

1 FRANCIS M. GREGOREK (144785)  
 gregorek@whafh.com  
 2 BETSY C. MANIFOLD (182450)  
 manifold@whafh.com  
 3 RACHELE R. RICKERT (190634)  
 rickert@whafh.com  
 4 MARISA C. LIVESAY (223247)  
 livesay@whafh.com

5 **WOLF HALDENSTEIN ADLER**

6 **FREEMAN & HERZ LLP**

7 750 B Street, Suite 2770  
 San Diego, CA 92101  
 Telephone: 619/239-4599  
 8 Facsimile: 619/234-4599

9 *Interim Class Counsel for Plaintiff and the Proposed Class*

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

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

14 Plaintiffs,

15 v.

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

18 Defendants.  
 19  
 20  
 21

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

) **NOTICE OF MOTION AND MOTION**  
 ) **FOR LEAVE TO AMEND AND FILE**  
 ) **FIFTH AMENDED COMPLAINT**

) Date: November 30, 2015  
 ) Time: 9:30 a.m.  
 ) Judge: Hon. George H. King,  
 Chief Judge  
 ) Room: 650

1           **TO THE COURT, ALL PARTIES, AND THEIR RESPECTIVE**  
2 **ATTORNEYS OF RECORD:**

3           **PLEASE TAKE NOTICE** that on November 30, 2015, at 9:30 a.m., or as  
4 soon thereafter as this matter may be heard before the Honorable George H. King  
5 in Courtroom 650 at the Edward R. Roybal Federal Building, 225 E. Temple  
6 Street, Los Angeles, California 90012, plaintiffs Good Morning To You  
7 Productions Corp., Robert Siegel, Rupa Marya d/b/a Rupa & The April Fishes, and  
8 Majar Productions, LLC (“Plaintiffs”), will, and hereby do, move this Court  
9 pursuant to Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 15(a)(2) and Local  
10 Rule (“L.R.”) 15-1 for an order granting leave to amend the operative Fourth  
11 Amended Complaint. *See* Dkt. 95. Plaintiffs seek to: (i) expand the class definition  
12 based on discovery obtained from Defendants in the initial (Claim One) phase of  
13 this litigation; (ii) provide detailed allegations regarding delayed discovery,  
14 equitable tolling and concealment of the truth of Defendants’ (and their  
15 predecessors–in-interest) limited copyright of *Happy Birthday* based on this same  
16 evidence; and (iii) allege a 1922 publication of *Happy Birthday* without a  
17 copyright notice based on evidence only recently discovered by Plaintiffs because  
18 Defendants “mistakenly” withheld evidence during discovery in Phase One.  
19 Amendment is necessary (and not futile) prior to Defendants’ anticipated motion to  
20 dismiss under Fed. R. Civ. P. 12 and Plaintiffs’ class certification motion. The  
21 proposed amendments are made in good faith, are not unfairly prejudicial to  
22 Defendants (as the facts were not publicly disclosed by Defendants or their  
23 predecessors until this litigation), and will not cause undue delay (a stay of the  
24 remaining claims, statute of limitations, and class certification was only lifted on  
25 October 19, 2015).

26           This Motion is based upon this notice of motion, the accompanying  
27 memorandum of points and authorities, the Declaration of Betsy C. Manifold in  
28

1 Support of Plaintiffs' Motion, the attached proposed amended pleading as required  
2 under L.R. 15-1 and 15-2, all pleadings, discovery, memorandum of points and  
3 authorities, supplemental memoranda of law, oral or documentary evidence  
4 proffered in support thereof, arguments of counsel, and any other matters as the  
5 Court deems proper.

6 This Motion is made following the conference of counsel pursuant to L.R. 7-  
7 3 which took place on October 14, 16, and 23, 2015.

8 Dated: October 29, 2015

**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP**

9  
10 By: /s/ Betsy C. Manifold  
BETSY C. MANIFOLD

11 FRANCIS M. GREGOREK  
12 gregorek@whafh.com  
13 BETSY C. MANIFOLD  
14 manifold@whafh.com  
15 RACHELE R. RICKERT  
16 rickert@whafh.com  
17 MARISA C. LIVESAY  
18 livesay@whafh.com  
19 BRITTANY N. DEJONG  
20 dejong@whafh.com  
21 750 B Street, Suite 2770  
22 San Diego, CA 92101  
23 Telephone: 619/239-4599  
24 Facsimile: 619/234-4599

19 **WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP**  
20 MARK C. RIFKIN (pro hac vice)  
21 rifkin@whafh.com  
22 JANINE POLLACK (pro hac vice)  
23 pollack@whafh.com  
24 270 Madison Avenue  
25 New York, NY 10016  
26 Telephone: 212/545-4600  
27 Facsimile: 212-545-4753

24 *Interim Lead Counsel for Plaintiffs*

25 **RANDALL S. NEWMAN PC**  
26 RANDALL S. NEWMAN (190547)  
27 rsn@randallnewman.net  
28 37 Wall Street, Penthouse D  
New York, NY 10005

Telephone: 212/797-3737

**HUNT ORTMANN PALFFY NIEVES  
DARLING & MAH, INC.**

ALISON C. GIBBS (257526)

gibbs@huntortmann.com

OMEL A. NIEVES (134444)

nieves@nieves-law.com

KATHLYNN E. SMITH (234541)

smith@huntortmann.com

301 North Lake Avenue, 7th Floor

Pasadena, CA 91101

Telephone: 626/440-5200

Facsimile: 626/796-0107

**DONAHUE GALLAGHER  
WOODS LLP**

WILLIAM R. HILL (114954)

rock@donahue.com

ANDREW S. MACKAY (197074)

andrew@donahue.com

DANIEL J. SCHACHT (259717)

daniel@donahue.com

1999 Harrison Street, 25th Floor

Oakland, CA 94612-3520

Telephone: 510/451-0544

Facsimile: 510/832-1486

**GLANCY PRONGAY & MURRAY  
LLP**

LIONEL Z. GLANCY (134180)

lglancy@glancylaw.com

MARC L. GODINO (188669)

mgodino@glancylaw.com

1925 Century Park East, Suite 2100

Los Angeles, CA 90067

Telephone: 310/201-9150

Facsimile: 310/201-9160

*Attorneys for Plaintiffs*

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1 MEMORANDUM OF POINTS & AUTHORITIES

2 **I. INTRODUCTION**

3 Plaintiffs respectfully request leave to file a Fifth Amended Complaint.<sup>1</sup> *See*  
4 Manifold Decl., Ex. A. Based on evidence discovered during Phase One of this  
5 litigation (and unknown to Plaintiffs prior to this litigation), the proposed  
6 amendments fall into three categories: (i) expansion of the class period based on  
7 equitable tolling; (ii) detailed allegations regarding delayed discovery, concealment  
8 of the truth regarding Defendants’ (and their predecessors-in-interest) limited  
9 copyright in *Happy Birthday* and equitable tolling; and (iii) the 1922 publication of  
10 the *Happy Birthday* song by The Cable Car Company. Amendment is necessary  
11 (and not futile) prior to Defendants’ anticipated Rule 12 motion and Plaintiffs’  
12 class certification motion (now due January 18, 2016). The proposed amendments  
13 are made in good faith, are not unfairly prejudicial to Defendants (as the facts were  
14 *not* publicly disclosed by Defendants or their predecessors until this litigation and  
15 Defendants have benefitted from the concealment of the truth for decades), and  
16 will not cause undue delay (the stay relating to the remaining claims, statute of  
17 limitations, and class certification was only lifted on October 19, 2015).

18 Plaintiffs’ Motion should be granted and the Fifth Amended Complaint (Ex.  
19 A) filed immediately.

20  
21  
22  
23  
24 \_\_\_\_\_  
25 <sup>1</sup> A redlined copy of Plaintiffs’ [Proposed] Fifth Amended Complaint is  
26 attached to the Declaration of Betsy C. Manifold in Support of this Motion  
27 (“Manifold Decl.”) as Exhibit (“Ex.”) B in addition to the clean copy attached as  
28 Ex. A pursuant to Local Rule (“L.R.”) 15-1, so the Court can easily view all of the  
amendments and additions given the limited changes Plaintiffs seek to make by  
this amendment.

1 **II. PROCEDURAL BACKGROUND**

2 **A. Bifurcation of Proceedings into Two Phases**

3 At the hearing on Defendants’ motion to dismiss on October 7, 2013, “the  
4 Parties agreed that the most efficient way to proceed in this case would be to  
5 bifurcate Claim One from the six other claims for the purposes of discovery and  
6 summary judgment.” Dkt. 71 at 3. On October 16, 2013, the Court issued an  
7 Order re: Defendants’ Motion to Dismiss Second Amended Consolidated Class  
8 Action Complaint and/or Motion to Strike Plaintiffs’ Proposed Class Definition  
9 (Dkt. 52), which granted in part and denied in part Defendants’ motions. *See* Dkt.  
10 71. The October 16, 2013 Order *bifurcated* Claim One from all other claims  
11 through Summary Judgment as Phase One and *stayed* all other claims “including  
12 discovery specific to such claims,” as Phase Two. Dkt. 71 at 3. Plaintiffs also  
13 were granted leave to re-plead their “two-step theory for declaratory judgment” in  
14 an amended complaint. Dkt. 71 at 3-4.

15 On November 6, 2013, Plaintiffs filed a Third Amended Complaint (Dkt.  
16 75), which Defendants answered on December 11, 2013 as to Claim One *only*  
17 (Dkt. 79). Thereafter, based on the Parties’ Joint Stipulation (Dkt. 94), on April  
18 29, 2014, the Court granted Plaintiffs leave to file a Fourth Amended Complaint  
19 (Dkt. 95). *See* Dkt. 96. On May 6, 2014, Defendants answered the Fourth  
20 Amended Complaint as to Claim One *only* (Dkt. 99).

21 **B. March 24, 2014 Scheduling Conference re: Phase One**

22 After the parties’ March 24, 2014, Scheduling Conference, the Court filed an  
23 Order Entering Schedule Dates. Dkt. 92. The Court agreed “to defer consideration  
24 of the statute of limitations defenses and class certification at this time;” set  
25 scheduling dates for summary judgment motions on Claim One; and stated that,  
26 “[i]f the summary judgment motions do not dispose of this first phase of this  
27 action, we will set further scheduling dates as needed.” Dkt. 92 at 1.  
28

1 On September 22, 2015, the Court issued its Memorandum and Order Re:  
2 (1) Cross-Motions for Summary Judgment (Dkt. 179); (2) Defendants' Motion for  
3 Leave to File Supplemental Evidence (Dkt. 223); and (3) Plaintiffs' Ex Parte  
4 Application to Supplement the Record (Dkt. 224) ("Summary Judgment Order")  
5 which denied Defendants' Motion For Summary Judgment and granted in part  
6 Plaintiffs' Motion for Summary Judgment. *See* Dkt. 244. The Summary Judgment  
7 Order determined that Defendants do not own a copyright to the *Happy Birthday*  
8 lyrics. The Summary Judgment Order determined there are triable issues of fact on  
9 Plaintiffs' demand for a declaratory judgment that the *Happy Birthday* lyrics are in  
10 the public domain. A bench trial of the remaining factual issues in Phase One is  
11 set for December 15, 2015. *See* Dkt. 248.

12 **C. Parties' Discussions Re: Amendment Prior to Status Conference**

13 On October 8, 2015, Plaintiffs provided Defendants with a draft Fifth  
14 Amended Complaint and asked Defendants to stipulate to its filing without  
15 prejudice to Defendants' right to file a Rule 12 motion. *See* Manifold Decl., ¶ 3.  
16 Plaintiffs followed up with a revised draft on October 14, 2015 adding additional  
17 detail. *Id.* On October 16, 2015, Defendants responded that they were inclined to  
18 agree with Plaintiffs' request to stipulate but required a discovery stay for any  
19 responsive documents prior to 2009 pending the Court's resolution of any Rule 12  
20 motion. Plaintiffs did not accept this offer. *Id.* at ¶ 4.

21 **D. October 19, 2015 Status Conference**

22 At the October 19, 2015 Status Conference (Dkt. 248), the Court advised the  
23 parties that the Court wants this litigation "to move ahead," "the case has been  
24 around for long enough" and the parties "should be able to move ahead much more  
25 quickly." 10/19/15 Hearing Transcript at 10:16-21. The Court denied Defendants'  
26 request for a stay of discovery pending their Motion for Reconsideration (Dkt. 247)  
27 (scheduled to be heard on November 16, 2015) and lifted the stay as to the  
28 remaining six claims, class certification and the statute of limitations. Dkt. 248. In

1 addition to the December 15, 2015 bench trial to complete Phase One (Claim One),  
2 the Court set deadlines for Phase Two including Defendants' Rule 12 motion (30  
3 days to file), Plaintiffs' class certification motion (January 18, 2016), and expert  
4 designation (March 1, 2016) with a drop dead discovery cut-off of April 19, 2016.  
5 *Id.* A bench trial of the remaining claims is scheduled for May 31, 2016. *Id.*

6 **E. Failure of the Parties to Agree on Amendment by October 26,**  
7 **2015 Necessitating Motion**

8 At the October 19, 2015, Status Conference, the Court directed the parties to  
9 stipulate and lodge the proposed Fifth Amended Complaint on or before October  
10 26, 2015 if an agreement could be reached. *See* Dkt. 248. On October 23, 2015,  
11 Defendants provided a draft stipulation which again requested a discovery stay for  
12 any responsive documents prior to 2009 pending the Court's resolution of  
13 Defendants' Rule 12 motion, despite the short timeline for completing this case set  
14 by the Court at the Status Conference on October 19, 2015. Manifold Decl., ¶ 5.  
15 In light of the Court's directives at the October 19, 2015 Status Conference to  
16 move this case quickly, Plaintiffs could *not* agree to Defendants' proposed stay of  
17 discovery. The timing requested by Defendants was impossible under the Court's  
18 Phase Two Scheduling Order. The earliest *hearing* date for Defendants' Rule 12  
19 motion is January 4, 2016.<sup>2</sup> Staying any discovery *pending the Court's decision*  
20 on such a motion would put Defendants' proposed discovery stay out to the  
21 January 18, 2016, deadline for Plaintiffs' class certification motion. Defendants  
22 declined to stipulate to the filing of the proposed Fifth Amended Complaint absent  
23 a discovery stay, and Plaintiffs could not agree to any stay.

24 \_\_\_\_\_  
25 <sup>2</sup> With 30 days to respond to Plaintiffs' Fifth Amendment Complaint (to be  
26 lodged by October 26, 2015), Defendants' Rule 12 Motion would be filed on or  
27 before November 25, 2015. The first available hearing on the Court's motion  
28 calendar under L.R. 6-1 is January 4, 2016. December 28, 2015, the earliest notice  
date, is a closed hearing date.

1 Absent agreement of the parties, the Court directed Plaintiffs to file their  
2 motion for leave to amend within twenty-one (21) days or on or before November  
3 16, 2015. Dkt. 248. Plaintiffs are filing their motion now and, because of the need  
4 to move the litigation forward, concurrently file with their motion a joint  
5 stipulation to shorten the briefing and hearing schedule by approximately two  
6 weeks to permit the Court to hear and decide this motion on November 16, 2015.

7 **III. SUMMARY OF AND BASIS FOR PLAINTIFFS' AMENDMENTS IN**  
8 **THE FIFTH AMENDED COMPLAINT**

9 **A. Expansion of Class Definition Based on Delayed Discovery,**  
10 **Concealment of the Truth of Limited Copyright and Equitable**  
11 **Tolling**

12 Based on new evidence demonstrating Defendants (and their predecessors)  
13 concealed the truth regarding their limited copyright to *Happy Birthday*, Plaintiffs  
14 now seek to amend the class definition as follows:

15 **All persons or entities (excluding Defendants' directors,**  
16 **officers, employees, and affiliates) who entered into a license**  
17 **with Defendants or their predecessors-in-interest, or paid**  
18 **Defendants or their predecessors-in-interest, directly or**  
19 **indirectly, a licensing fee for the song *Happy Birthday to You***  
20 **at any time since at least September 3, 1949 (the latest date**  
21 **on which the copyright to *Good Morning to All* expired), until**  
22 **Defendants' conduct as alleged herein has ceased.<sup>3</sup>**

23 <sup>3</sup> Plaintiffs also added the following common questions of law and fact  
24 regarding delayed discovery, equitable tolling and concealment of the truth in  
25 support of their class allegations: (i) whether Defendants (and their predecessors)  
26 knew or should have known that the 1935 copyrights did *not* cover the popular  
27 *Happy Birthday* lyrics; (ii) whether Defendants (and their predecessors)  
28 misrepresented that the 1935 copyrights covered the familiar *Happy Birthday*  
lyrics or concealed the fact that the 1935 copyrights covered only the piano  
arrangements composed by Summy Co.'s employees-for-hire, *not* the familiar  
*Happy Birthday* lyrics; (iii) whether, in the exercise of reasonable care, Plaintiffs

1 See Manifold Decl., Ex. B, ¶ 164. In substance, the proposed change extends the  
2 class definition back to 1949 as a result of the discovery of facts supporting  
3 equitable tolling, delayed discovery, and concealment of the truth, which also  
4 necessitated adding a reference to payments to Defendants’ predecessors-in-  
5 interest, such as the Clayton F. Summy Co., before Defendants purchased the stock  
6 of Birch Tree Group Ltd. in 1988 because Defendants acquired the liabilities of  
7 Birch Tree Group Ltd. in that stock purchase.

8 As alleged in Plaintiffs’ Fourth Amended Complaint, “it was common  
9 knowledge within the entertainment industry that Warner/Chappell widely claimed  
10 exclusive copyright ownership of the Song.” “Warner/Chappell held itself out as  
11 the exclusive owner of the copyright in the Song;” and thus, Plaintiffs “did not  
12 question and had no reason to question Warner/Chappell’s claim of copyright  
13 ownership.”<sup>4</sup> See Dkt. 95 at ¶¶ 134(c)-(d). A potential licensee faced a “statutory  
14 penalty of \$150,000 under the Copyright Act, 17 U.S.C. § 101 *et seq.*, if it used the  
15 Song without Warner/Chappell’s permission and Warner/Chappell, in fact, owned  
16 the copyright that it claimed.” *Id.* at ¶ 134(e). See also *id.* at ¶¶ 121, 128.

17 However, Plaintiffs learned during discovery in Phase One that Defendants  
18 and their predecessors concealed evidence as well as the truth that they had no  
19 claim to a copyright in the *Happy Birthday* lyrics. See Manifold Decl., Ex. A at ¶¶  
20 142-162. Based on this newly discovered evidence (unknown to Plaintiffs prior to  
21 this litigation and previously concealed by Defendants), Plaintiffs seek to amend  
22 the class definition to sufficiently plead delayed discovery, concealment of the

---

23 and the Class knew or could have known that Defendants did not own any  
24 copyright to the familiar *Happy Birthday* lyrics; and (iv) whether the  
25 commencement of any applicable statute of limitations was tolled and, if so, for  
26 how long. See Manifold Decl., Ex. A, ¶ 166(c)-(g).

26 <sup>4</sup> In California, the discovery rule postpones accrual of a claim until “the  
27 plaintiff *discovers, or has reason to discover*, the cause of action.” *Clemens v.*  
28 *DaimlerChrysler Corp.*, 534 F.3d 1017, 1024 (9th Cir. 2008) (citing *Norgart v.*  
*Upjohn Co.*, 21 Cal. 4th 383, 397 (1999)) (emphasis added).

1 truth regarding Defendants’ limited copyright and equitable tolling prior to  
2 Defendants’ anticipated Rule 12 motion and Plaintiffs’ class certification  
3 motion. *See Ortega v. Natural Balance Inc.*, No. CV 13-05942 ABC (Ex), 2013  
4 U.S. Dist. LEXIS 176437, at \*12 (C.D. Cal. Dec. 16, 2013) (denying defendant’s  
5 motion to dismiss class claims as time-barred and finding that plaintiffs sufficiently  
6 pled delayed discovery as to their own claims and sufficiently pled “generalized  
7 allegations consistent with the elements of the delayed discovery rule” as to  
8 unknown class members, the court held: “Whether delayed discovery can be  
9 applied as a practical matter can be addressed at the class certification  
10 stage.”); *Schramm v. JPMorgan Chase Bank, N.A.*, No. LA CV09-09442 JAK  
11 (FFMx), 2011 U.S. Dist. LEXIS 122440, at \*28-31 (C.D. Cal. Oct. 19, 2011)  
12 (granting class certification, in part, and holding that plaintiffs carried their burden  
13 of demonstrating predominance where: (1) the question of inquiry notice is based  
14 on a reasonable person standard, and thus, there were no significant individual  
15 issues related to when members *should* have known of their claim; and (2)  
16 defendants presented no evidence that any potential member had *actual* notice of  
the potential claim outside of the statutory period.).

17 **B. Plaintiffs’ Detailed Allegations Relating to Equitable Tolling and**  
18 **Fraudulent Concealment**

19 The proposed amendment includes the new evidence obtained in Phase One  
20 in 28 highly detailed paragraphs alleging delayed discovery, concealment of the  
21 truth regarding Defendants’ limited copyright and equitable tolling.<sup>5</sup> *See* Manifold  
22 Decl., Ex. A, ¶¶ 135-162. A summary of these amendments is set forth below:

---

23  
24 <sup>5</sup> These concealment and fraud allegations should be considered as part of  
25 Plaintiffs’ class certification motion. *See Kanawi v. Bechtel Corp.*, 254 F.R.D.  
26 102, 112 (N.D. Cal. 2008) (granting plaintiffs’ renewed motion for class  
27 certification and holding that it was premature to make a determination on the  
28 merits of plaintiffs’ fraud and concealment tolling claim); *Tibble v. Edison Int’l*,  
No. CV 07-5359 SVW (AGRx), 2009 U.S. Dist. LEXIS 120939, at \*28 (C.D. Cal.  
June 30, 2009) (granting plaintiffs’ motion for class certification and holding that



- 1 • Before licensing *Happy Birthday* from Defendants and paying a  
2 synchronization or mechanical license fee to Defendants, Plaintiffs  
3 did not know, and in the exercise of reasonable care, could not have  
4 known, that Defendants’ copyrights, in fact, did not cover the Song’s  
5 familiar lyrics. *See* Manifold Decl., Ex. A, ¶¶ 135(a)-(b), 136(a)-(b),  
6 137(a)-(b), 138(a)-(b).
- 7 • Defendants (and their predecessors) consistently and uniformly  
8 demanded that all would-be users of *Happy Birthday* obtain licenses  
9 or permission from them to use, perform, or publish the Song and  
10 demanded payment for the right to use, perform, or publish *Happy*  
11 *Birthday* from all would-be users of the Song under and by virtue of  
12 their claim of copyright ownership. *Id.* at ¶¶ 139-141.
- 13 • Undisclosed prior to this litigation, Defendants (or their predecessors)  
14 have been in possession of, or have known the terms of: (a) the early  
15 1890s assignment from Patty Hill and Mildred Hill to Summy Co.,  
16 which related only to *Good Morning to All*; (b) the 1934 and 1935  
17 assignment from Jessica Hill to Summy Co. of only the rights to  
18 various piano arrangements to the musical composition *Good*  
19 *Morning to All*; and (c) the 1944 assignment from Patty Hill and  
20 Jessica Hill via the Hill Foundation to Summy Co. Those assignments  
21 allowed Defendants (and their predecessors) to know that they did not  
22 acquire any rights to the *Happy Birthday* lyrics from Patty Hill,  
23 Jessica Hill, or the Hill Foundation. *Id.* at ¶ 142.
- 24 • Summy Co. commenced three lawsuits alleging copyright  
25 infringement related to *Happy Birthday* *after* acquiring whatever

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26 “because the statute of limitations is an affirmative defense, and at the class  
27 certification stage the Court must focus on the allegations [of fraud and  
28 concealment] in the complaint, a determination on the statute of limitations is  
premature at this point in the litigation.”).

1 limited rights it ever obtained from the Hill sisters and the Hill  
2 Foundation, it did not even mention either of the 1935 copyrights. *Id.*  
3 at ¶¶ 143, 144 (describes limited rights).

- 4 • Undisclosed prior to this litigation, Defendants’ predecessor-in-  
5 interest received an inter-office communication from Universal City  
6 Studios on or about July 1, 1964, stating that the copyright asserted  
7 and relied upon by Defendants and their predecessors “covers only the  
8 particular [piano] arrangement” and that “no one could claim  
9 copyright in the new [*Happy Birthday*] lyrics.” *Id.* at ¶ 147.
- 10 • Unknown prior to this litigation, beginning in 1963, in meetings with  
11 Harry Fox Agency (“Fox”), as agent for Defendants’ predecessor-in-  
12 interest Summy Co., Walt Disney Productions (“Disney”) disputed the  
13 scope and ownership of the copyright to *Happy Birthday to You*. In an  
14 October 18, 1963, letter to Fox, Disney detailed their copyright  
15 research of *Happy Birthday*, beginning with Mildred and Patty Hill’s  
16 publication of *Good Morning to All in Song Stories for the*  
17 *Kindergarten*, and noted that “no one knows who first changed the  
18 words “good morning” to happy birthday.” Disney concluded that  
19 “the song together with the lyrics are now in the public domain.”  
20 Again, in a May 12, 1964 letter to the Fox, Disney asserted that  
21 “‘HAPPY BIRTHDAY TO YOU’ is definitely in the public domain.”  
*Id.* at ¶¶ 148-150.
- 22 • Unknown prior to this litigation, in a November 6, 1964 letter to  
23 counsel for Defendants’ predecessor Summy Co., Disney offered  
24 \$1,000 for five uses of *Happy Birthday* “not in acknowledgment that  
25 there is a protected right in [the Song] but to pass over that question  
26 and get a whitewash from your client.” Again, in a December 13,  
27 1971 letter, Disney’s counsel wrote to Fox, and reiterated its prior  
28 offer to pay \$250 as a “tribute” for each use of *Happy Birthday* for

1 “the simple reason that although we firmly believe that we would  
2 prevail in any litigation” that “business practices dictates that a small  
3 payment is better than expensive litigation.” Disney’s counsel also  
4 noted that having “recontacted various copyright experts,” Disney was  
5 “willing once and for all to fight this matter in the event you are  
6 asking an amount greater than previously paid by us.” *Id.* at ¶¶ 151,  
7 152

- 8 • Unknown prior to this litigation, a May 11, 1983 letter to Fox and  
9 Defendants’ predecessor-in-interest Summy-Birchard Music from  
10 Disney responded to a request from Fox, on behalf of Summy-  
11 Birchard Music, for a \$5,000 fee for a ten-year license of *Happy*  
12 *Birthday* for an exhibit at the Horizons Pavilion at EPCOT by offering  
13 a “tribute payment” of just \$250 to use the Song for a decade. Disney  
14 stated that the original song *Good Morning to All* and the “alleged  
15 adaptation,” *i.e.*, *Happy Birthday to You*, “are both in the public  
16 domain around the world,” but offered the nominal sum “only to  
17 avoid litigation to prove that they are free to use.” *Id.* at ¶ 153.
- 18 • At various times relevant hereto, Defendants (and their predecessors)  
19 claimed that Summy Co.’s employee Orem may have written the  
20 familiar *Happy Birthday* lyrics, claimed that Mildred Hill wrote the  
21 familiar *Happy Birthday* lyrics and concealed the fact that Summy  
22 Co.’s employees, Forman and Orem, did not write the familiar *Happy*  
23 *Birthday* lyrics, either alone, together, or with Mildred or Patty Hill.  
*Id.* at ¶¶ 154-156.
- 24 • Defendants (and their predecessors) concealed the fact that the 1935  
25 copyrights covered only the piano arrangements composed by Summy  
26 Co.’s employees-for-hire and did *not* cover the *Happy Birthday*  
27 lyrics. *Id.* at ¶¶ 158, 159.

- 1 • In part as a result of the actions of Defendants (and their  
2 predecessors), Plaintiffs and all other users of *Happy Birthday* did not  
3 know, had no reason to know, and in the exercise or reasonable care  
4 based on the complexity of the historical record could not know that  
5 Defendants did not own a copyright to the Song itself, but rather only  
6 to two piano arrangements composed by Summy Co.’s employees for  
7 hire. *Id.* at ¶¶ 160-162.

8 **C. Newly Discovered Evidence re 1922 Publication of *Happy***  
9 ***Birthday***

10 The proposed amendment also includes a new paragraph setting forth the  
11 newly discovered evidence by the Plaintiffs which was submitted via an *ex parte*  
12 application (Dkt. Nos. 224, 225, 232, 233) as part of the summary judgment record  
13 in Phase One, to which Defendants had no objection (Dkt. 226 at 1).

14 On July 13, 2015, Defendants gave Plaintiffs access to a database of  
15 approximately 500 pages of documents, including approximately 200 pages of  
16 documents they claim were “mistakenly” not produced during discovery, which  
17 ended on July 11, 2014, more than one year earlier. *See* Dkt. 225 at ¶¶ 5,8, 9. One  
18 of those documents – a 1927 publication of the *Happy Birthday* song that was  
19 expressly authorized by defendants’ predecessor the Clayton F. Summy Co. – was  
20 a proverbial smoking-gun. It and earlier versions of the song that Plaintiffs  
21 subsequently located through their own investigative efforts conclusively prove  
22 that *any* copyright that may have existed for the song itself (*i.e.*, the setting of the  
23 *Happy Birthday* lyrics to the melody of *Good Morning*) ***expired decades ago.***

24 This allegation in the Fifth Amended Complaint is as follows:

25 On information and belief, in or before 1922, pursuant to  
26 authority granted to it by Patty or Jessica Hill, Summy Co. authorized  
27 The Cable Company (Chicago) (“Cable Co.”) to publish the music  
28 and lyrics to *Happy Birthday to You*. In 1922, pursuant to that  
authority, Cable Co. published the revised fourth edition of The

1           Everyday Song Book with the music and lyrics to Happy Birthday to  
2           You, including the following note: “Special permission through  
3           courtesy of The Clayton F. Summy Co.” The Cable Company  
4           registered a copyright for the fourth edition of The Everyday Song  
5           Book in 1921, which it did not renew. The publication of The  
6           Everyday Song Book in 1922 was without a copyright notice.

7           Manifold Decl., Ex. A, ¶ 54.

8           This allegation based on newly-discovered evidence by Plaintiffs is provided  
9           in good faith. This allegation proves conclusively that the song is in the public  
10          domain and addresses the issue of whether Patty Hill abandoned any copyright she  
11          may have had to the lyrics. Because of the importance of this newly discovered  
12          evidence to the record, amendment is not futile. Plaintiffs are not at fault in the  
13          need for amendment, any prejudice to Defendants was created by their own  
14          conduct in “mistakenly” withholding evidence and good cause exists for  
15          amendment.

#### 15          **IV. ARGUMENT**

##### 16                  **A. Standard of Review**

17                  Rule 15(a) allows amendment to a complaint “when justice so requires.” In  
18          the Ninth Circuit, the policy favoring leave to amend is such that “a court should  
19          liberally allow a party to amend its pleading.” *Sonoma Cnty. Ass’n of Retired*  
20          *Employees v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013) (citing *Owens v.*  
21          *Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (finding  
22          the policy favoring amendment freely “is to be applied with extreme liberality.”)).  
23          *See also Bernhardt v. County of L.A.*, No. CV 99-10121-GHK, 2009 U.S. Dist.  
24          LEXIS 23115, at \*2 (C.D. Cal. Mar. 19, 2009). “Leave to amend lies within the  
25          sound discretion of the trial court.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d  
26          183, 185-86 (9th Cir. 1987) (internal quotations and citation omitted). “The  
27          underlying purpose of Rule 15 . . . [is] to facilitate decision on the merits, rather  
28

1 than on the pleadings or technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th  
2 Cir. 2000) (en banc).

3 The Supreme Court has held that motions to amend may be denied for the  
4 following reasons: (1) undue delay; (2) bad faith or dilatory motives on the part of  
5 the movant; (3) repeated failure to cure deficiencies by previous amendments; (4)  
6 undue prejudice to the opposing party; or (5) futility of the proposed amendment.  
7 *Foman v. Davis*, 371 U.S. 178, 182, (1962). See also *Sonoma County*, 708 F.3d at  
8 1117; *Owens*, 244 F.3d at 712. None of those reasons is present here.

9 In analyzing these factors, the Court should generally make “all inferences  
10 in favor of granting the motion.” *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877,  
11 880 (9th Cir. 1999) (citing *DCD Programs*, 833 F.2d at 186). Furthermore, “[t]he  
12 party opposing amendment bears the burden of showing prejudice,” futility, or one  
13 of the other permissible reasons for denying a motion to amend. *DCD Programs*,  
14 833 F.2d at 187. See also *Richardson v. United States*, 841 F.2d 993, 999 (9th Cir.  
15 1988) (leave to amend should be freely given unless opposing party makes “an  
16 affirmative showing of either prejudice or bad faith”). The possibility of delay  
17 alone cannot justify denial of a motion to amend. See *DCD Programs*, 833 F.2d at  
18 186 (citing cases).

19 Additionally, courts regularly grant motions for leave to amend to include  
20 allegations to support equitable tolling. See e.g. *Brown v. Napa Valley Sch. Dist.*,  
21 No. C-11-5673 JCS, 2012 U.S. Dist. LEXIS 69943, at \*31-32 (N.D. Cal. May 18,  
22 2012); *Ramos v. Chase Home Fin.*, 810 F. Supp. 2d 1125, 1139 (D. Haw. 2011);  
23 *Kamar v. Krolczyk*, No. 1:07-CV-0340 AWI, 2008 U.S. Dist. LEXIS 55975, at \*2  
(E.D. Cal. July 16, 2008).

24 **B. Defendants Will Not Be Unfairly Prejudiced by Amendment of**  
25 **the Complaint**

26 The addition of new facts based on evidence obtained from Defendants in  
27 Phase One of this litigation creates no unfair prejudice to Defendants, especially  
28 when the facts were exclusively in the Defendants’ possession and unavailable to

1 Plaintiffs prior to this litigation – some of which were “mistakenly” concealed by  
2 Defendants. Defendants have no conceivable claim of unfair prejudice here.

3 The Ninth Circuit has held that “[p]rejudice to the opposing party is the most  
4 important factor” in deciding a motion for leave to amend under Rule 15. *Jackson*  
5 *v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (internal citation omitted).  
6 *See also Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973). The party  
7 opposing the amendment bears the burden of proving that unfair prejudice will  
8 result from the amendment. *DCD Programs*, 833 F.2d at 187. Defendants will not  
9 suffer any unfair prejudice if the Court allows Plaintiffs to amend.

10 **C. Plaintiffs Do Not Seek Amendment in Bad Faith**

11 An additional factor to consider in amending the complaint is whether  
12 Plaintiffs’ motives are dilatory or otherwise in bad faith. *Foman*, 371 U.S. at 182.  
13 Again, the nonmoving party bears the burden of proving dilatory motive (*DCD*  
14 *Programs*, 833 F.2d at 187), which Defendants cannot do here.

15 Under Rule 15(a), bad faith includes an amendment to destroy diversity (*see,*  
16 *e.g., Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987)) or the addition of  
17 new but baseless legal theories for the sole purpose of prolonging the litigation  
18 (*Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293 (9th Cir. 1998)). Neither of those  
19 goals, or anything remotely like them, motivates Plaintiffs here. Rather, Plaintiffs  
20 move this Court for leave to amend the Complaint in order to better protect the  
21 interests of the class. Because new evidence now clarifies Plaintiffs’ claims,  
22 Plaintiffs are duty-bound to amend. By this amendment, Plaintiffs are striving to  
23 maintain adequate representation for the proposed class they represent. Defendants  
cannot find bad faith in such a motive.

24 **D. Plaintiffs’ Amendment is Not Futile**

25 A proposed amended pleading adding new claims is futile only if “it appears  
26 beyond doubt” that the claims sought to be added would be dismissed for failure to  
27  
28

1 state a claim. *DCD Programs*, 833 F.2d at 188 (internal citations omitted); *see*  
2 *also Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

3       Allowing Plaintiffs to amend their complaint to add pertinent substantive  
4 allegations (set forth in § III above) to support their claims could not be futile  
5 under this liberal pleading standard. *First*, the expanded class definition is  
6 properly addressed at the class certification stage, not at dismissal for failure to  
7 state a claim. *Second*, the detailed allegations regarding delayed discovery and  
8 concealment of the truth about Defendants’ limited copyright in *Happy Birthday*  
9 are sufficient on their face to provide a basis for equitable tolling and are not futile.  
10 *Third*, the 1922 publication of *Happy Birthday* by The Cable Company without a  
11 copyright notice is a critical fact in proving that the Song is in the public domain.

12       **E.       There is No Undue Delay**

13       Whether a Plaintiff has unduly delayed filing a motion for leave to amend  
14 turns on whether the moving party knew or should have known the facts and  
15 theories raised by the amendment in the original pleading. *AmerisourceBergen*  
16 *Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 954 (9th Cir. 2006); *Jackson*, 902 F.2d  
17 at 1388. “[L]ate amendments to assert new theories are not reviewed favorably  
18 when the facts and theory have been known to the party seeking amendment since  
19 the inception of the cause of action.” *Acri v. Int’l Ass’n of Machinists & Aerospace*  
20 *Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986) (internal citations omitted). *See also*  
*In re Circuit Breaker Litig.*, 175 F.R.D. 547, 550 (C.D. Cal. 1997).

21       As discussed above, Plaintiffs only had access to the evidence and facts,  
22 which provide the substance of their proposed amendments, during the course of  
23 discovery in Phase One. Plaintiffs could *not* have known these facts prior to the  
24 inception of the litigation. Moreover, these facts (other than the 1922 publication  
25 of *Happy Birthday* by The Cable Company which was discussed in the course of  
26 the Summary Judgment proceedings) have become relevant to the litigation only  
27 now that the stay was lifted on October 19, 2015, and the case has moved to Phase  
28



1 Two addressing the remaining claims, class certification, and the statute of  
2 limitations. As to the 1922 publication of *Happy Birthday*, any delay in raising  
3 this fact is attributed to Defendants “mistakenly” not producing the later edition of  
4 this publication during discovery (which ended on July 11, 2014) but instead  
5 delaying the production until July 13, 2015. *See* Dkt. 225 at ¶¶ 5, 8, 9.

6 **V. CONCLUSION**

7 For the reasons stated above, the three groups of proposed amendments  
8 (expanded class definition; allegations re: delayed discovery, concealment and  
9 equitable tolling; and a 1922 publication of *Happy Birthday*) based on new  
10 evidence discovered prior to the commencement of Phase Two are *not* futile but  
11 critical to class certification (and other substantive) issues. Amendment will *not*  
12 unduly delay the litigation as the stay on the remaining claims, class certification  
13 and the statute of limitations was only lifted ten (10) days ago. The only prejudice  
14 is to Plaintiffs, not Defendants, as this evidence was unknown to Plaintiffs prior to  
15 this litigation.

16 For the reasons stated above, Plaintiffs respectfully request the Court grant  
17 leave to file the Fifth Amended Complaint (Ex. A) immediately.

18 Dated: October 29, 2015

**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP**

19 By:           /s/ Betsy C. Manifold            
20 **BETSY C. MANIFOLD**

21 FRANCIS M. GREGOREK  
22 gregorek@whafh.com  
23 BETSY C. MANIFOLD  
24 manifold@whafh.com  
25 RACHELE R. RICKERT  
26 rickert@whafh.com  
27 MARISA C. LIVESAY  
28 livesay@whafh.com  
BRITTANY N. DEJONG  
dejong@whafh.com  
750 B Street, Suite 2770  
San Diego, CA 92101  
Telephone: 619/239-4599

Facsimile: 619/234-4599

**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP**

MARK C. RIFKIN (pro hac vice)  
rifkin@whafh.com  
JANINE POLLACK (pro hac vice)  
pollack@whafh.com  
270 Madison Avenue  
New York, NY 10016  
Telephone: 212/545-4600  
Facsimile: 212-545-4753

*Interim Lead Counsel for Plaintiffs*

**RANDALL S. NEWMAN PC**  
RANDALL S. NEWMAN (190547)  
rsn@randallnewman.net

37 Wall Street, Penthouse D  
New York, NY 10005  
Telephone: 212/797-3737

**HUNT ORTMANN PALFFY NIEVES  
DARLING & MAH, INC.**

ALISON C. GIBBS (257526)  
gibbs@huntortmann.com  
OMEL A. NIEVES (134444)  
nieves@nieves-law.com  
KATHLYNN E. SMITH (234541)  
smith@huntortmann.com  
301 North Lake Avenue, 7th Floor  
Pasadena, CA 91101  
Telephone: 626/440-5200  
Facsimile: 626/796-0107

**DONAHUE GALLAGHER  
WOODS LLP**

WILLIAM R. HILL (114954)  
rock@donahue.com  
ANDREW S. MACKAY (197074)  
andrew@donahue.com  
DANIEL J. SCHACHT (259717)  
daniel@donahue.com  
1999 Harrison Street, 25th Floor  
Oakland, CA 94612-3520  
Telephone: 510/451-0544  
Facsimile: 510/832-1486

**GLANCY PRONGAY & MURRAY  
LLP**

LIONEL Z. GLANCY (134180)  
lglancy@glancylaw.com  
MARC L. GODINO (188669)  
mgodino@glancylaw.com

1925 Century Park East, Suite 2100  
Los Angeles, CA 90067  
Telephone: 310/201-9150  
Facsimile: 310/201-9160

*Attorneys for Plaintiffs*

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