not only the arrangement composed by Summy’s other
20 employee-for-hire, Mrs. R.R. Forman, but the revised lyrics written by Mrs. Forman.
21 Defendants also judicially admit that Mrs. Forman did not write the familiar *Happy*
22 *Birthday* lyrics. *See* SOF at 47, ¶ P109. By reviewing Exhibit 43, the Court can
23 determine precisely what those revised lyrics were: “May your birthday be bright, Full
24 of cheer and delight” Klaus Decl., Ex. 43 at 41 (App’x at 3:624).

25 As Defendants acknowledged in their summary judgment briefing, the absence of
26 a deposit copy is excused if the copyright claimant “holds a registration certificate and
27 offers evidence of the contents of the deposit copy. *Jt. Br. at 39* (citing *Hosp. for Sick*
28 *Children v. Melody Fare Dinner Theatre*, 516 F. Supp. 67, 70 (E.D. Va. 1980) and
Enter. Mgmt. Ltd. v. Warrick, 717 F.3d 1112, 1120 n.8 (10th Cir. 2013)). While
Summy held a registration certificate for E51990 (Manifold Decl., Ex. 48), Defendants
now admit they have offered *no evidence of the contents* of the deposit copy. Defs. Br.
at 8:5. Thus, under Defendants’ own argument, they cannot rely upon E51990 since
they cannot prove what work it covered.

1 (covering Mr. Orem’s piano arrangement) were both submitted on December 6, 1935, in
2 their response to this motion, Defendants deliberately mix up the work deposited with
3 E51988 – for which there is a stamped deposit copy (Klaus Decl., Ex. 43) – with
4 E51990 by referring to them together as “the sheet music Summy indisputably
5 deposited in the Copyright Office in December 1935.” Defs. Br. at 8:14-15.

6 Defendants hope to confuse the Court by conflating the two works. Plainly, they
7 were different copyrights, covering different works for hire that were created by
8 different employees-for-hire. The only facts shared by E51988 and E51990 are that: (i)
9 neither employee-for-hire wrote the familiar *Happy Birthday* lyrics; (ii) neither
10 copyright covers those lyrics or the setting of those lyrics to the Song’s melody; and (iii)
11 the applications for both copyrights were submitted on the same day.

12 But more importantly, even assuming that Exhibit 106 somehow relates to the
13 work deposited with the application for E51990, whether Exhibit 106 includes the
14 Song’s familiar lyrics does not prove the scope of E51990, any more than the fact that
15 Exhibit 43, which includes the Song’s familiar lyrics as well as the obscure second verse
16 written by Mrs. Forman, proves the scope of E51988.

17 **E. Defendants Still Have Not Authenticated Exhibit 119**

18 Plaintiffs have moved to exclude Defendants’ Exhibit 119, a “Summary Fact
19 Sheet” excerpted from an undated, unsigned, and unidentified CIM. It appears under
20 the letterhead of Wertheim Schroder & Company Incorporated (“Wertheim”).⁷ Despite
21 that identifying information, Defendants now assert that Exhibit 119 was prepared by
22 Birch Tree Group Ltd. (“BTG”) in 1988. Defs. Br. at 12-13. Other than the fact that
23 Exhibit 119 mentions BTG as the subject company, nothing in Exhibit 119 identifies
24

25 ⁷ In 1986, Schrodgers Plc., an England-based bank and investment firm, acquired
26 50% interest in New York investment bank and securities firm, Wertheim & Co., which
27 then operated as Wertheim Schroder & Co., Inc., until the remaining 50% interest was
28 acquired by Schrodgers in 1994 (and renamed Schroder & Co., Inc.). *See* Schrodgers Plc.,
<http://www.schrodgers.com/global/home/> (follow “Company history” hyperlink; then
follow “20th Century” hyperlink).

1 BTG – or anyone from BTG – as the author of the Summary Fact Sheet or the source of
2 the information contained in it. *See* Klaus Decl., Ex. E at 30-38.

3 Defendants have yet to authenticate Exhibit 119.⁸ Kelly Klaus, Esquire, another
4 of Defendants’ outside counsel, purports to identify a few additional pages from the
5 CIM, which, Defendants argue, substantiate that Exhibit 119 was prepared by BTG. To
6 begin, a witness can only authenticate a document based upon his or her own first-hand
7 knowledge. *See United States v. Bellucci*, 995 F.2d 157, 160 (9th Cir. 1993). Mr. Klaus
8 does not claim to have personal knowledge of anything having to do with those
9 additional pages from the CIM, and he does not otherwise explain how he is able to
10 identify or authenticate them.

11 Even if the Court were to accept Mr. Klaus’s authentication of those additional
12 pages from the CIM – a complete copy of which has never been produced or identified
13 – those new excerpts certainly do not authenticate Exhibit 119 or prove the Summary
14 Fact Sheet was prepared by BTG. The additional excerpted pages attached to Mr.
15 Klaus’s declaration merely state that the CIM “was prepared *by and for* BTG,” without
16 identifying which parts were prepared *by* BTG and which parts were prepared *for* it.
17 Klaus Decl., Ex. E at 32 (emphasis added). Thus, the new pages excerpted from the
18 CIM still leave the Court to guess who prepared Exhibit 119, the original excerpt from
19 the CIM.

20 Adding yet another layer of uncertainty to the record, the new excerpt attached as
21 Exhibit E to Mr. Klaus’s declaration explicitly disclaims reliability: “The information
22 contained herein has not been independently verified by [Wertheim]. Accordingly, there
23 can be no representation by [Wertheim] as to the completeness or accuracy of such
24 information.” Klaus Decl., Ex. E at 32. This explicit disclaimer casts added doubt upon
25

26 ⁸ Defendants have not even tried to authenticate Exhibit 119. Rather, they argue it
27 is self-authenticating under Fed. R. Evid. 901(b)(4). *See* Defs. Br. at 13. For the reasons
28 discussed in Section II.F., below, however, Defendants cannot rely upon Rule 901(b)(4)
to authenticate an ancient document.

1 the accuracy and reliability of the entire document, including the unidentified,
2 unverified, unauthenticated snippet (the Summary Fact Sheet) that Defendants
3 previously culled out of the CIM and marked as Exhibit 119. Nothing about the contents
4 of Exhibit 119, or the new excerpt from the CIM attached as Exhibit E to Mr. Klaus's
5 declaration, suggests that the Summary Fact Sheet is reliable. To the contrary, the
6 additional excerpts attached to the Klaus Decl. show that Exhibit 119 cannot be relied
7 upon for anything.

8 **F. The "Ancient Records" Exception To The Hearsay Rule Does**
9 **Not Apply To Exhibit 119**

10 If Defendants rely upon Exhibit 119 to prove the truth of anything stated in it, the
11 exhibit is inadmissible hearsay. Defendants' bootstrap response, that Exhibit 119 is not
12 hearsay since it has been self-authenticated, is legally unavailing. To be admissible
13 under the "ancient document" hearsay exception, the document must first be
14 authenticated under Fed. R. Evid. 901(b)(8); it may *not* be self-authenticated under Rule
15 901(b)(4). *Columbia First Bank, F.S.B. v. United States*, No. 95-510 C, 2003 U.S.
16 Claims LEXIS 310, at *4 (Fed. Cl. Oct. 31, 2003) (Rule 803(16) "requires
17 authentication for an ancient document to be admissible, and Fed. R. Evid. 901(b)(8)
18 identifies the appropriate criteria to be satisfied for authentication of ancient
19 documents.").

20 Under Rule 901(b)(8), to be admissible, the proponent⁹ of an ancient document
21 must offer evidence that it "(A) is in a condition that creates no suspicion about its
22 authenticity; (B) was in a place where, if authentic, it would likely be; and (C) is at least
23 20 years old when offered." *Id.* Defendants have not even cited, much less tried to
24 meet, two of the requirements of Rule 901(b)(8). While there is no doubt that Exhibit
25 119 is more than 20 years old, Defendants have offered no evidence regarding where it
26 was kept or found, and absolutely no evidence of its condition that eliminates suspicion

27 ⁹ As the proponent of the evidence, Defendants bear the burden to authenticate it
28 properly.

1 about its authenticity. Far from it, there is considerable doubt about the authenticity of
2 the excerpts from the CIM that Defendants have marked as Exhibit 119, starting with
3 the fact that its author still has not been identified and Defendants have not produced the
4 entire document.

5 Even if the Court were to admit Exhibit 119 under the “ancient document”
6 exception to the hearsay rule, Defendants offer no response to Plaintiffs’ argument that
7 they have failed to lay a proper foundation for the statements made by the still-
8 unidentified and unknown author of Exhibit 119. *See* Fed. R. Evid. 803 adv. comm. n.
9 (1972 Proposed Changes) (firsthand knowledge requirement not dispensed with) (citing
10 Fed. R. Evid. 602). At a minimum, Defendants were required to identify the author and
11 provide facts permitting the Court to find that he or she likely had first-hand knowledge
12 of the matters stated. *Columbia First Bank*, 2003 U.S. Claims LEXIS 310, at *7-8.

13 If the author of Exhibit 119 (whomever that was) did not have first-hand
14 knowledge of the chain of title but, rather, was repeating information provided by
15 someone else, then the double hearsay problem would render it inadmissible. *Id.* at *9
16 (“hearsay within hearsay problem persists” for ancient documents). Defendants have not
17 even tried to solve this problem.

18 For these reasons, the Court should grant Plaintiffs’ motion to exclude Exhibit
19 119 and strike all references to it from the summary judgment record.

20 **III. CONCLUSION**

21 For all these additional reasons, Defendants’ Exhibits 101-104, 106, and 119 are
22 inadmissible and should be stricken from the Appendix and any reference to those
23 exhibits should be stricken from the Joint Brief and SOF.

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