

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**
FREEMAN & HERZ LLP

6 750 B Street, Suite 2770
 7 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)	Case No. CV 13-04460-GHK (MRWx)
14	PRODUCTIONS CORP., <i>et al.</i> ,)	REPLY TO MOTION FOR LEAVE TO AMEND AND FILE FIFTH AMENDED COMPLAINT
15	Plaintiffs,)	
16	v.)	
17	WARNER/CHAPPELL MUSIC,)	Time: 9:30 a.m.
18	INC., <i>et al.</i>)	Judge: Hon. George H. King, Chief Judge
19	Defendants.)	Room: 650
20)	
21)	
22)	

23
 24
 25
 26
 27
 28

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

	Page
I. INTRODUCTION	1
II. ARGUMENT	2
A. The Amendment is Not Futile.....	3
1. Plaintiffs Have Alleged Facts to Support Application of the Delayed Discovery Rule	3
2. Plaintiffs Have Alleged Sufficient Facts to Support Fraudulent Concealment.....	9
B. Defendants Will Not Be Unfairly Prejudiced by Amendment of the Complaint.....	12
C. Plaintiffs Do Not Seek Amendment in Bad Faith	13
III. CONCLUSION	13

TABLE OF AUTHORITIES

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

Page

Cases

April Enters., Inc. v. KTTV,
147 Cal. App. 3d 805 (1983).....9

DCD Programs, Ltd. v. Leighton,
833 F.2d 183 (9th Cir. 1987).....3, 12

El Pollo Loco, Inc. v. Hashim,
316 F.3d 1032 (9th Cir. 2003).....4, 8, 9

Eminence Capital, LLC v. Aspeon, Inc.,
316 F.3d 1048 (9th Cir. 2003).....3

Enhance-It, L.L.C. v. Am. Access Techs., Inc.,
413 F. Supp. 2d 626 (D.S.C. 2006).....3

Gryczman v. 4550 Pico Partners, Ltd.,
107 Cal. App. 4th 1 (2003).....6

Hoffman v. 162 North Wolfe LLC,
228 Cal. App. 4th 1178 (2014).....10

Jackson v. Bank of Hawaii,
902 F.2d 1385 (9th Cir. 1990).....12

Keilholtz v. Lennox Health Products, Inc.,
No. C 08-00836 CW, 2009 U.S. Dist.
LEXIS 81108 (N.D. Cal. Sept. 8, 2009)3, 4

McKelvey v. Boeing North Am.,
74 Cal. App. 4th 151 (1999).....4, 7

Miller v. Rykoff-Sexton, Inc.,
845 F.2d 209 (9th Cir. 1988).....3

1	<i>Norgart v. Upjohn Co.</i> ,	
2	21 Cal. 4th 383 (1999)	4
3	<i>Owens v. Kaiser Foundation Health Plan, Inc.</i> ,	
4	244 F.3d 708 (9th Cir. 2001).....	2
5	<i>Sonoma Cnty. Ass’n of Retired Employees v. Sonoma Cnty.</i> ,	
6	708 F.3d 1109 (9th Cir. 2013).....	2
7	<i>Tseng v. Nordstrom, Inc.</i> ,	
8	No. CV 11-08471 CAS (MRx), 2012 U.S. Dist.	
9	LEXIS 103142 (C.D. Cal. July 23, 2012).....	3
10	<i>Yumul v. Smart Balance, Inc.</i> ,	
11	733 F. Supp. 2d 1117 (C.D. Cal. 2010)	3

Statutes

12	California Code of Civil Procedure	
13	340.8(c)(2)	7

Rules

14	Federal Rules of Civil Procedure	
15	15	2

1 **I. INTRODUCTION**

2 For decades, Defendants and their predecessors-in-interest (“Defendants”)
3 have charged unsuspecting absent class members millions of dollars in licensing
4 fees for use of *Happy Birthday to You* (the “Song” or “*Happy Birthday*”), falsely
5 claiming to own the copyright to the Song even though the evidence they
6 possessed, which was produced or uncovered during this litigation, proves that
7 Defendants knew, or should have known, they did not own a copyright in the
8 Song’s lyrics. Now that new evidence has come to light that was unavailable to
9 Plaintiffs and the absent Class members, Plaintiffs seek to extend the relevant
10 Class Period based on the delayed discovery rule and Defendants’ fraudulent
11 concealment of the truth. Defendants cry foul and seek to prevent Plaintiffs and the
12 rest of the Class from recovering the money they never should have paid to
13 Defendants in the first place under the bogus copyright claim.

14 Defendants argue that Plaintiffs and the absent Class members should have
15 searched for 80-year old records, such as 1930s and 1940s court files (that had to
16 be obtained from the National Archives) and a 1935 copyright record book; then
17 stitched together a 1944 assignment from these records; and then should have
18 determined that Defendants “might not” own a copyright to the Song. On its face,
19 that argument is plainly unreasonable. The Brauneis Article (Dkt. 264-6), an
20 obscure article published in a technical trade journal with a limited circulation,
21 does not change this conclusion. Defendants do not cite a single case (and
22 Plaintiffs have not found one) holding that such a limited, obscure, technical
23 publication is sufficiently widespread to put everyone on notice of a potential
24 claim. This is especially so in light of Defendants’ decades-long assertion of
25 copyright ownership and the incompleteness of the public record.

26 In any event, the Brauneis Article incorrectly “assumed” that the 1944
27 assignment, which Defendants now believe “should have” put Plaintiffs and the
28 absent Class members on notice of a claim, actually assigned the lyrics to

1 Defendants. In addition, it should not be lost on the Court that Defendants argue in
2 their motion for reconsideration that in granting partial summary judgment for
3 Plaintiffs, the Court ignored the purported fact that the 1944 assignment
4 supposedly transferred a copyright in the lyrics to Defendants. That argument
5 squarely conflicts with their argument here: that Plaintiffs and the Class should
6 have been able to determine for themselves that the 1944 assignment did *not*
7 transfer a copyright in the lyrics to Defendants. Defendants cannot have it both
8 ways; they should not be rewarded for their fraudulent conduct and they should be
9 required to return all their ill-gotten gains to Plaintiffs and the rest of the Class.

10 Plaintiffs' motion to amend should be granted under the liberal policy of
11 allowing amendments pursuant to Rule 15 to facilitate decisions on the merits. The
12 amendment is not futile and Defendants will not be unfairly prejudiced.
13 Defendants ignore Plaintiffs' specific allegations that support both the delayed
14 discovery rule and fraudulent concealment. Moreover, Defendants' argument that
15 they will be unfairly prejudiced because of the purported "crushing discovery
16 burden" is without merit. Plaintiffs have only propounded two (2) interrogatories
17 and 17 requests for production that relate to the newly expanded Class definition.
18 Surely, Defendants have brought upon themselves whatever discovery burden they
19 will bear by misrepresenting and concealing for decades the true facts about the
20 limited scope of their copyright. Because Defendants have not shown that the
21 amendments would be futile or that they will suffer undue prejudice, Plaintiffs'
22 motion should be granted.

23 **II. ARGUMENT**

24 It is indisputable that there is a strong policy favoring amendments and "a
25 court should liberally allow a party to amend its pleading." *Sonoma Cnty. Ass'n of*
26 *Retired Employees v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013) (citing
27 *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)
28 (finding the policy favoring amendment freely "is to be applied with extreme

1 liberality’’)). As the party opposing the amendment, Defendants bear the burden of
2 showing prejudice and futility. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183,
3 187 (9th Cir. 1987).

4 **A. The Amendment is Not Futile**

5 Defendants cannot meet their burden of showing that the proposed
6 amendment to the Class definition would be futile. The party opposing amendment
7 must make a “strong showing” of futility in order for the court to deny amendment
8 on this ground alone, which Defendants have not done here. *See Eminence Capital,*
9 *LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). “[A] proposed
10 amendment is futile only if *no set of facts can be proved* under the amendment to
11 the pleadings that would constitute a valid and sufficient claim or defense.” *Miller*
12 *v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (emphasis added). “For a
13 motion to amend to be denied for futility, the amendment must be clearly
14 insufficient or frivolous on its face.” *Enhance-It, L.L.C. v. Am. Access Techs., Inc.*,
15 413 F. Supp. 2d 626, 629 (D.S.C. 2006) (quotations and citation omitted). “Given
16 this high standard, courts rarely deny motions to amend on this [futility] basis.”
17 *Tseng v. Nordstrom, Inc.*, No. CV 11-08471 CAS (MRx), 2012 U.S. Dist. LEXIS
18 103142, at *10 (C.D. Cal. July 23, 2012).

19 **1. Plaintiffs Have Alleged Facts to Support Application of the** 20 **Delayed Discovery Rule**

21 Plaintiffs have alleged facts sufficient to toll the statute of limitations.¹ In
22 general, a cause of action accrues at “the time when the cause of action is complete

23 ¹ Defendants’ reliance on *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 117,
24 1130-33 (C.D. Cal. 2010) and *Keilholtz v. Lennox Health Products, Inc.*, No. C 08-
25 00836 CW, 2009 U.S. Dist. LEXIS 81108, at *8-13 (N.D. Cal. Sept. 8, 2009), to
26 argue that Plaintiffs’ tolling amendments are “futile” is misplaced. *See* Dkt. 264 at
27 7. In *Yumul*, after granting a motion to dismiss, the court granted leave to amend so
28 that the plaintiffs could provide more detail as to tolling. *Yumul*, 733 F. Supp. 2d
at 1133-34. If such amendments were futile, then leave to amend would *not* have
been granted. *Keilholtz* is easily distinguishable on its facts. The plaintiffs in that

1 with all of its elements.” *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397 (1999). The
2 discovery rule is an exception to this general rule and it postpones accrual of a
3 cause of action until the plaintiff discovers, or has reason to discover, the cause of
4 action. *Id.* A plaintiff has reason to discover a cause of action when he “has reason
5 at least to suspect a factual basis for its elements.” *Id.* at 398. The discovery rule
6 ameliorates the harshness of the general rule “in some cases . . . where it is
7 manifestly unjust to deprive plaintiffs of a cause of action before they are aware
8 that they have been injured.” *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1039
9 (9th Cir. 2003). The purpose of the discovery rule is to protect plaintiffs who are
10 ignorant of their cause of action through no fault of their own. *Id.*

11 As required under the discovery rule, Plaintiffs have specifically pleaded
12 facts that “show (1) the time and manner of discovery; and (2) the inability to have
13 made earlier discovery despite reasonable diligence.” *McKelvey v. Boeing North*
14 *Am., Inc.*, 74 Cal. App. 4th 151, 160 (1999) (emphasis omitted). For example,
15 Plaintiff Good Morning To You Productions Corp. (“GMTY”) alleges that, “In or
16 about 2012, Plaintiff GMTY’s principal learned of a dispute regarding Defendants’
17 claim to own the copyright to *Happy Birthday to You*.”² Fifth Amended

18 _____
19 case alleged that the defendants concealed that fireplaces it manufactured were
20 excessively hot, and therefore dangerous and unsafe. The Court granted the
21 defendant’s motion to dismiss without leave amend because the plaintiffs had
22 obvious exposure to the alleged excessive heat generated by the fireplaces when
23 they used them and because the owners’ manual and the fireplace glass screen had
24 printed warnings (“Caution: Hot while in operation”). *Keilholtz*, 2009 U.S. Dist.
LEXIS 81108, at *12 n.2. The Court concluded that with the exercise of
25 reasonable diligence, the plaintiffs could have discovered that the fireplace screens
26 were hot. To suggest that the obscure, incomplete, historical facts in this case are
27 as easily discoverable as a hot fireplace borders on frivolous.

28 ² It should be noted that Defendants only claim that Plaintiffs Majar and
Siegel’s declaratory relief causes of action would be barred by the statute of
limitations. Thus, only these Plaintiffs would need to show that the delayed
discovery rule applies to their claims. In any event, each Plaintiff has alleged facts
to show when they discovered Defendants’ wrongdoing.

1 Consolidated Complaint (“FAC”) ¶ 135(a). And the other Plaintiffs allege that
2 they discovered the copyright dispute *after* this lawsuit was filed. *Id.* at ¶¶ 136(b),
3 137(b) 138(b); *see also* Chressanthis Declaration, ¶ 3; Marya Declaration, ¶ 3
4 (filed concurrently herewith). Prior to that, Plaintiffs did not question, and had no
5 reason to question, Warner/Chappell’s (or its predecessors-in-interest) claim of
6 copyright ownership because Defendants consistently claimed ownership of the
7 copyright, and it was common knowledge within the entertainment industry that
8 Warner/Chappell widely claimed exclusive ownership of the Song. FAC ¶¶ 121,
9 125(b), 128, 131, 134(c); *see also* Chressanthis Declaration, ¶ 3; Marya
10 Declaration, ¶ 3. Additionally, Plaintiffs all allege that they did not know, and in
11 the exercise of reasonable care, could not have known, that Defendants’ copyright
12 did not cover the Song’s familiar lyrics. FAC ¶¶ 135(b), 136(a), 137(a), 138(a).
13 Until Warner/Chappell admitted in the middle of this litigation that Summy’s
14 employee, Preston Ware Orem, did not write the lyrics, no one could have known
15 that Summy’s 1935 copyright covered only the piano arrangement that he wrote as
16 Summy’s employee-for-hire.

17 Nothing in the facts alleged in the proposed Fifth Amended Complaint
18 supports the conclusion that Plaintiffs and absent Class members were ignorant of
19 their claims through their own fault. Notwithstanding Defendants’ bombastic
20 argument, while Defendants claimed copyright ownership for decades, no
21 reasonable person, in the exercise of reasonable care or diligence, would have gone
22 to the Copyright Office or obtained court records dating back to the 1930s and
23 1940s from the National Archives. In any event, even if a hyper-vigilant lay person
24 had done so, no one would have concluded from those incomplete historical
25 records that Defendants’ copyright claim could be challenged.

26 Defendants describe Plaintiffs’ motion as “fantastical” (Dkt. 264 at 6:7-8),
27 “absurd” (*id.* at 16:3), “specious” (*id.* at 16:17), and “preposterous” (*id.* at 17:1). If
28 anything is fantastical, absurd, specious, or preposterous, it is Defendants’ own

1 argument that a reasonable person would be able to discover those ancient
2 documents, and then could have determined from the face of them that Defendants
3 did not own the Song's lyrics. Defendants' argument that the public is charged
4 with knowing what is in *records going back 80 years* – the meaning of which
5 Defendants continue to deny to this day – strains credibility.

6 If accepted by the Court, Defendants' reasoning would result in the delayed
7 discovery rule *never* being applied. Plaintiffs' counsel uncovered the records, and
8 then determined their meaning, only through extraordinary investigative efforts.
9 Under Defendants' argument, however, Plaintiffs would be charged with knowing
10 about *every* conceivable public record, no matter how old, obscure, or mis-located.
11 Moreover, Defendants' argument expects Plaintiffs to determine from those
12 records a meaning – that the 1944 transfer of the copyright was limited to the piano
13 arrangements only – that their own highly skilled counsel vigorously deny to this
14 very day. The near impossibility of that task without access to Defendants'
15 confidential internal records (only discovered by Plaintiffs in this litigation)
16 allowed Defendants to conceal the truth for decades. In any event, whether
17 Plaintiffs and the absent Class members were expected to undertake such an
18 exhaustive (practically obsessive) investigation is for the fact-finder to decide, not
19 something to be decided on a motion for leave to amend. *Gryczman v. 4550 Pico*
20 *Partners, Ltd.*, 107 Cal. App. 4th 1, 6-7 (2003) (when reasonable minds could
21 differ as to the sufficiency of plaintiff's diligence in discovering a breach of
22 contract, whether plaintiff exercised reasonable diligence under the circumstances
23 is a question of fact for a jury to decide).

24 The Brauneis Article adds nothing to Defendants' argument. The article was
25 published only once in a technical copyright journal, with a limited distribution of
26 approximately 1,500, and was available only on an obscure social science research
27 website directed at professionals. No case of which Plaintiffs are aware has come
28 close to finding that such limited publication of a professional article is sufficient

1 to put the general public on inquiry notice. Defendants cite a single case, *McKelvey*
2 *v. Boeing North Am.*, 74 Cal. App. 4th 151, 162 (1999), to support their
3 extraordinary argument. The facts in *McKelvey* could not be more clearly different
4 from the facts here. In *McKelvey*, the court held that information about a particular
5 hazard that received widespread publicity, including 117 articles published in
6 newspapers of general circulation, radio and television broadcasts, and “fact
7 sheets” distributed by the state and federal government was sufficient to sustain a
8 demurrer. *Id.* Leaving apart the gaping factual differences between the repeated,
9 widespread publication of hard facts in newspapers and by state and federal
10 authorities in *McKelvey* and the arcane analysis in the Brauneis Article,³ this is *not*
11 a motion to dismiss.⁴

12 In any event, the Brauneis Article was hardly definitive – or even correct –
13 on the limited scope of the copyright. The article incorrectly “assumed” that
14 Summy Co. was assigned the Song’s lyrics as part of the settlement in *The Hill*
15 *Foundation v. Clayton F. Summy Co.* litigation (Dkt. 264-6 at 48) when, in fact, it
16 was not. That assumption is inconsistent with the Court’s summary judgment
17 ruling. Anyone who read the Brauneis Article might have made the same (albeit
18 incorrect) assumption about the Hill Foundation’s 1944 assignment. Without
19 access to other confidential materials produced in this litigation, no reasonable

20 ³ That the Brauneis Article was mentioned in a July 18, 2008, newscast and a
21 single newspaper article on July 21, 2008, which occurred years before any of the
22 Plaintiffs paid the licensing fee to Defendants, does not make this case anything
23 like *McKelvey*. There were 116 more publications in *McKelvey*, there were
24 multiple radio and television broadcasts, and there were state and federal
25 publications describing the particular hazard in question. The differences are
26 overwhelming.

27 ⁴ *McKelvey* has also been superseded by California Code of Civil Procedure
28 section 340.8(c)(2) which provides that, “Media reports regarding . . . hazardous
material or toxic substance contamination do not, in and of themselves, constitute
sufficient facts to put a reasonable person on inquiry notice that . . . injury or death
was caused or contributed to by the wrongful act of another.”

1 person would have been able to conclude that the assignment was limited to piano
2 arrangements.

3 Moreover, the Brauneis Article stated that the registration certificates for
4 E51988 and E51990 contained “the names of Mildred and Patty Smith Hill as
5 authors of “Happy Birthday to You” (Dkt. 264-6 at 36). They do not. The
6 copyright registration certificate for E51990 contains only the name of Preston
7 Ware Orem (whom Defendants now concede did not write the familiar lyrics).
8 Absent knowledge that Mr. Orem did not write the lyrics, no reasonable person
9 could possibly discover from the incorrect statement in the Brauneis Article that
10 the registration certificates named Mildred and Patty as the authors of the Song,
11 that Defendants did not own a copyright to the lyrics.

12 Courts regularly apply the delayed discovery rule to breach of contract
13 actions when: (1) “the injury or the act causing the injury, or both, have been
14 difficult for the plaintiff to detect; (2) the defendant has been in a far superior
15 position to comprehend the act and the injury; *or* (3) the defendant had reason to
16 believe the plaintiff remained ignorant [that] he had been wronged.” *El Pollo Loco*,
17 316 F.3d at 1039 (emphasis added, quotations omitted).

18 In *El Pollo Loco*, the defendant entered into a franchise agreement to operate
19 two El Pollo Loco restaurants. The agreement prohibited the franchisee from
20 operating competing restaurants, and the defendant misrepresented that he was in
21 the process of transferring his ownership interest in a KFC and provided a forged
22 document showing that the conveyance was almost complete. The plaintiff sought
23 to terminate the agreement after discovering that the defendant owned a KFC. The
24 defendant responded that the claims were barred by the statute of limitations. *Id.* at
25 1035-37.

26 The Ninth Circuit affirmed the trial court’s application of the delayed
27 discovery rule and held that the plaintiff’s claims were not barred by the statute of
28 limitations. *El Pollo Loco*, 316 F.3d at 1039. The defendant had reason to believe

1 that the plaintiff remained ignorant of the wrongdoing because his own
2 misrepresentations made it difficult to detect. *Id.* at 1040.

3 That standard squarely fits the facts of this case, and the Ninth Circuit's
4 reasoning is exactly applicable here. Defendants have had reason to know that
5 their wrongdoing was difficult – indeed, impossible – for Plaintiffs and the other
6 Class members to detect because they repeatedly misrepresented that they owned a
7 copyright to the Song's lyrics. The Song's complex history, and the age and
8 incompleteness of the copyright records made it even more difficult for Plaintiffs
9 and the other Class members to discover that Defendants owned only a copyright
10 to specific piano arrangements, not the Song's familiar lyrics. Defendants
11 undoubtedly knew the poor state of the record; indeed, they capitalized on it for
12 decades to take tens of millions of dollars from people they knew (or certainly had
13 reason to believe) were ignorant of the truth. Furthermore, as owners of at least
14 some historical records, Defendants were unquestionably in a superior position to
15 know of their wrongdoing because they had the relevant documentation proving
16 that they did not own a copyright to the Song in their possession and should have
17 been familiar with the facts surrounding the copyrights.

18 The absent Class members reasonably relied upon Defendants' frequent
19 misrepresentations. *See El Pollo Loco*, 316 F.3d at 1040. Defendants should not
20 be allowed to profit from the absent Class members' ignorance of their injury.
21 *April Enters., Inc. v. KTTV*, 147 Cal. App. 3d 805, 831 (1983).

22 **2. Plaintiffs Have Alleged Sufficient Facts to Support Fraudulent** 23 **Concealment**

24 The proposed Fifth Amended Complaint also adequately alleges facts in
25 support of tolling due to fraudulent concealment.

26 In opposing Plaintiffs' proposed fraudulent concealment amendment,
27 Defendants argue that affirmative deceptive conduct is required to toll the statute
28 of limitations because there is no fiduciary relationship between the parties. That

1 argument misstates the law. No case holds that only *affirmative* deceptive conduct,
2 as opposed to fraudulent *concealment* of material facts, tolls the statute of
3 limitations.

4 As a general matter, under California law, “a duty to disclose may arise from
5 the relationship between seller and buyer, employer and prospective employee,
6 doctor and patient, or parties entering into any kind of contractual agreement.”
7 *Hoffman v. 162 North Wolfe LLC*, 228 Cal. App. 4th 1178, 1187 (2014) (citations
8 omitted). Nondisclosure or concealment may breach the duty to disclose in four
9 instances, at least three of which apply here: (1) when the defendant is in a
10 fiduciary relationship with the plaintiff; (2) *when the defendant had exclusive*
11 *knowledge of material facts not known to the plaintiff*; (3) *when the defendant*
12 *actively conceals a material fact from the plaintiff*; and (4) *when the defendant*
13 *makes partial representations but also suppresses some material facts*. *Id.* at
14 1186 (emphasis added).

15 No case has held that those principles do not apply in the context of the
16 statute of limitations. There is no reason why the same principles should not apply
17 to fraudulent concealment for purposes of tolling the statute of limitations just as
18 they apply to a claim for fraud itself. If conduct amounting to fraudulent
19 concealment is sufficient to support a cause of action for fraud under California
20 law, then the conduct should also be sufficient to delay commencement of the
21 limitations period for any other claim.

22 Plaintiffs’ proposed amendment meets the second, third, and fourth *Hoffman*
23 standards. As discussed above, until discovery was taken in this case, Defendants
24 had exclusive knowledge of material facts not known to Plaintiffs or the other
25 Class members, including that Mr. Orem did not write the *Happy Birthday* lyrics
26 and the Foundation never transferred any rights to the lyrics to Summy.

27 Plaintiffs also have alleged affirmative misrepresentations here. For
28 example, Plaintiff GMTY alleges that on or about September 18, 2012, Defendants

1 demanded that it pay \$1,500 to use the Song and that Defendants again demanded
2 a royalty payment on or about March 12, 2013. FAC ¶¶ 119-120. Defendants
3 similarly told the other Plaintiffs that they would have to pay a fee for use of the
4 Song. (FAC ¶¶ 127, 134(c), (d) and 132). Plaintiffs reasonably relied upon
5 Defendants' misrepresentations. See FAC at ¶¶ 128, 132, and 134(d). In addition,
6 Defendants have actively concealed material facts from Plaintiffs and the other
7 members of the Class. For example, until November 2014, when Defendants
8 finally admitted that Mr. Orem did not write the *Happy Birthday* lyrics, at various
9 times Defendants asserted that he had written them with Mildred or Patty.
10 Defendants also asserted on occasion that Mildred wrote the lyrics, even though
11 there was never a shred of evidence that she had.

12 Finally, Plaintiffs have alleged that Defendants made only partial disclosure
13 of some relevant facts while suppressing other material facts about the Song. For
14 example, Defendants finally admitted that Mr. Orem did not write the Song, but
15 they withheld producing the *The Everyday Song Book*, which published the *Happy*
16 *Birthday* lyrics without a copyright notice, thereby forfeiting any copyright
17 protection, until July 9, 2015, eight months *after* the cross-motions for summary
18 judgment were filed.

19 Contrary to Defendants' argument, the fact that some businesses may have
20 been aware of the copyright dispute and paid only a nominal fee to Defendants
21 instead of a licensing fee does not demonstrate that Plaintiffs were not diligent in
22 their investigation. Instead, this further demonstrates fraudulent concealment by
23 Defendants. Rather than litigate the ownership issue in court, which would have
24 settled the dispute (or at least made the public aware of the dispute), Defendants
25 instead accepted token payment (such as \$250 for a ten-year license) to squelch the
26 ownership dispute (FAC, ¶¶ 152-53) and continued charging unsuspecting absent
27 Class members substantially larger amounts to use the Song.

28

1 **B. Defendants Will Not Be Unfairly Prejudiced by Amendment of**
2 **the Complaint**

3 Defendants contend, without any factual support, that the recent discovery
4 propounded by Plaintiffs “would impose a crushing discovery burden upon
5 Warner/Chappell” (Dkt. 264 at 21) and that the expense, delay wear and tear on
6 individuals and companies count toward prejudice. “Prejudice to the opposing
7 party is the most important factor” in deciding a motion for leave to amend under
8 Rule 15 (*Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990)) (internal
9 citation omitted). Defendants have not met their burden of proving that unfair
10 prejudice will result from the amendment. *DCD Programs*, 833 F.2d at 187.
11 Defendants fail to point out that Plaintiffs propounded **only two (2) interrogatories**
12 that request Defendants to identify other persons and entities who claim ownership
13 of the copyright to the Song and **only 17 requests for production** that seek three
14 (3) narrow categories of documents: (1) documents showing amounts paid for use
15 of the Song; (2) documents identifying persons and/or entities that paid for use of
16 the Song; and (3) documents relating to any dispute regarding the ownership of the
17 Song. More importantly, Defendants have provided nothing by way of explaining
18 how readily available the information is, what form it is in, how difficult it will be
19 to retrieve or assemble, or how many hours will be required to retrieve and
20 assemble it. The record of the actual burden to Defendants to provide this
21 reasonable, undeniably relevant discovery is completely blank.

22 The burden to provide this discovery will be modest in light of the
23 magnitude and importance of this case, to say nothing of the staggering amount of
24 money – millions of dollars each year – that Defendants have taken from Plaintiffs
25 and the rest of the Class over a period of many decades under their bogus claim of
26 copyright ownership. Given the vast sums Defendants have taken (without any
27 right) from Plaintiffs and the Class over the decades, Defendants should not be
28

1 heard to complain that the sheer size of their victim pool excuses them from having
2 to comply with these discovery requests.

3 There is no unfair prejudice to Defendants from the amendment. Plaintiffs
4 have not alleged any new causes of actions, nor have they raised any new theories
5 of recovery. Instead, Plaintiffs are merely expanding the applicable Class Period so
6 that all absent Class members can recover the money Defendants improperly took
7 from them. The proposed amendment does not change any substantive issue left to
8 be litigated; the expansion of the Class Period relates only to the amount of
9 damages Defendants must pay to the absent Class members.

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

11 Defendants' bald assertion that Plaintiffs have sought this amendment in bad
12 faith rings hollow. Plaintiffs owe a fiduciary duty to the absent Class members.
13 Plaintiffs are not acting in bad faith, but rather are acting in the utmost good faith
14 to protect the absent Class members because the evidence that Plaintiffs have
15 uncovered during this litigation demonstrates that the statute of limitations should
16 be tolled under the delayed discovery rule and fraudulent concealment.

17 **III. CONCLUSION**

18 For all these additional reasons, Plaintiffs respectfully request the Court
19 grant their Motion for leave to file the Fifth Amended Complaint.

20 Dated: November 12, 2015

**WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP**

21

By: /s/ Betsy C. Manifold

22

BETSY C. MANIFOLD

23

FRANCIS M. GREGOREK

24

gregorek@whafh.com

BETSY C. MANIFOLD

25

manifold@whafh.com

RACHELE R. RICKERT

26

rickert@whafh.com

MARISA C. LIVESAY

27

livesay@whafh.com

28

750 B Street, Suite 2770
San Diego, CA 92101

1 Telephone: 619/239-4599
2 Facsimile: 619/234-4599

3 **WOLF HALDENSTEIN ADLER**
4 **FREEMAN & HERZ LLP**

5 MARK C. RIFKIN (pro hac vice)
6 rifkin@whafh.com
7 JANINE POLLACK (pro hac vice)
8 pollack@whafh.com

9 270 Madison Avenue
10 New York, NY 10016
11 Telephone: 212/545-4600
12 Facsimile: 212-545-4753

13 *Interim Lead Counsel for Plaintiffs*

14 **RANDALL S. NEWMAN PC**
15 **RANDALL S. NEWMAN (190547)**

16 rsn@randallnewman.net
17 37 Wall Street, Penthouse D
18 New York, NY 10005
19 Telephone: 212/797-3737

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

22 ALISON C. GIBBS (257526)
23 gibbs@huntortmann.com
24 OMEL A. NIEVES (134444)
25 nieves@nieves-law.com

26 KATHLYNN E. SMITH (234541)
27 smith@huntortmann.com
28 301 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

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

**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