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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		)	DECLARATION OF BETSY C.
16	Plaintiffs,	)	MANIFOLD IN SUPPORT OF
17	v.	)	PLAINTIFFS' EX PARTE
18		)	APPLICATION TO HAVE THE COURT
19	WARNER/CHAPPELL MUSIC,	)	CONSIDER NEWLY DISCOVERY
20	INC., <i>et al.</i>,	)	EVIDENCE "MISTAKENLY"
21		)	WITHHELD BY DEFENDANTS
22	Defendants.	)	DURING DISCOVERY AND ENTER
23		)	SUMMARY JUDGMENT IN
24		)	PLAINTIFFS' FAVOR
25)	
26		)	Judge: Hon. George H.
27		)	King, Chief Judge
28		)	Courtroom: 650
)	
		)	Fact Discovery Cutoff: July 11, 2014
		)	MSJ Hearings March 23, 2015
		)	and July 29, 2015
		)	Pretrial Conference: N/A
		)	Trial: N/A
)	

1 I, Betsy C. Manifold, hereby declare as follows:

2 1. I am an attorney duly licensed to practice law in the States of California,
3 New York, and Wisconsin, and before this Court. I am a partner with the law firm
4 Wolf Haldenstein Adler Freeman & Herz LLP, interim lead class counsel for
5 plaintiffs and the class. I have personal knowledge of the following facts, and if
6 called upon to do so, I could and would competently testify as to them.

7 2. I submit this declaration in support of Plaintiffs' *Ex Parte* Application to
8 have the Court Consider Newly Discovery Evidence "Mistakenly" Withheld by
9 Defendants during Discovery and Enter Summary Judgment in Plaintiffs' Favor.

10 **NOTICE OF EX PARTE APPLICATION PURSUANT TO L.R. 7-19.1**

11 3. On July 24, 2015, at approximately 1:20 pm, I notified Defendants'
12 counsel, Kelly Klaus and Adam Kaplan, that Plaintiffs intended to file an *ex parte*
13 application asking the Court to consider newly discovered evidence mistakenly
14 withheld by Defendants during discovery as well as evidence discovered by Plaintiffs
15 directly related to Defendants' newly discovered evidence and to enter summary
16 judgment in Plaintiffs' favor based on the applicable law. After scanned versions of
17 the relevant pages to be submitted were sent by me to Defendants' counsel at
18 approximately at 2:00 p.m. on same day, Defendants' counsel advised me in writing
19 that Defendants do not oppose the submission of this evidence (Exhibits A-C) by
20 Plaintiffs. Defendants will oppose in writing the entry of summary judgment in
21 Plaintiffs' favor. Mr. Klaus requested that I attach a copy of his July 24, 2015 e-
22 mail to my declaration, a copy of which is attached hereto as Exhibit F.

23 4. On July 27, 2015, Plaintiffs electronically served a copy of this *ex parte*
24 application and supporting papers on Defendants' counsel *prior* to filing.

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1 **PROCEDURAL BACKGROUND: DISCOVERY CUT-OFF AND JOINT**
2 **SUMMARY JUDGMENT MOTIONS**

3 5. The Court initially set the fact discovery deadline for June 27,
4 2014. (Dkt. 92), which was extended by Magistrate Judge Wilner, in connection
5 with this Court, and at the request of both parties, to July 11, 2014. (Dkt. 119).

6 6. On November 25, 2014, the parties filed Joint Cross-Motions for
7 Summary Judgment (Dkt. 179, 181, 182), a Joint Statement of Uncontroverted Facts
8 (Dkt. 180, 183), and an extensive Joint Evidentiary Appendix (Dkt. 167-178) (which
9 was amended by Court Order and re-filed). (Dkt. 185, 187-195). Oral argument was
10 held on March 23, 2015. (Dkt. 207).

11 7. On May 18, 2015, the Court ordered further briefing on the issue of
12 abandonment (Dkt. 215) which was submitted pursuant to Stipulation and Court
13 Order by the parties on June 15, 2015 (Dkt. 217, 219). In the May 18, 2015 Order,
14 the Court stated that “The Parties shall *not* submit any new evidence.” Dkt. At 215 at
15 1. Oral argument on the Supplemental Briefing is now set for July 29, 2015. (Dkt.
16 222).

17 **SUPPLEMENTAL PRODUCTION OF DOCUMENTS BY DEFENDANTS**
18 **AFTER JULY 2014 DISCOVERY CUT-OFF**

19 8. Nearly one year after the close of fact discovery, on July 9, 2015,
20 Defendants advised Plaintiffs that they were providing a supplemental production of
21 documents. Due to technical issues, Plaintiffs were unable to access the secure
22 production link until July 13, 2015.

23 9. On July 13, 2015, Plaintiffs were finally able to access the secure
24 database link of approximately 500 pages of documents, including approximately
25 200 pages of documents they claim were “mistakenly” not produced during
26 discovery. After a quick initial review of the documents, on the same day, Plaintiffs
27 advised Defendants that they did not consent to Defendants’ submission of any new
28 evidence to the Court in further support of their motion for summary judgment.

10. The supplemental production by Defendants included blurred pages

1 from *The EVERYDAY Song Book* (1927 edition) which included the *Good Morning*
2 *and Birthday Song*. See Exhibit A below. Other documents “mistakenly” produced
3 by Defendants also support Plaintiffs’ argument that the two copyrights in question,
4 E51988 and E51990, are limited to the *arrangements* written by Summy’s
5 employees as works-for-hire and the obscure second verse written by one of those
6 employees. One of the documents is a call sheet for E51990, an internal document
7 that identifies the copyrighted work as a piano arrangement of the earlier work *Good*
8 *Morning to All*. Since the only common element between *Good Morning* and *Happy*
9 *Birthday* is the shared melody, this document is an admission that E51990 covered
10 only that particular piano arrangement of the shared melody, which has been
11 Plaintiffs’ position since the beginning of this case.

12 11. Thereafter, Plaintiffs sought to obtain a clear version of the page from
13 *The EVERYDAY Song Book* (1927 edition) containing the *Good Morning and*
14 *Birthday Song*. On July 21, 2015, Plaintiffs contacted the Center for American
15 Music at the University of Pittsburgh to see if an original copy of the *Song Book* was
16 available. See Exhibit B below.

17 12. On July 23, 2015, the University of Pittsburgh found a copy in their
18 archives and provided clear scanned copies of the relevant pages from *The*
19 *EVERYDAY Song Book* (1927 edition) containing the *Good Morning and Birthday*
20 *Song*. *Id.* The *Good Morning and Birthday Song* had the following language:
21 “Special permission through courtesy of The Clayton F. Summy Co.” *Id.* Unlike
22 other individual works in the book, for which a copyright was identified, *no*
23 *copyright was claimed or identified* for the *Good Morning and Birthday Song*.

24 13. After seeing this language, Plaintiffs then searched and located a 1922
25 edition of *The EVERYDAY Song Book* with the same publication of *Good Morning*
26 *and Birthday Song* and same language. On July 24, 2015, Plaintiffs received a copy
27 of *The EVERYDAY Song Book* and copies of the relevant pages are attached to this
28 declaration. See Exhibit C below.

1 12. On July 21, 2015, Plaintiffs also e-mailed Defendants and requested an
2 opportunity to review the originals of Defendants' late supplemental production. On
3 July 22, 2015, Defendants offered to allow Plaintiffs to inspect the microfiche from
4 which the copies were produced and again produced a blurred copy of the relevant
5 pages from *The EVERYDAY Song Book* (1927 edition) which included the *Good*
6 *Morning and Birthday Song*.

7 **NEED FOR EXTRORDINARY RELIEF**

8 13. Plaintiffs are mindful of the Court's order directing the parties not to
9 supplement the summary judgment record when they submitted their supplemental
10 joint brief on whether Patty Hill abandoned any copyright to the *Happy Birthday*
11 lyrics. However, because the documents prove conclusively that the song is in the
12 public domain, thus making it unnecessary for the Court to decide the scope or
13 validity of the disputed copyrights, much less whether Patty Hill abandoned any
14 copyright she may have had to the lyrics – indeed, all those issues become moot –
15 Plaintiffs are compelled to bring them to the Court's attention now, before more time
16 is needlessly spent on the pending cross-motions for summary judgment.

17 14. Absent this relief, the Court will waste judicial resources in determining
18 and hearing further argument on the extensive cross-motions for summary judgment
19 filed by the parties in November 2014. Here, evidence withheld by Defendants
20 during discovery and during the extensive briefing of the cross-motions and newly
21 discovered evidence by Plaintiffs directly related to Defendants' supplemental
22 production readily resolves the key issues in Plaintiffs' favor and should be
23 considered in the interest of justice.

24 15. Plaintiffs are not at fault in the need for this *ex parte* relief, any
25 prejudice to Defendants was created by their own conduct in "mistakenly"
26 withholding evidence and good cause exists for the review of this newly discovered
27 evidence by the Court and the grant of Summary Judgment in Plaintiffs' favor.

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1 **EXHIBITS**

2 16. Attached hereto are true and correct copies of the following documents:

3 **Exhibit A:** Relevant pages from Defendants’ Supplemental Production, first
4 accessed by Plaintiffs on July 13, 2015, including pages from 1927 version of
5 “*The EVERYDAY Song Book*” showing the *Good Morning and Birthday Song*
6 (WC2397-2400);

7 **Exhibit B:** July 23, 2015 e-mail from Linda Tashbook (University of
8 Pittsburgh) to Mark Rifkin attaching scanned pages from the 1927 version of “*The*
9 *EVERYDAY Song Book*” showing the *Good Morning and Birthday Song*;

10 **Exhibit C:** Copies of the relevant pages from 1922 version of “*The*
11 *EVERYDAY Song Book*” which pages showing the *Good Morning and Birthday*
12 *Song*;

13 **Exhibit D:** Copyright Reg. No. A453345, for the first edition of *The*
14 *EVERYDAY Song Book*, filed on Aug. 5, 1916 (which did not include the *Good*
15 *Morning and Birthday Song*);

16 **Exhibit E:** Copyright Reg. No. A624750 for revised edition of *The*
17 *EVERYDAY Song Book*, filed on Oct. 6, 1921 (which included the *Good Morning*
18 *and Birthday Song*); and

19 **Exhibit F:** July 24, 2015 Electronic Mail exchange between Plaintiffs’
20 counsel (Betsy Manifold and Mark Rifkin) and Defendants’ Counsel (Kelly Klaus
21 and Adam Kaplan).

22
23 I declare under penalty of perjury that the foregoing is true and correct.
24 Executed this 27th day of July 2015, in the City of San Diego, State of California.

25 By: /s/ Betsy C. Manifold
26 BETSY C. MANIFOLD