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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)

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND AND FILE FIFTH AMENDED COMPLAINT

Courtroom: 650
Judge: Hon. George H. King, Chief Judge

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I. Introduction

Plaintiffs' motion seeks to expand the class definition and toll the statute of limitations *by 60 years* beyond the applicable dates (June 2009 forward) that Plaintiffs set forth in the now-operative Fourth Amended Complaint and the four complaints that preceded it. This is a transparent and cynical attempt to drive up the cost and burden to Warner/Chappell of litigating this long-pending case and, of course, to increase the case's *in terrorem* value. The motion also is fantastical and meritless. The lynchpin of Plaintiffs' argument as to why they waited more than two years from the filing of the case—and failed to avail themselves of the opportunity in four other amendments—to tack on 60 years to the class period is that only through Phase I discovery could Plaintiffs unearth the "newly discovered evidence (unknown to Plaintiffs prior to this litigation and previously concealed by Defendants)" that supposedly justifies the amendments. Mot. at 6:19-20. That is simply false. The documents that Plaintiffs say could not be obtained until Plaintiffs unearthed them through discovery were in fact hiding in plain sight: in, among other places, the United States Copyright Office, public court records and newspapers and magazines. In fact, since March 2008, many of the documents have been conveniently located on a public website created and hosted by Plaintiffs' litigation consultant, Prof. Robert Brauneis. Prof. Brauneis established this website in 2008—more than *a year before* the June 2009 outside class date that Plaintiffs pleaded through five consecutive complaints and more than *five years before* Plaintiffs brought this case—as a companion to a 69-page article that Prof. Brauneis wrote laying out the roadmap for Plaintiffs' case.

Plaintiffs have not come close to showing that they are entitled to so dramatically expand the scope of this case. The Court should deny the motion for either or both of two overarching reasons:

[1] The Proposed Class Definition and Tolling Amendments Are Futile: Plaintiffs insist that the Court cannot consider the sufficiency of the

proposed amendments to their complaint until the class certification hearing, currently set for February 22, 2016. Nonsense. Courts can and do dismiss plainly time-barred class claims where the allegations that plaintiffs make fail to meet the standards for tolling. *See, e.g.*, *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1130-33 (C.D. Cal. 2010); *Keilholtz v. Lennox Hearth Prods. Inc.*, No. C 08-00836 CW, 2009 WL 2905960, at *3-5 (N.D. Cal. Sept. 8, 2009). That is exactly the case with the proposed tolling amendments in Plaintiffs' Fifth Amended Complaint.

One of the core requirements to plead equitable tolling is that "the plaintiff must specifically plead facts which show … the inability to have made earlier discovery [of facts necessary to put the plaintiff on notice of the claim] despite reasonable diligence." *Yumul*, 733 F. Supp. 2d at 1130 (citation omitted). As noted above, the very documents that Plaintiffs claim are foundational to the proposed tolling amendments were publicly available for decades before the 2009 date, and many of them were posted to a website by Prof. Brauneis in 2008. (Prof. Brauneis himself appeared on network television in July 2008, proclaiming that a court would likely find *Happy Birthday* in the public domain.) Moreover, the very allegations and documents that Plaintiffs put forward in justifying an extension of the limitations period back to 1949 completely undermine Plaintiffs' assertion that licensees were unable to discover the relevant facts. Those allegations and documents show that *for decades* actual licensees that Plaintiffs seek to add to the class *knew and raised* the same theories of invalidity that Plaintiffs say all class members did not know.

[2] The Proposed Class And Tolling Amendments Are Extraordinarily Prejudicial: Plaintiffs' expansion of the class and potential damages going back to 1949 would blow the doors off of the limited discovery necessary to bring this case to closure by the May 31, 2016 trial date. Discovery requests that Plaintiffs already served—and that Plaintiffs admit they would not hold in abeyance while the Court considered their plea to dramatically expand the scope of this case—show that

Plaintiffs want to force Warner/Chappell to search for and produce licenses, revenue statements, correspondence and numerous other documents going back to 1949, almost 40 years before Warner/Chappell acquired Summy.

It is difficult to imagine more futile allegations, or allegations more deliberately calculated to cause maximum prejudice to the opposing party, than those Plaintiffs seek to add at this late juncture.

Before proceeding, it is important to note two items that are not at issue here. *First*, Plaintiffs' motion is not about amending their complaint to add allegations about the 1922 Cable Company publication. That is a calculated distraction. This publication is already in the record, and through the December 15 trial the pleadings will be deemed to conform to this evidence. Fed. R. Civ. P. 15(b)(2). *Second*, the arguments that Warner/Chappell raised in its 2013 motion to dismiss (Dkt. 42) are not at issue on this motion, including whether the Copyright Act's three-year limitations period, 17 U.S.C. § 507(b), preempts any longer state-law limitations period that may be applicable (the maximum being four years). Warner/Chappell preserves the arguments it raised previously and on which the Court did not rule in connection with the original motion to dismiss, and will present those arguments in its motion to dismiss, as per the Stipulation and Order at Dkt. 262.

II. Background

In June and July 2013, each of the named plaintiffs filed putative class action complaints alleging a four-year class period. Declaration of Kelly M. Klaus ("Klaus Decl.") ¶ 2. Plaintiffs filed a consolidated first amended complaint in July 2013 (Dkt. 21), a second amended consolidated complaint in September 2013 (Dkt. 59), a third amended consolidated complaint in November 2013 (Dkt. 72) and a fourth amended consolidated complaint in April 2014 (Dkt. 95). Each of these four amended complaints also alleged a putative four-year class. The class definition remained at four years until the Court ruled on the cross-motions for summary judgment on the evening of September 22, 2015. Just a few hours later, the *Los*

Angeles Times reported that, according to Plaintiffs' lead counsel, "plaintiffs will pursue Warner for royalties paid since 'at least' 1988, and could also ask the company to repay royalties that have been collected all the way back to 1935." Klaus Decl. Ex. 1 at 11-12.

Plaintiffs sent Warner/Chappell a proposed Fifth Amended Complaint on October 8, 2015, that sought to extend the putative class definition by 60 years—alleging claims dating to 1949, rather than 2009 as pleaded by Plaintiffs in their first five complaints—and to add allegations regarding equitable tolling. Klaus Decl. ¶ 7. Plaintiffs sent Warner/Chappell a revised version on October 14, 2015. *Id*. ¶ 8. Warner/Chappell responded that it would stipulate to the amendment, but asked for a deferral of discovery relating to claims between 1949 and 2009 until the Court resolved Warner/Chappell's arguments against those new allegations by way of a Rule 12 motion. Warner/Chappell also asked Plaintiffs, as part of the meet and confer process, to identify the factual support for their proposed allegations. *Id*. ¶ 9.

On October 20, Plaintiffs sent Warner/Chappell another revised version of their proposed Fifth Amended Complaint, which contained additional allegations purportedly supporting their tolling theories. *Id*. ¶ 10. On October 23, Warner/Chappell prepared a stipulation regarding the filing, which reiterated the earlier request to defer discovery on the newly expanded class claims. Plaintiffs refused to agree to the limited deferral of discovery, claiming that it was not possible because of the schedule imposed by the Court at the October 19 status conference. *Id*. ¶ 12. Plaintiffs repeat this claim in their motion. (Mot. at 4:14-22.)

However, at the October 19 status conference, Warner/Chappell raised the possibility that a significantly expanded class definition, among other things, would impose a discovery burden that would make an April 2016 cut-off unrealistic. The Court said that it would "set a short discovery period," but that "depending upon what happens after the Rule 12 motions, if it turns out that this discovery completion

date is no longer appropriate, then you folks can call it to my attention. I'll be happy to make an appropriate extension of it." 10/19/15 Hearing Tr. at 23:16-21.

On October 21, Plaintiffs served Warner/Chappell with document requests and interrogatories relating to Plaintiffs' proposed claims dating back to 1949. The broad document requests ask for, *inter alia*, all licenses relating to *Happy Birthday* since 1949; all revenue statements relating to *Happy Birthday* licenses since 1949; all documents identifying agents who have collected royalties for *Happy Birthday* since 1949; all documents showing royalties paid to the Hill Foundation since 1949; and various other records dating back to 1949 or 1988. Klaus Decl. ¶ 11 & Exs. 2-3.

III. Argument

A. Legal Standard

Under Rule 15, "leave to amend is not to be granted automatically." *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990). Grounds for denying leave to amend include "bad faith or dilatory motive on the part of the movant … undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Futility is by itself sufficient to justify denial of leave to amend. "Leave to amend need not be given if a complaint, as amended, is subject to dismissal." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). Thus, leave to add new claims should be denied where those claims would be barred by the applicable statute of limitations. *Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1060 (9th Cir. 2008) (affirming denial of leave to amend because the plaintiff's proposed claims were outside the limitations period and the plaintiff could not establish delayed discovery or fraudulent concealment).

Prejudice also suffices to deny leave to amend. Prejudice can be shown where the amendments introduce new theories requiring additional discovery, which may in turn result in further delays in the case. *See Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1399 (9th Cir. 1986); *Jackson*, 902 F.2d at

1387-88 (finding that the "burden of necessary future discovery" justified denying leave to amend). "Expense, delay, and wear and tear on individuals and companies count toward prejudice." *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994). Other factors supporting denial of leave to amend include the plaintiff's bad faith, *Millar v. Bay Area Rapid Transit District*, 236 F. Supp. 2d 1110, 1113 (N.D. Cal. 2002), and the fact that a plaintiff has been granted leave to amend previously, *Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1438 (9th Cir. 1986).

B. The Court Should Deny Plaintiffs' Motion For Leave To Amend

1. Plaintiffs' Proposed Class And Tolling Amendments Are Futile

(a) The Proposed Class Amendments Are Facially Time-Barred

Amendments that propose to plead time-barred claims are futile. *Platt*, 522 F.3d at 1060; *Robinson v. City of San Bernardino Police Dep't*, 992 F. Supp. 1198, 1209 (C.D. Cal. 1998). Here, Plaintiffs' proposed expansion of the class is time-barred on its face. Plaintiffs seek to extend the class definition by 60 years and thereby assert claims that date back to 1949. As Plaintiffs acknowledged in proposing a class dating to June 2009 in their first five complaints, the longest statute of limitations that could conceivably apply to any of their claims would be four years. That is the applicable limitations period for Plaintiffs' Unfair Competition Law ("UCL") and breach of contract claims. Cal. Bus. & Prof. Code

§ 17208 (UCL); Cal. Civ. Proc. Code § 337(1) (breach of written contract).[1] The remaining claims are subject to two- or three-year limitations periods.[2]

(b) Warner/Chappell Does Not Need To Wait Until Class Certification To Demonstrate The Futility Of Plaintiffs' New Claims

Plaintiffs argue that their proposed amendments are not futile because "the expanded class definition is properly addressed at the class certification stage, not at dismissal for failure to state a claim." Mot. at 15:5-7; *id.* at 7 & n.5. Plaintiffs are incorrect. "Where 'the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claims,' courts may address class certification issues [such as the class definition] in a 12(b)(6) motion." *Shabaz v. Polo Ralph Lauren Corp.*, 586 F. Supp. 2d 1205, 1211 (C.D. Cal. 2008) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)).

In particular, courts routinely strike or dismiss class claims that are time-barred, including where the claims fail adequately to allege delayed discovery or fraudulent concealment. *See id*. (striking class allegations for claims outside the

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[1] As noted, Warner/Chappell preserves the arguments from its initial motion to dismiss that the Court has not ruled upon, including its arguments relating to preemption, the applicable limitations period, and whether various of Plaintiffs' state-law causes of action state a claim under applicable law.

[2] *See* Dkt. 71 at 2-3 (three-year limitations period applies to Plaintiffs' declaratory judgment claims under the Copyright Act); *Franck v. J.J. Sugarman-Rudolph Co.*, 40 Cal. 2d 81, 90 (1952) (two-year limitations period governs actions for money had and received); *Cnty. of Fresno v. Lehman*, 229 Cal. App. 3d 340, 346 (1991) (applying three-year limitations period of Cal. Civ. Proc. Code § 338 to false advertising law claim); *see also Nakash v. Super. Ct.*, 196 Cal. App. 3d 59, 70 (1987) ("Rescission is *not* a cause of action; it is a remedy.") (emphasis in original). The Court has ruled that "Plaintiffs Robert Siegel's and Majar Productions, LLC's claims fall outside the three-year [limitations] period" applicable to Claim One and Claim Two, and dismissed those plaintiffs' declaratory judgment claims with leave to amend. Dkt. 71 at 3.

applicable statute of limitations); *Campbell v. PricewaterhouseCoopers*, No. CIV. S-06-2376 LKK/GGH, 2008 WL 3836972, at *6 (E.D. Cal. Aug. 14, 2008) (same); *Yumul*, 733 F. Supp. 2d at 1133 (dismissing putative class action complaint "to the extent it alleges conduct occurring outside the relevant statutes of limitations" and finding that tolling and fraudulent concealment were not adequately alleged); *Keilholtz*, 2009 WL 2905960, at *3-5 (same). As shown below, denial of leave to amend is appropriate here because the pleadings and the record demonstrate the futility of Plaintiffs' proposed amendments.

The cases that Plaintiffs cite are inapposite. In all of them, the courts found that the plaintiffs adequately alleged delayed discovery and/or fraudulent concealment—and that they did so with respect to both the named plaintiffs and absent class members.[3] Here, by contrast, Plaintiffs have failed to allege that the named plaintiffs are entitled to tolling. More importantly, Plaintiffs' proposed amendments conclusively prove that other putative class members had actual notice of their claims outside the limitations period. *Cf. Schramm*, 2011 WL 5034663, at *10-11 (certifying class where there was "no significant individual issues" as to when class members should have known basis of claims and there was "no evidence that any potential class member had actual notice outside the statutory period").

[3] *Ortega v. Natural Balance Inc.*, No. CV 13-05942 ABC(Ex), 2013 WL 6596792, at *5 (C.D. Cal. Dec. 16, 2013) (finding that "Plaintiffs sufficiently pled delayed discovery as to their own claims" and "[a]s to the class, Plaintiffs pled generalized allegations consistent with the elements of the delayed discovery rule"); *Schramm v. JPMorgan Chase Bank, N.A.*, No. LA CV09-09442 JAK(FFMs), 2011 WL 5034663, at *10-11 (C.D. Cal. Oct. 19, 2011) (granting class certification where there were "no significant individual issues related to when members should have known" the bases of their claims and "no evidence that any potential class member had actual notice outside the statutory period"); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 112 (N.D. Cal. 2008) (finding adequate allegations of fraud and concealment and citing *Taylor v. United Technologies Corp.*, No. 3:06-CV-1494, 2008 WL 2333120 (D. Conn. June 3, 2008), which found that the operative complaint was "replete with allegations of fraud and concealment").

(c) The Untimely Claims Are Not Saved By Tolling Rules

Plaintiffs' argument on tolling is summed up in a single sentence in their motion: Plaintiffs assert that "the detailed allegations regarding delayed discovery and concealment of the truth about Defendants' limited copyright in *Happy Birthday* are sufficient on their face to provide a basis for equitable tolling and are not futile." Mot. at 15:7-9. Plaintiffs do not even recite the legal standards for the tolling that they seek. As Warner/Chappell demonstrates, Plaintiffs' own allegations—both express and as communicated through the documents they incorporate by reference—show that the delayed discovery and fraudulent concealment allegations are futile.

(i) Plaintiffs Fail To Plead Equitable Tolling Under The Delayed Discovery Rule

"In order to invoke [the delayed discovery exception] to the statute of limitations, the plaintiff must specifically plead facts which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Yumul*, 733 F. Supp. 2d at 1130 (alteration in original). "The burden is on the plaintiff to show diligence, and conclusory allegations will not withstand demurrer." *McKelvey v. Boeing N. Am., Inc.*, 74 Cal. App. 4th 151, 160 (1999). In *McKelvey*, the court affirmed the dismissal with prejudice of class action complaints that failed adequately to allege delayed discovery. The court emphasized that the plaintiffs "have not alleged *facts* about the time or manner of discovery" and "have not alleged *facts* showing their inability to have made earlier discovery despite reasonable diligence." *Id*. at 161 (emphasis in original). Plaintiffs' proposed amendments suffer from these same deficiencies.

Plaintiffs' allegations as to *how* and *when* the named plaintiffs learned of their purported claims are conclusory, and insufficient as a matter of law. In order to justify Siegel's and Majar's assertion of time-barred claims, for example, Plaintiffs simply allege that "[a]fter the commencement of this action in 2013, [Siegel and

Majar] thereafter discovered additional facts sufficient to challenge whether Defendants' copyrights cover the Song's familiar lyrics." Fifth Am. Compl. ¶¶ 136(b), 138(b). Similarly, in order to establish that these plaintiffs could not have discovered their claims earlier, Plaintiffs simply allege that legal conclusion: "Before licensing *Happy Birthday to You* from Defendants and paying fees for synchronization licenses to Defendants, [Siegel and Majar] did not know, and in the exercise of reasonable care, could not have known, that Defendants' copyrights in fact did not cover the Song's familiar lyrics." *Id*. ¶¶ 136(a), 138(a). As in *McKelvey*, 74 Cal. App. 4th at 161, the Fifth Amended Complaint is bereft of any *facts* supporting these mere conclusions. *See also Keilholtz*, 2009 WL 2905960, at *4-5 (discovery rule inapplicable where plaintiffs did "not adequately alleged how and when the class members with time-barred claims discovered the alleged fraud").

More important, when a plaintiff "*has the opportunity to obtain knowledge from sources open to his investigation (such as public records or corporation books), the statute commences to run*." *McKelvey*, 74 Cal. App. 4th at 160 n.11 (emphasis in original). Here, the named plaintiffs and absent class members alike could have learned about their purported claims from records that have been available publicly since the 1930s and 1940s.

First, Plaintiffs allege that knowledge of the terms of the 1934 and 1935 assignment from Jessica Hill to Summy allowed Warner/Chappell and its predecessors to know that this assignment transferred "only the rights to various piano arrangements to the musical composition *Good Morning to All*," and that Warner/Chappell and its predecessors "did not acquire any rights to the *Happy Birthday to You* lyrics." Fifth Am. Compl. ¶ 142. Plaintiffs further allege that, due to "misrepresentations and concealment of material fact" and "the complexity of the historical record surrounding the song" they "did not know, had no reason to know, and in the exercise of reasonable care could not know that Defendants and their predecessors-in-interest did not own a copyright to the Song itself, but rather only to

two piano arrangements composed by Summy Co.'s employees for hire." *Id*. ¶¶ 160-61; *see also id*. ¶ 162.

This is absurd. To discover Plaintiffs' theory about the limited scope of the 1934 and 1935 assignment, Plaintiffs—and absent class members—need only have looked at the court files for the Southern District of New York. J.A. 50-51; *see also* Dkt. 182 at 3:4-6, 23:4-5 (arguing that the 1942 pleadings prove that Warner/Chappell acquired only "limited rights to '***various piano arrangements***'") (emphasis in original).

Second, Plaintiffs allege that Warner/Chappell and its predecessors "concealed the fact that the 1935 copyrights covered only the piano arrangements composed by Summy Co.'s employees-for-hire and did ***not*** cover the *Happy Birthday to You* lyrics"—and encouraged others to do the same—and that, as a result of that concealment and the "complexity of the historical record," Plaintiffs did not know, had no reason to know, and could not reasonably have known of the true scope of those 1935 copyrights. Fifth Am. Compl. ¶¶ 158-62 (underline added).

This, too, is specious. Plaintiffs and absent class members could have discovered Plaintiffs' theory about the limited claim of the 1935 registrations simply by going to the United States Copyright Office. J.A. 44, 48; *see also* Dkt. 251 at 7:14-23 (arguing that registration E51990 proves that Summy did not register the *Happy Birthday* lyrics).

Third, Plaintiffs allege that knowledge of the terms of the 1944 assignment from Patty and Jessica Hill to Summy ("via the Hill Foundation") allowed Warner/Chappell and its predecessors to know that "they did not acquire any rights to the *Happy Birthday to You* lyrics from Patty Hill, Jessica Hill, or the Hill Foundation." Fifth Am. Compl. ¶ 142. Plaintiffs further allege that they did not know, had no reason to know, and could not reasonably have known of the true scope of Defendants' rights in *Happy Birthday*. *See id*. ¶¶ 160-62.

This contention, too, is preposterous. To discover Plaintiffs' theory about what the 1944 assignment transferred, Plaintiffs and absent class members only had to go to the United States Copyright Office, where the 1944 transfers from the Hill Sisters to the Hill Foundation and from the Hill Foundation to Summy had been recorded as of November 1944. J.A. 113, 115; *see also* Dkt. 251 at 10:16-11:2 (arguing that the recorded transfer from the Hill Foundation to Summy proves that Summy did not obtain the common law copyright to the *Happy Birthday* lyrics in 1944).

Notably, since March 2008, Plaintiffs and absent class members have also been able to educate themselves about their purported claims against Warner/Chappell through publications by Prof. Robert Brauneis. Prof. Brauneis, who serves as Plaintiffs' litigation consultant, first released his article analyzing the *Happy Birthday* copyright and made public his online repository of records relating to *Happy Birthday* in 2008. Klaus Decl. ¶¶ 15-18 & Ex. 4 at 32, Ex. 5 at 2 n.10, Ex. 6.[4] Prof. Brauneis's article, published more than five years before this lawsuit was brought, concluded that it was "doubtful" that *Happy Birthday* was still under copyright. *Id.* Ex. 5 at 37. Indeed, Plaintiffs' initial complaints appear to have been based in large part on that very article.[5] Prof. Brauneis was not shy about publicizing his theories in 2008. The press reported on his article at the time, and Prof. Brauneis even went on network television in July 2008 to proclaim that a court likely would find *Happy Birthday* in the public domain. Klaus Decl. Ex. 7 at 128-29, Ex. 8 at 133.

[4] Concurrently with this opposition, Warner/Chappell has filed a request that the Court take judicial notice of publicly available web pages and publications and of documents incorporated into Plaintiffs' proposed Fifth Amended Complaint by reference.

[5] *Compare* Second Am. Compl. (Dkt. 59) ¶¶ 16-110, *with* Klaus Ex. 5 at 45-46, 55-90.

Finally, not only did Plaintiffs and absent class members have ample *opportunity* to learn from public records the bases for their purported claims, but Plaintiffs' own allegations show that absent class members *actually did know* the bases for those claims. Plaintiffs' proposed amendments make this crystal clear. Plaintiffs allege that in 1964, for example, an absent class member concluded that the *Happy Birthday* copyright covered "only the particular [piano] arrangement," and not the lyrics. Fifth Am. Compl. ¶ 147 (alteration in original); Klaus Decl. Ex. 9. Of course, that is Plaintiffs' precise argument here. Plaintiffs also allege that, as of 1971, another absent class member "firmly believe[d]" that it would prevail in an infringement action, but was willing to pay a "tribute" instead. Fifth Am. Compl. ¶ 152; Klaus Decl. Ex. 10. Similarly, Plaintiffs allege that in 1983, an absent class member believed the song was "in the public domain around the world" (as do Plaintiffs), but chose instead to pay a "tribute" rather than pursue a legal claim. Fifth Am. Compl. ¶ 153; Klaus Decl. Ex. 11. These and other allegations demonstrate that as far back as at least the 1960s, absent class members had actual notice of the various bases on which to challenge the *Happy Birthday* copyright. Fifth Am. Compl. ¶¶ 147-53; Klaus Decl. Exs. 9-11. This forecloses any argument that Plaintiffs or absent class members were unable, with the exercise of reasonable diligence, to discover the facts supporting their purported claims until 2009. *See Yumul*, 733 F. Supp. 2d at 1130; *McKelvey*, 74 Cal. App. 4th at 160 n.11. As a matter of law, the delayed discovery rule does not apply.

(ii) Plaintiffs Fail To Plead Tolling Based On Fraudulent Concealment

Plaintiffs also fail to allege that the statute of limitations should be tolled based on alleged fraudulent concealment. "A defendant's fraud in concealing a cause of action against him will toll the statute of limitations, and that tolling will last as long as a plaintiff's reliance on the misrepresentations is reasonable." *Grisham v. Philip Morris U.S.A., Inc.*, 40 Cal. 4th 623, 637 (2007). "In order to

establish fraudulent concealment, the complaint must show: (1) when the fraud was discovered; (2) the circumstances under which it was discovered; and (3) that the plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry." *Yumul*, 733 F. Supp. 2d at 1131 (citation omitted). A claim that fraudulent concealment should toll a statute of limitations must be pled with particularity under Rule 9(b). *Id.* at 1132-33. Moreover, "[a]bsent a fiduciary relationship, nondisclosure is not fraudulent concealment—affirmative deceptive conduct is required." *Long v. Walt Disney Co.*, 116 Cal. App. 4th 868, 874 (2004). "Silence or passive conduct of the defendant is not deemed fraudulent, unless the relationship of the parties imposes a duty upon the defendant to make disclosure." *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978). Plaintiffs' fraudulent concealment theory fails for a number of reasons.

First, because there is no fiduciary relationship between Warner/Chappell and its licensees, or Warner/Chappell's predecessors and their licensees, Plaintiffs must allege with particularity *affirmative* acts of concealment. Plaintiffs cannot rely on mere silence or nondisclosure. *Id.* at 250; *Lauter v. Anoufrieva*, No. CV 07-6811 JVS(JC), 2010 WL 3504745, at *22 (C.D. Cal. July 14, 2010) ("Unless a defendant has a fiduciary duty to disclose information to the plaintiff, passive concealment is insufficient for a court to grant equitable tolling."). As a result, Plaintiffs' allegations that Summy failed to disclose to licensees that other licensees had challenged the *Happy Birthday* copyright are unavailing. Fifth Am. Compl. ¶¶ 147-53. Also unavailing are Plaintiffs' allegations that Summy concealed, and encouraged others to conceal, the fact that Preston Ware Orem did not write the *Happy Birthday* lyrics and the (alleged) fact that the E51990 copyright did not cover those lyrics. *Id*. ¶¶ 156-59. Moreover, Plaintiffs offer no evidence that any of these alleged nondisclosures were intended to deceive anyone and offer no explanation as to how they could have deceived anyone.

The only affirmative conduct that Plaintiffs allege is that "[a]t various times relevant hereto," Warner/Chappell and Summy (1) "claimed that Summy Co.'s employee Orem may have written the familiar *Happy Birthday to You* lyrics, either alone, together [sic], or with Mildred or Patty Hill" and (2) "claimed that Mildred Hill wrote the familiar *Happy Birthday to You* lyrics, either alone or together with Patty Hill or with Summy Co.'s employee Orem." *Id*. ¶¶ 154-55. These allegations also cannot support a fraudulent concealment claim. Critically, there is not a single allegation—let alone one that would satisfy Rule 9(b)—regarding: *to whom* these alleged statements were made, *by whom* they were made, *when* (during the last seven decades) they were made, or *how* they were made. *Yumul*, 733 F. Supp. 2d at 1133.[6] Nor is there a single allegation that Plaintiffs or any absent class member actually relied on any such alleged statement by Warner/Chappell or Summy, and reasonably so relied. *Grisham*, 40 Cal. 4th at 637. And even if Plaintiffs did plead these allegations about the authorship of the *Happy Birthday* lyrics with sufficient specificity—which they plainly have not done—how could this possibly be relevant? Plaintiffs do not explain how these alleged statements served to fraudulently conceal the basis for any claim that Plaintiffs have actually asserted in this case.

Second, Plaintiffs' conclusory allegations as to when and how Plaintiffs discovered the alleged fraud are fatally flawed, for the same reasons shown above. Fifth Am. Compl. ¶¶ 135-38. This avenue for tolling is even less plausible than tolling based on delayed discovery. Here, Plaintiffs must plead with particularity the "who, what, when, where, and how of the alleged fraudulent concealment." *Yumul*, 733 F. Supp. 2d at 1133; *see Juniper Networks v. Shipley*, No. C 09-0696 SBA, 2009 WL 1381873, *5 (N.D. Cal. May 14, 2009) (allegation that a website

[6] Plaintiffs provided no factual support for these allegations when Warner/Chappell requested it during the meet and confer process, and they should not be afforded yet another opportunity to re-plead their allegations now. Klaus Decl. ¶¶ 9-10; *Fid. Fin. Corp.*, 792 F.2d at 1438.

represented that a firewall was functioning despite knowledge that the statement was untrue was "too vague to comply with the particularity requirements of Rule 9(b)"); *Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774 MMM(CWx), 2006 WL 4749756, *43 (C.D. Cal. Sept. 25, 2006) (to establish fraudulent concealment, the plaintiff "must plead with particularity the circumstances surrounding the concealment and state facts showing his due diligence in trying to uncover the facts"). Plaintiffs should not be given yet another bite at the apple to re-plead their deficient allegations. *Kaplan*, 49 F.3d at 1370; *Fid. Fin. Corp.*, 792 F.2d at 1438.

Third, Plaintiffs do not adequately allege that Plaintiffs or absent class members were not at fault for failing to exercise reasonable diligence to discover the bases of their purported claims from public records. On the contrary, Plaintiffs' allegations affirmatively prove that absent class members had actual knowledge of purported claims against Warner/Chappell's predecessors, based on the absent class members' review of decades-old public records. Plaintiffs cannot establish fraudulent concealment in these circumstances. *Yumul*, 733 F. Supp. 2d at 1131.

2. Amendment Would Be Prejudicial To Warner/Chappell

The Court also should deny Plaintiffs' motion for leave to amend because Plaintiffs' attempt to expand the class definition by 60 years and to assert new legal theories of fraudulent concealment and legal tolling would cause undue prejudice to Warner/Chappell. "Expense, delay, and wear and tear on individuals and companies count toward prejudice." *Kaplan*, 49 F.3d at1370 (citation omitted).

Plaintiffs' proposed amendments, if allowed, would impose a crushing discovery burden upon Warner/Chappell. Plaintiffs' pending document requests make this clear. Plaintiffs have requested, for example, all licenses relating to *Happy Birthday* since 1949; all revenue statements relating to *Happy Birthday* licenses since 1949; all documents identifying agents who have collected royalties for *Happy Birthday* since 1949; all documents showing royalties paid to the Hill Foundation since 1949; and numerous other onerous requests for records dating

back seven decades. Klaus Decl. ¶ 11 & Ex. 2 at 16-19; *see also id*. Ex. 3 at 27-28. *See Kaplan*, 49 F.3d at 1370; *Jackson*, 902 F.2d at 1387-88 (finding that the "burden of necessary future discovery" justified denying leave to amend); *Acri*, 781 F.2d at 1398-99 (affirming denial of leave to amend when allowing amendment would prejudice the defendant "because of the necessity for further discovery"). Moreover, while the Court expressed willingness to entertain a request to extend the present deadlines, it also stated its interest in moving ahead, and established a tight schedule for discovery on the remaining issues in the case. Denial of leave to amend is appropriate in these circumstances. *See, e.g.*, *Kaplan*, 49 F.3d at 1370 (addition of new claims would be unreasonably prejudicial where trial was close, protracted discovery had been completed, the complaint previously had been amended, and the basis for the amendment had long been known).

Denial of leave to amend is particularly justified here because, in addition to the significant burden the proposed amendments would place on Warner/Chappell, Plaintiffs' fraudulent concealment and tolling claims are also "tenuous at best." *Lockheed Martin Corp. v. Network Solutions, Inc.*, 175 F.R.D. 640, 646 (C.D. Cal. 1997) (finding that "[s]uch a tenuous claim" did not "merit the delay and prejudice" its addition would cause); *see also Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (denying leave to amend and emphasizing the "tenuous nature" of the proposed claims).

Finally, while Plaintiffs deny any ill motive in seeking to expand the class definition by 60 years, the timing of this tactic and the feebleness of the claims suggest that Plaintiffs are seeking to burden Warner/Chappell intentionally and to gain leverage. *See Millar*, 236 F. Supp. 2d at 1113 (factors supporting denial of leave to amend include bad-faith motive, such as "us[ing] the motion to … impose additional expense on the opposing party, or gain additional leverage in settlement negotiations"). Although Plaintiffs indisputably have been in possession of the documents allegedly supporting their tolling theories since May 2014—and in

reality have been in possession of facts to assist their causes of action for many years—Plaintiffs have not, until now, raised the possibility of asserting claims dating back many decades. They began touting this idea in the press only after the Court ruled on the cross-motions for summary judgment. Klaus Decl. ¶ 6 & Ex. 1.

IV. Conclusion

Plaintiffs' proposed amendments are futile and prejudicial. Warner/Chappell respectfully requests that the Court deny Plaintiffs' motion for leave to file a Fifth Amended Complaint.

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