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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)

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: June 27, 2016
Time: 9:30 a.m.
Room: 650
Judge: Hon. George H. King, Chief Judge

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

PLEASE TAKE NOTICE that on June 27, 2016, at 9:30 a.m., or as soon thereafter as this matter may be heard before the Honorable George H. King in Courtroom 650 at the Edward R. Roybal Federal Building, 225 E. Temple Street, Los Angeles, California 90012, plaintiffs Good Morning To You Productions Corp., Robert Siegel, Rupa Marya d/b/a Rupa & The April Fishes, and Majar Productions, LLC, will respectfully move the Court to grant final approval of the proposed settlement (the "Settlement") of this class action. Specifically, Plaintiffs respectfully request that the Court: (a) enter the [Proposed] Final Order and Judgment submitted herewith; (b) confirm certification of the Settlement Class (conditionally certified in the Court's Preliminary Approval Order; and (c) grant final approval to the Settlement of the terms and conditions set forth in the Revised Class Action Settlement Agreement entered into by the Parties on March 2, 2016, which was preliminarily approved in the Preliminary Approval Order.

This Motion is made pursuant to the Court's Preliminary Approval Order, entered on March 7, 2016. Dkt. 316. Defendants Warner/Chappell Music, Inc. and Summy-Birchard, Inc. and Intervenors the Association for Childhood Education International and the Hill Foundation, Inc. do not oppose this Motion. This Motion is based upon this Notice of Motion and Motion for Final Approval of Proposed Class Action Settlement, Plaintiffs' Memorandum of Points and Authorities in Support Thereof, the Declaration of Mark C. Rifkin, the Revised Class Action Settlement Agreement, the Fifth Amended Complaint, the accompanying declarations of Plaintiffs and Plaintiffs' Counsel, any reply in further support, oral

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argument of counsel, the complete Court files and record in the above-captioned matter, and such additional matters as the Court may consider.

Respectfully submitted,

Dated: April 27, 2016

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP

By: */s/ Betsy C. Manifold*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Plaintiffs Good Morning to You Productions Corp. ("GMTY"), Robert Siegel ("Siegel"), Rupa Marya d/b/a Rupa & The April Fishes ("Marya"), and Majar Productions, LLC ("Majar") (collectively, "Plaintiffs") hereby submit this Memorandum of Points and Authorities in support of their motion for final approval of the proposed settlement (the "Settlement") of this action (the "Action"), and entry of the [Proposed] Final Order and Judgment ("Judgment") submitted herewith. When entered by the Court, the Judgment will: (i) confirm certification of the Settlement Class (conditionally certified in the Court's Preliminary Approval Order entered on March 7, 2016) for purposes of implementing the Settlement; and (ii) grant final approval to the Settlement on the terms and conditions set forth in the Revised Class Action Settlement Agreement entered into by the Parties on March 2, 2016 (the "Revised Settlement Agreement"), which was preliminarily approved in the Preliminary Approval Order. Dkt. 316.

I. INTRODUCTION

After nearly three years of intensive litigation, the Parties reached an agreement to settle this class action against Defendants Warner/Chappell Music, Inc. ("Warner") and Summy-Birchard Inc. ("Defendants") over the disputed copyright to *Happy Birthday to You* ("*Happy Birthday*" or the "Song"), the world's most popular song. The Settlement also resolves the disputed copyright claim recently asserted by the Association for Childhood Education International and The Hill Foundation, Inc. ("Intervenors").

The Parties and their counsel executed the Class Action Settlement Agreement on February 8, 2016.[1] Declaration of Mark C. Rifkin in Support of Motion for Final Approval of Proposed Class Action Settlement ("Rifkin Decl."),

[1] The "Parties" are Plaintiffs, Defendants, and the Intervenors, each of whom is identified *supra*. Unless otherwise defined herein, this Memorandum of Points and Authorities incorporates by reference the defined terms set forth in the Revised Settlement Agreement, and all such terms shall have the same meaning herein.

¶¶ 5, 65. Plaintiffs presented the proposed Settlement to the Court for preliminary approval on February 29, 2016. At the preliminary approval hearing, the Court directed the Parties to make certain changes to the original Settlement Agreement and necessary conforming changes to the Notice, Publication Notice, [Proposed] Preliminary Approval Order, and [Proposed] Final Order and Judgment. Rifkin Decl., ¶ 70.

The Parties made the changes as directed by the Court and promptly submitted the Revised Settlement Agreement to the Court. Rifkin Decl., ¶ 70. On March 7, 2016, the Court entered the Preliminary Approval Order. Thereafter, the Settlement Administrator, Rust Consulting, Inc. (approved by the Court in the Preliminary Approval Order), mailed the Notice to more than 4,600 Class members and published the Publication Notice in *The Hollywood Reporter*, in the U.S. edition of *Variety*, in *Billboard*, and on the Settlement Website in accordance with the Preliminary Approval Order. *See* Declaration of Norman Swett of Rust Consulting, Inc. ("Swett Decl."), ¶¶ 6, 8, 9, 12.

The Settlement accomplishes all three of Plaintiffs' objectives in this Action. *First*, the Settlement includes an agreement by Defendants and the Intervenors to forego collecting any more fees for use of the Song. *Second*, the Settlement provides a mechanism for the Court to declare the Song to be in the public domain, ending more than eighty years of uncertainty regarding the disputed copyright. And *third*, the Settlement provides a substantial recovery of $14 million for the Settlement Class: thousands of people and entities who paid millions of dollars to Defendants and their predecessors-in-interest to use the Song since 1949.

As previously explained to the Court, the Settlement is the product of lengthy and arduous litigation, followed by extensive arm's-length negotiations between experienced and knowledgeable counsel, facilitated by David A. Rotman, Esquire, a highly accomplished and well-respected mediator. Rifkin Decl., ¶ 62. By the time the Settlement was reached, Plaintiffs and Plaintiffs' Counsel had: (i)

conducted an exhaustive investigation of the Song's history, including a detailed review of records of the Copyright Office and the Library of Congress, original historical source materials, old court filings in multiple jurisdictions, various news reports, other publicly available information, and formal discovery from Defendants and non-parties; (ii) filed three original complaints and four successive amended complaints, with several rounds of motion practice and extensive briefing on those pleadings; (iii) defeated Defendants' motion to dismiss the Second Consolidated Complaint; (iv) obtained partial summary judgment against Defendants declaring that they do not own (and their predecessors never owned) a copyright to the Song's lyrics; (v) conducted exhaustive research of the applicable law for the claims in this Action and the potential defenses thereto; (vi) consulted with multiple experts; (vii) reviewed damages documents and information provided informally by Defendants and obtained from non-parties through discovery; (viii) fully prepared for the trial of the remaining issues on Claim One; and (ix) participated in the lengthy, hard-fought mediation and settlement negotiation process. *Id*., ¶¶ 14, 61, 62.

Based on their well-informed evaluation of the facts and governing legal principles, the advanced stage of the litigation, and their recognition of the substantial risk and expense of continued litigation, Plaintiffs' and Plaintiffs' Counsel believed and continue to believe that the Settlement is fair, reasonable and adequate under Federal Rule of Civil Procedure 23. Rifkin Decl., ¶ 62. To date, no Class member has objected to the Settlement, and those Class members who have contacted Plaintiffs' Counsel have expressed overwhelming praise for the Settlement. The Settlement also has received extremely favorable review by the worldwide media.

Accordingly, Plaintiffs respectfully request final approval of the Settlement and submit this memorandum of points and authorities in support thereof.

II. BACKGROUND AND SUMMARY OF THE LITIGATION

Plaintiffs GMTY, Siegel, Marya, and Majar, each paid Defendants for a license to perform or use the Song. Declaration of Jennifer Nelson in Support of Final Approval of Class Action Settlement and Request for Incentive Compensation Award, ¶ 6; Declaration of Robert Siegel in Support of Final Approval of Class Action Settlement and Request for Incentive Compensation Award, ¶ 3; Declaration of Rupa Marya in Support of Final Approval of Class Action Settlement and Request for Incentive Compensation Award, ¶ 3; Declaration of James Chressanthis in Support of Final Approval of Class Action Settlement and Request for Incentive Compensation Award, ¶ 3.

The classic *Happy Birthday* melody is the same melody as another song called *Good Morning to All* ("*Good Morning*"). Mem. and Opinion on Cross-Motions for Summary Judgment (Dkt. 244), at 2. Mildred Hill and her sister Patty Hill1 wrote *Good Morning* sometime prior to 1893; "Mildred composed the music with Patty's help, and Patty wrote the lyrics." *Id*.

On June 13, 2013, Plaintiff GMTY filed the first class action complaint against Defendants in the United States District Court for the Southern District of New York, alleging that Defendants did not own a copyright to the Song. Rifkin Decl., ¶ 16. Plaintiffs Siegel, Marya, and Majar filed similar class action complaints in this Court on June 19, 2013, June 20, 2013, and July 17, 2013, respectively. *Id*., ¶ 16, 17. The actions in this Court were consolidated, and on September 4, 2013, all four Plaintiffs filed a Second Amended Consolidated Complaint on behalf of a proposed class of all persons or entities (other than Defendants' directors, officers, employees, and affiliates) who entered into an agreement with Defendants or paid them for the use of the Song at any time since June 18, 2009. Rifkin Decl., ¶ 20. The Second Amended Consolidated Complaint asserted claims for: (1) declaratory judgment, 28 U.S.C. § 2201; (2) declaratory and injunctive relief and damages, 28 U.S.C. § 2202; (3) violation of California's

unfair competition law, Bus. & Prof. Code §§ 17200 *et seq.*; (4) breach of contract; (5) money had and received; (6) rescission; and (7) violation of California's false advertising law, Bus. & Prof. Code §§ 17500 *et seq*. Dkt. 59. Plaintiffs allege that Defendants do not own, and that Defendants and their predecessors did not own, a copyright to the Song. Throughout the litigation, Plaintiffs have sought to obtain a judicial determination that Defendants' copyrights covered only specific piano arrangements for the Song, not the words and music themselves, and to recover damages for themselves and all others who paid licensing fees to Defendants for the Song under Defendants' allegedly false claim of copyright ownership. Plaintiffs and Defendants vigorously disagree as to whether Defendants own a copyright to the Song.

Defendants moved to dismiss the Second Amended Consolidated Complaint or strike Plaintiffs' proposed class definition. Dkt. 52. On October 16, 2013, the Court granted in part and denied in part Defendants' motions to dismiss, bifurcating Plaintiffs' first claim (for a declaratory judgment) from their remaining claims for purposes of discovery through summary judgment and granting Plaintiffs leave to file an amended complaint. Dkt. 71. Plaintiffs filed a Third Amended Consolidated Complaint on November 6, 2013, asserting the same seven claims as set forth above, which Defendants answered as to Claim One only on December 11, 2013. Dkt. 75. On April 21, 2014, Plaintiffs filed a Fourth Amended Consolidated Complaint, asserting the same seven claims as set forth above, which Defendants answered as to Claim One only on May 6, 2014. Dkt. 95, 99. Thereafter, Plaintiffs and Defendants engaged in extensive written, document, and deposition discovery between February and July 2014. Rifkin Decl., ¶ 26.[2]

[2] Among other things, Plaintiffs deposed Warner's designated corporate representative and its Vice President of Administration. Plaintiffs and Defendants each answered numerous interrogatories and requests for admissions. Plaintiffs and Defendants each produced thousands of pages of documents. Plaintiffs produced
(footnote continued on following page)

On November 25, 2014, Plaintiffs and Defendants filed cross-motions for summary judgment. Dkt. 179. The cross-motions were filed with an extensive factual record, comprised of more than 125 exhibits and more than 300 statements of uncontroverted fact. Dkts. 183, 187. The Court heard argument on the cross-motions on March 23, 2015. *See* Dkt. 207. On May 18, 2015, the Court directed Plaintiffs and Defendants to submit a supplemental joint brief addressing whether Patty Hill had abandoned the copyright to the *Happy Birthday* lyrics, which they filed on June 15, 2015. (Dkts. 215, 219). The Court heard argument on the question of abandonment on July 29, 2015. *See* Dkt. 229.

On September 22, 2015, the Court issued its historic Memorandum and Opinion on Cross-Motions for Summary Judgment granting in part and denying in part Plaintiffs' motion for summary judgment and denying Defendants' cross-motion for summary judgment in its entirety. Dkt. 244. The Court found there was no dispute that Defendants and their predecessors never owned a copyright to the Song's lyrics. *Id*. at 43. However, the Court found disputed questions of fact as to whether Patty Hill wrote the Song's lyrics (*id*. at 19); whether there was a divestive publication of the Song's lyrics (*id.* at 22); and whether Patty Hill abandoned any copyright to the Song's lyrics (*id.* at 25). Thus, the Court's decision left open the potential question of whether anyone else might own a copyright to the Song's lyrics.[3] The Court set a bench trial for December 15 and 16, 2015, on the disputed questions of fact identified above. *See* Dkt. 248.

On October 29, 2015, Plaintiffs moved for leave to file a Fifth Amended

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an expert report, and Defendants deposed Plaintiffs' expert. Plaintiffs also subpoenaed documents from a number of third parties. The efforts of Plaintiffs' Counsel in this litigation are more fully described in the accompanying Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Award of Attorneys' Fees and Expenses and Incentive Compensation Awards, and in the supporting declarations of Plaintiffs' Counsel.

[3] On October 15, 2015, Defendants moved for reconsideration of the Court's summary judgment order or for certification of that order for interlocutory appeal under 8 U.S.C. § 1292(b).

Consolidated Complaint to extend the class period to September 3, 1949, the latest date on which the 1893 copyright to *Good Morning to All*, the musical composition from which *Happy Birthday* was derived, expired. Dkt. 258. Plaintiffs proposed to add allegations that the statute of limitations on their claims was equitably tolled under the delayed discovery rule and because Defendants concealed material facts regarding the scope of the copyright they owned. On December 7, 2015, the Court granted Plaintiffs' motion for leave to amend, holding that the question of whether Plaintiffs adequately alleged equitable tolling or fraudulent concealment was better resolved by motion to dismiss. Dkt. 289. On December 9, 2015, Plaintiffs filed a Fifth Amended Consolidated Complaint, asserting the same seven claims set forth above on behalf of a class of persons or entities (other than Defendants' directors, officers, employees, and affiliates) who entered into a license with Defendants or their predecessors-in-interest or paid Defendants or their predecessors-in-interest for use of the Song at any time since September 3, 1949. Dkt. 291.

On November 9, 2015, the Intervenors moved to intervene, which Plaintiffs and Defendants did not oppose. Dkt. 266. The Intervenors claimed to own a common law copyright to the Song through a series of testamentary transfers from Mildred Hill and Patty Hill, who wrote *Good Morning to All*. The Court granted the Intervenors' unopposed motion on December 7, 2015, but did not decide whether they owned any copyright to the Song. Dkt. 288.

By that date, the Parties had nearly completed preparation of their trial briefs and the Joint Exhibit List in advance of the bench trial scheduled for December 15 and 16, 2015. Rifkin Decl., ¶ 50. Those trial preparations were substantially completed on December 8, 2015, on which date the Parties contacted the Court and advised the Court that a settlement in principle had been reached between the Parties. On the same date, the Court issued a Minute Order which relieved the Parties of their obligation to file the trial brief and Joint Exhibit List and vacated the bench trial because the Parties advised the Court that the Action had been

settled. Dkt. 290.

III. MEDIATION EFFORTS

During a status conference on October 19, 2015, the Court directed counsel for Plaintiffs and Defendants to pursue mediation. Counsel met in person on October 29, 2015, to discuss mediation, and thereafter agreed to retain Mr. Rotman to assist them as a settlement mediator. *See* Dkt. 248. On December 1, 2015, counsel for the Parties held an all-day, in-person mediation with Mr. Rotman. Rifkin Decl., ¶ 57. Representatives of Defendants and their insurer and the Intervenors also attended the mediation. *Id*. The mediation lasted late into the evening. *Id*. Substantial progress was made during the mediation session, but no settlement was reached at that time. *Id*., ¶ 58.

After the in-person mediation session, Mr. Rotman engaged in a series of telephone discussions with counsel for the various Parties, and counsel for the Parties also communicated directly with each other by telephone over the ensuing few days. Rifkin Decl., ¶ 58. As a result of those additional communications, on December 6, 2015, after a series of telephone and email communications with counsel for the parties following the in-person mediation on December 1, 2015, Mr. Rotman made a confidential mediator's proposal to counsel for the Parties of the material terms on which to settle the Action. *Id*., ¶ 59.

Plaintiffs and their counsel determined that the settlement terms proposed by Mr. Rotman were fair and reasonable because they achieved all three of Plaintiffs' objectives in the Action: (i) an end to Defendants' and the Intervenors' claims to own the Song; (ii) a judicial determination that the Song is in the public domain; and (iii) substantial compensation to Plaintiffs and the other Settlement Class Members who had paid Defendants to use the Song in the past. More importantly, Plaintiffs and their counsel believed that the mediator's proposed settlement terms were the best possible terms on which a settlement would or could be reached. Rifkin Decl., ¶ 60.

On December 8, 2015, after the Court granted Plaintiffs' motion for leave to amend and granted the Intervenors' motion for leave to intervene, and after the Parties had substantially completed their preparation for the bench trial on the remaining factual issues on Claim One, counsel for all the Parties advised Mr. Rotman that their clients had accepted the terms of the mediator's proposal. Rifkin Decl., ¶¶ 59, 63. Counsel for the Parties promptly notified the Court of the settlement in principle and began the process of preparing and executing the Settlement Agreement. *See* Dkt. 290. During the process of negotiating the Settlement Agreement, substantial disputes arose among the Parties which required Mr. Rotman's ongoing, active participation to resolve. Rifkin Decl., ¶ 64. All Parties executed the Settlement Agreement on February 8, 2016, and Plaintiffs immediately filed their unopposed motion for preliminary approval of the Settlement.

IV. REASONS FOR THE PROPOSED SETTLEMENT

Plaintiffs agreed to this Settlement with a solid understanding of the strengths and weaknesses of their claims. This understanding is based upon Plaintiffs' Counsels' meticulous preparation of the case, including their exhaustive investigation of the Song's history, including a detailed review of records of the Copyright Office and the Library of Congress, original historical source materials, old court filings in multiple jurisdictions, various news reports and other publicly available information, and formal and informal discovery from Defendants and non-parties. Plaintiffs' understanding also is informed by the Court's decision granting partial summary judgment in their favor against Defendants, declaring that Defendants do not own (and their predecessors never owned) a copyright to the Song's lyrics as well as the Court's finding of factual disputes which left open whether anyone else (such as the Intervenors) might own a copyright to the Song's lyrics. Plaintiffs also considered the substantial risk the Court might not toll the statute of limitations. Plaintiffs were aware of their counsel's preparations for trial

and were advised by their counsel of the risk of continued litigation, including the risk posed by the Intervenors' recent claim, and the risk, expense, and unavoidable delay of an appeal or appeals.

Based on a careful review of all these factors, as well as the substantial expense and length of time necessary to prosecute this Action through the completion of merits and expert discovery, trial, and appeals, and the considerable uncertainties in predicting the outcome of any complex litigation, Plaintiffs have concluded that substantial risk exists that the Song might not be declared to be in the public domain and the Settlement Class might recover far less than the Settlement provides or nothing at all if the Action were to continue. Mr. Rotman also recommended and endorsed the Settlement and, indeed, the Settlement is the result of and embodies his mediator's proposal, made only after extensive arm's-length negotiations.

Accordingly, Plaintiffs respectfully request that the Court grant final approval of the Settlement.

V. FINAL APPROVAL SHOULD BE GRANTED

A. Standards for Final Settlement Approval

Rule 23 requires judicial approval of any class action settlement. *See* Fed. R. Civ. P. 23(e) ("claims . . . of a certified class may be settled . . . only with the court's approval"). "In deciding whether to approve a proposed settlement, the Ninth Circuit has a 'strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.'" *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at *9 (C.D. Cal. June 10, 2005) (citations omitted); *see also Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). As the Ninth Circuit has held more than once, "[t]here is an overriding public interest in settling and quieting litigation." *MWS Wire Indus., Inc. v. Cal. Fine Wire Co.*, 797 F.2d 799, 802 (9th Cir. 1986)). *See also Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (general

policy is "particularly true in class action suits"); *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 U.S. Dist. LEXIS 86266, at *39 (N.D. Cal. Nov. 16, 2007) ("public and judicial policies strongly favor settlement of class action law suits").

The district court must exercise "sound discretion" in approving a settlement. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981); *see also Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). Therefore, in exercising its discretion, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625. Recognizing that "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in [the] litigation," courts favor approval of settlements. *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

The Ninth Circuit has identified several factors that may be considered in evaluating the fairness of a class action settlement. These factors are:

> the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Stanton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003) (internal citation and quotations omitted). *See also Officers for Justice*, 688 F.2d at 625 (citations omitted); *Torrisi*, 8 F.3d at 1375 (9th Cir. 1993).

"The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claims advanced, the types of

relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice*, 688 F.2d at 625. "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness, and the settlement must stand or fall in its entirety." *Staton*, 327 F.3d at 960 (quotations, citation and brackets omitted).

Review of a proposed settlement typically proceeds in two stages, with preliminary approval followed by a final fairness hearing. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 21.632-21.634 (2004). At this final approval stage, the Court is required to make a final determination as to whether the proposed Settlement is fair, reasonable and adequate. The Ninth Circuit has cautioned, however, that:

> [T]he settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what ***might*** have been achieved by the negotiators.

Officers for Justice, 688 F.2d at 625 (emphasis added).

All these factors easily and convincingly support final approval here.

B. The Excellent Results Achieved Strongly Support Final Approval

It is no exaggeration to say that this Action – believed to be the first of its kind – has achieved historic results. Until now, no court has ever ruled whether *Happy Birthday* was protected by a copyright. The Action was commenced to end what is surely the most infamous copyright dispute of all time, and it does so unquestionably in favor of Plaintiffs and the Settlement Class. Under the Settlement, Defendants and the Intervenors have agreed to abandon their copyright claims forever. The Court will declare *Happy Birthday* to be in the public domain. Furthermore, Defendants have agreed to return up to $14 million to thousands of

people and entities who paid millions of dollars to Defendants and their predecessors-in-interest to use the Song since 1949.

Thus, the Settlement unquestionably achieves all three goals of this Action: ending the disputed copyright claim; a judicial determination that the Song is in the public domain; and a substantial cash payment to Settlement Class Members.

Arguably, the most important parts of the Settlement are the termination of Defendants' demand for payment for use of the Song and a judicial determination that the Song is in the public domain. These parts of the Settlement should not be overlooked or undervalued. Under the current copyright law, Defendants' copyright – assuming it covered the Song's words and music – would have lasted until 2030 at the earliest. Defendants' and Intervenors' agreement to forego collecting any fees for use of the Song for the remaining 15 years it would be covered by the existing copyright (again, assuming it covered the Song) is significant. An expert in intellectual property valuation retained by Plaintiffs estimates that the present value of the revenue likely to be generated from that copyright, assuming it covered the Song's words and music, is approximately $15 million. *See* Declaration of Daniel Roche in Support of Settlement Approval, ¶ 15. Dkt. 301-2. A judicial determination that *Happy Birthday* is in the public domain has at least that much value. Because the public will be able to use the Song in the future without fear of copyright infringement or having to pay Defendants to use the Song – ending the chilling effect of the copyright dispute – the actual value of this part of the Settlement is likely much higher.

Significantly, this Settlement – in which public notice has been given before the Court will enter its Final Order and Judgment – may be the only way for the Court to be certain that anyone claiming to own the *Happy Birthday* copyright may be heard before the Song is declared to belong to the public.[4] Thus, anyone

[4] Sections 502 to 505 of the Copyright Act, 17 U.S.C. §§ 502 to 505, provide various means for a copyright owner to enforce his, her, or its copyright through
(footnote continued on following page)

claiming to own a copyright to the Song will have the opportunity to come forward and be heard. In a private action, the Court cannot be certain that a non-party does not claim ownership of a disputed copyright. As a practical matter, this factor alone overwhelmingly supports approval of the Settlement.

The Settlement also includes a payment by Defendants of up to $14 million to be distributed (after the payment of attorneys' fees, expenses, and incentive awards approved by the Court) to Settlement Class members who timely submit valid claims. Defendants informally provided information to Plaintiffs, which Plaintiffs confirmed through their own investigation and analysis, that Period One Class Members paid approximately $11 million and Period Two Class Members paid approximately $35-$40 million for use of the Song. Rifkin Decl., ¶ 55.

The Net Settlement Fund is "reversionary," meaning that any amount not necessary to pay all Authorized Claims in full will be returned to Defendants. However, nothing will be retained by Defendants unless all Authorized Claims are, in fact, paid in full.[5] One month remains for Settlement Class Members to submit their claims against the Net Settlement Fund. To date, only a small number of claims have been submitted. However, based upon their communications with Settlement Class Members, including, in particular, ASCAP, Plaintiffs' Counsel anticipate that claims will be made in total equal to most, if not all, of the Net Settlement Fund. More importantly, to date, no Settlement Class Member has expressed any objection to or concern for the Settlement or any part thereof.

By any objective standard, Plaintiffs have achieved an outstanding victory in this Action. The Settlement preserves the Court's summary judgment ruling, it

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civil litigation. There is no similar provision in the Copyright Act providing a civil remedy against one who misuses or abuses a copyright, such as by wrongfully claiming broader protection than that provided under the copyright.

[5] Defendants agreed to pay the full Settlement Fund amount of $14 million only upon the express condition that any portion of the Net Settlement Fund remaining after the payment of all Authorized Claims would be returned to them.

avoids expensive, time-consuming litigation, it saves the Parties' and the Court's time and resources, and it does so on terms that are eminently fair and reasonable to the Settlement Class. For these reasons, Plaintiffs and their Counsel enthusiastically endorse the Settlement, and the Court should finally approve it.

C. The Risk, Expense, Complexity, and Likely Duration of Continued Litigation Strongly Supports Final Approval

In assessing the fairness, reasonableness and adequacy of the Settlement, the Court should balance the benefits of the Settlement against the risk, expense, burden, and duration of continued litigation. *In re NVIDIA Corp. Derivative Litig.*, No. C-06-06110-SBA (JCS), 2009 U.S. Dist. LEXIS 24973, at *9 (N.D. Cal. Mar. 18, 2009); *Officers for Justice*, 688 F.2d at 625. Avoiding the "expense, complexity, and likely duration of further litigation" is an important settlement consideration. *Officers for Justice*, 688 F.2d at 625; *see also Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). This Action is obviously and undoubtedly complex. If not for this Settlement, the Action would have continued to be fiercely contested by the Parties, no doubt for many more years of extremely hard-fought litigation. Continued litigation here would be extremely complex, costly, and of substantial duration, not just in this Court but certainly in the appellate courts as well.

No case is certain – even one in which the trial court has granted partial summary judgment. While Plaintiffs firmly believe their case has merit, numerous obstacles exist that could prevent them from prevailing at trial and on appeal. For example, there is no certainty the Court would require Defendants to return all the money they collected for the Song to Plaintiffs or the Settlement Class members. It is particularly far from certain that the Court would permit any recovery for Settlement Class members whose claims might be time-barred under the applicable statutes of limitations. In addition, there is now at least some small risk the Court might conclude that the Intervenors own a copyright to the *Happy Birthday* lyrics.

Whichever Party prevailed before this Court, an appeal (or multiple appeals) would be certain. Although Plaintiffs are confident that they could and would

succeed in the Ninth Circuit, there is no certainty that the Court's summary judgment decision would be affirmed on appeal. Likewise, there is no certainty that a verdict in favor of Plaintiffs and the Settlement Class would be affirmed on appeal. And even if they were successful at trial and again on appeal, Plaintiffs might face re-litigating the same issues raised by Defendants or the Intervenors in this Court.

Importantly, the Settlement preserves for all time the Court's historic summary judgment ruling that Defendants do not own, and their predecessors never owned, any rights to the Song's lyrics (the melody having long ago become a public work). Proving that fact was Plaintiffs' major objective and the focus of a great portion of the work done by Plaintiffs' Counsel. The Court's decision received substantial media praise. For example, the *Los Angeles and San Francisco Daily Journal* hailed it as the top Verdict of the Year in 2015. Rifkin Decl., ¶ 46 and Ex. K. *Billboard* magazine named it as the top Landmark Decision that Shook Music in 2015. *Id*., ¶ 45 and Ex. J.

When the Settlement was reached, there was also some risk that the Court might not have granted class certification, or might have certified a much shorter class than the Settlement Class. Defendants and the Intervenors would likely oppose certification on the ground that individual issues, such as whether any of the class members had actual or constructive knowledge that the Song was in the public domain and whether they knowingly paid Defendants to license the Song, would predominate over common questions (including whether Defendants or the Intervenors owned a copyright to the Song's familiar lyrics). In addition, Defendants and the Intervenors certainly would have argued that the class period could begin no earlier than June 13, 2009, under the four-year statute of limitations applicable to Plaintiffs' California state law claims, and perhaps no earlier than June 13, 2010, under the Copyright Act's three-year statute of limitations

applicable to Plaintiffs' Declaratory Judgment Act claims.[6] If the Court accepted that argument, the class period would be substantially shorter than provided for in the Settlement.

Whatever else might be said of the risk, continued litigation would certainly impose great expense and burden on the Parties and the Court, to say nothing of the additional time it would require. The Settlement not only eliminates all that risk and uncertainty, it also avoids the considerable expense, burden, and delay of continued litigation as well. For these reasons, the Settlement warrants final approval.

D. The Extent of Discovery Completed and the Advanced Stage of the Action Strongly Support Final Settlement Approval

The stage of the proceedings and the amount of discovery completed is another factor the Court should consider in determining the fairness, reasonableness, and adequacy of the Settlement. *Officers for Justice*, 688 F.2d at 625; *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 617 (N.D. Cal. 1979). Since the Settlement was achieved only after extensive litigation – indeed, after the Court granted partial summary judgment for the Plaintiffs – this factor strongly supports final Settlement approval.

As the Court knows, the litigation had reached a very advanced stage before the Settlement was reached – indeed, before any settlement discussions even had taken place. Plaintiffs' counsel conducted an exhaustive factual investigation of the origin of the Song before commencing the Action, reviewing historical artifacts

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[6] The Declaratory Judgment Act, 28 U.S.C. § 2201, does not have its own statute of limitations. Instead, it borrows the most closely analogous statute of limitations; here, the three-year statute of limitations under the Copyright Act, 17 U.S.C. § 507. *Welles v. Turner Entm't. Co.*, 503 F.3d 728, 734 (9th Cir. 2007) (applying three-year statute of limitations to declaratory claim for copyright ownership; *Stewart v. Wachowski*, 574 F. Supp. 2d 1074, 1111 n.147 (C.D. Cal 2005) ("The three year statute of limitations governing copyright infringement actions also governs claims for declaratory relief regarding copyright ownership or infringement.")

including original court records, books, manuscripts, papers, and periodicals. Rifkin Decl., ¶ 14. Plaintiffs' Counsel also met with Robert Brauneis, Esquire, Professor of Copyright Law at George Washington Law School, who had written a law review article challenging Defendants' copyright claim, and they conducted considerable independent legal research on the copyright issues. After the Action was commenced, Plaintiffs' Counsel continued to conduct exhaustive historical research, often aided by volunteers from around the world who had learned of the litigation from extensive media coverage. *Id*., ¶¶ 14, 27. Plaintiffs' Counsel retained Joel Sachs, Ph.D, Professor of Music History at the Juilliard School in New York, to review certain historical evidence (such as the copyrights and sheet music) and to review some of Defendants' various defenses to Plaintiffs' claims. *Id*., ¶ 31. After the Court denied Defendants' motion to dismiss in part and bifurcated the Action, Plaintiffs' Counsel also conducted formal written and documentary discovery from Defendants and third-parties, including the American Society of Composers, Authors and Publishers ("ASCAP") and The Hill Foundation, and several major motion picture studios. *Id*., ¶ 26. Plaintiffs' Counsel also deposed three witnesses from Defendants and a witness from ASCAP. *Id*.

At the conclusion of their investigation and formal discovery, Plaintiffs' Counsel had a thorough – indeed, encyclopedic – knowledge of the Song's origin and history. Rifkin Decl., ¶ 37. Recognizing the significance of the Action, as well as the difficulty of challenging an 80-year-old copyright, Plaintiffs' Counsel learned virtually all there was to know about *Happy Birthday* and the disputed copyrights. Armed with that knowledge, Plaintiffs' Counsel prepared Plaintiffs' motion for summary judgment and opposed Defendants' cross-motion for summary judgment. *Id*., ¶ 34. That process was exhaustive, as Defendants left no stone unturned in vigorously defending their copyrights. *Id*. However, Plaintiffs' Counsel's meticulous preparation enabled the Court to grant Plaintiffs' summary judgment motion in part, ruling that Defendants and their predecessors-in-interest

never owned a copyright to the Song's familiar lyrics (the copyright to the famous melody having expired no later than 1949).

Few class action settlements are reached at such an advanced litigation stage, and even fewer are reached by counsel as knowledgeable and well-prepared as Plaintiffs' Counsel were in this Action. This factor militates strongly in favor of final judicial approval of the Settlement.

E. The Experience and Views of Counsel Favor Approval

Experienced counsel acting at arm's-length weighed all the foregoing factors and endorse the Settlement. Deciding whether to enter into a class action settlement necessarily requires the exercise of judgment by the attorneys for the parties based upon a comparison of "'the terms of the compromise with the likely rewards of litigation.'" *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). As many courts have explained, the view of the attorneys actively conducting the litigation is "entitled to significant weight." *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 488 (E.D. Pa. 1985); *see also Weinberger*, 698 F.2d at 74; *Ellis*, 87 F.R.D. at 18; and *Boyd*, 485 F. Supp. at 622. For example, in *Lyons v. Marrud, Inc.*, No. 66 Civ. 415, 1972 1972 U.S. Dist. LEXIS, at *5 (S.D.N.Y. June 6, 1972), the court noted: "Experienced and competent counsel have assessed these problems and the probability of success on the merits. They have concluded that compromise is well-advised and necessary. The parties' decision regarding the respective merits of their positions has an important bearing on this case."

After granting Plaintiffs' motion for summary judgment in part and denying Defendants' cross-motion for summary judgment on September 22, 2015, the Court held a pre-trial status conference on October 19, 2015. At the status conference, the Court directed counsel for Plaintiffs and Defendants to meet to explore the possibility of a settlement. Rifkin Decl., ¶ 54. Counsel for Plaintiffs

and Defendants had not discussed settlement prior to the status conference. *Id*. A preliminary settlement meeting took place in New York on October 28, 2015. *Id*.

Following the meeting in New York, counsel for the Parties selected David Rotman, Esquire, a highly experienced and well-respected mediator, to help facilitate further settlement negotiations. Rifkin Decl., ¶ 54. Plaintiffs' Counsel also obtained additional information from Defendants so that Plaintiffs could more finely estimate the potential size of the Class and the value of Plaintiffs' and the Class members' claims. *Id*., ¶ 55. Counsel for the Parties met with Mr. Rotman in San Francisco on December 1, 2015, for an all-day settlement mediation. No settlement was reached that day, and negotiations (both direct and through Mr. Rotman) continued for the next five days. *Id*., ¶¶ 57, 58. Meanwhile, counsel for the Parties simultaneously completed all the necessary detailed pre-trial preparations for the trial of the remaining part of Claim One, set for December 15 and 16, 2015. *Id*., ¶¶ 50, 51.

The Parties remained unable to reach a settlement after five days of negotiation. Rifkin Decl., ¶ 58. On December 6, 2015, Mr. Rotman made a confidential mediator's proposal of the material terms on which to settle the Action. *Id*., ¶ 59. While his proposal was outstanding, on December 7, 2015, the Court granted the Intervenors' motion to intervene and also granted Plaintiffs' motion for leave to amend and file a Fifth Amended Consolidated Complaint, which was filed on December 9, 2015. *Id*. On December 8, 2015, counsel for all the Parties notified Mr. Rotman that they had accepted the material terms of a settlement contained in his confidential mediator's proposal. *Id*., ¶ 63.

Over the ensuing two months, Plaintiffs' Counsel diligently drafted and negotiated the Settlement Agreement. Rifkin Decl., ¶ 64. Those negotiations were long, arduous, and often highly contentious; nearly every material term, and many ancillary terms, was hard-fought. *Id*. The settlement nearly fell apart twice. *Id*. Both times, Mr. Rotman's intervention was required to preserve the settlement. *Id*.

As a result, the Parties sought extra time from the Court to complete negotiation of the Settlement Agreement. *Id*. Ultimately, after exhaustive negotiations, the Parties executed the Settlement Agreement on February 8, 2016.

There is no doubt that Plaintiffs' Counsel were fully informed before accepting the material settlement terms in Mr. Rotman's mediator's proposal. Nor is there any doubt that the Settlement was the result of extensive arm's-length negotiations between counsel for the Parties.

The Parties were represented throughout the litigation by experienced and well-respected counsel. Plaintiffs' Counsel are highly experienced in complex class action and intellectual property litigation. *See, e.g.*, Rifkin Decl., ¶ 3 (setting forth the considerable experience of Lead Counsel). The settlement process itself confirms not just the judgment exercised by Plaintiffs' Counsel, but their diligent settlement efforts as well. For their part, Defendants' counsel are among the best and most well-respected attorneys in the country. They zealously raised vigorous defenses to Plaintiffs' claims, and their support for the Settlement likewise confirms the reasonableness of the Settlement. Counsel for the Intervenors was equally diligent in their representation, and likewise support the Settlement.

For these reasons, the experience and views of counsel for the Parties also strongly support final judicial approval of the Settlement.

F. The Reaction of the Class Also Favors Final Approval

The final factor, the reaction of the Class, also favors final judicial approval of the Settlement. The Settlement Administrator mailed Notices by U.S. Mail or via email to more than 4,500 potential Class Members. Swett Decl., ¶¶ 6, 8, 11. Defendants provided the names and last known addresses of more than 1,500 Class members to the Settlement Administrator from their internal records. *Id*. at ¶ 4. Separately, Plaintiffs' Counsel provided postal or email addresses for more than 3,000 more potential Class members to the Settlement Administrator. Most of those potential Class members were movie studios, record companies, production

companies, performance rights societies, and other individuals and entities likely to have used the Song over the past several decades. Although the date for Class members to object has not yet passed, in the four weeks since the Notice was mailed and the Published Notice was published, not one member or potential Class member has objected to the Settlement or, indeed, voiced any opposition to it. Rifkin Decl., ¶ 74; Swett Decl., ¶ 13. Quite to the contrary, those Class members who have contacted the Settlement Administrator or Plaintiffs' Counsel have done so to request help filing claims, and those few Class members who have expressed any view of the Settlement have had praise for it. Rifkin Decl., ¶ 74; Swett Decl., ¶ 13.

In addition, pursuant to Section 1715 of the Class Action Fairness Act, 28 U.S.C. § 1711 *et seq*. ("CAFA"), the Settlement Administrator also mailed notice of the Settlement to the U.S. Attorney General and the attorney generals/representatives of all 50 states, the District of Columbia and the U.S. territories (Guam, Puerto Rico, Northern Mariana, American Samoa, Virgin Islands). None of the attorney generals/representatives have opposed the Settlement or expressed any opposition to it. Swett Decl., ¶ 14. Likewise, the Settlement has achieved favorable review in newspapers and other media around the world. Given the high profile of the Action, these facts also speak strongly in favor of final judicial approval of the Settlement.

G. The Plan of Allocation is Fair and Reasonable

Finally, the proposed plan of allocation is fair and reasonable. Payments to Settlement Class Members who timely submit valid claims will be based on how much they paid Defendants to use the Song. In addition, the amounts of those claims are fairly and reasonably based upon when the Claimants paid Defendants to use the Song: those who paid within the statute of limitations period will have their claims valued in full, while those who paid outside the statute of limitations period will have their claims discounted to account for the additional risk they face

that their claims would be untimely.

No Settlement Class Members, including Plaintiffs, will receive unduly preferential treatment. All their claims (including Plaintiffs' own claims) will be evaluated under the same criteria and will be paid under the same formulas. *See* Revised Settlement Agreement, Exs. A & B. The discount applicable to Period Two Settlement Claims is equitable because the value of the claims of these earlier Period Two Settlement Class Members is proportionately lower. Indeed, the risk they face of having their claims dismissed as untimely is the greatest risk any Settlement Class Member would face if this case were to proceed to a final adjudication on the merits. *See, e.g., In re Patriot Am. Hospitality Inc. Sec. Litig*., No. MDL C-00-1300 VRW, 2005 U.S. Dist. LEXIS 40993, at *13 (N.D. Cal. Nov. 30, 2005) (granting final approval of a securities class action settlement that provided for different recoveries depending upon when class members sold their stock); *Vinh Nguyen v. Radient Pharms. Corp*., No. CV 11-00406 DOC (MLGx), 2014 U.S. Dist. LEXIS 63312 at *12-13 (C.D. Cal. May 6, 2014) (class action settlement can make distinctions based upon relative strengths and weaknesses of class members' individual claims); *In re MicroStrategy, Inc. Sec. Litig*., 148 F. Supp. 2d 654, 668-69 (E.D. Va. 2001) (approving settlement whereby class members with stronger claims received a premium over other class members). Indeed, failing to account for the unique risk faced by the early Settlement Class Members would unfairly prejudice the later Period One Settlement Class Members, whose claims are unquestionably timely.[7]

[7] Because certain Settlement Class Members paid royalties for the Song more than four years before the first complaint was filed, those earlier claims will be discounted to reflect the unique risk they face that their claims would be barred as untimely under the relevant statute of limitations. To reflect the risk that their claims might be dismissed as untimely, the proposed plan of allocation limits the allowed claims of Period Two Settlement Class Members (those Settlement Class Members who paid for the Song prior to June 13, 2009) to 15% of the total amount they paid prior to June 13, 2009. Because that risk does not exist for Settlement Class Members who paid for the Song on or after June 13, 2009, their claims will not be discounted under the proposed plan of allocation. Plaintiffs' Counsel believe (footnote continued on following page)

All Settlement Members, including Plaintiffs, are subject to the same notice and claims procedures, are otherwise subject to the same settlement formulas, and the same eventual release of claims. The Settlement formula varies only according to the dollar amounts paid to Defendants and whether those payments were made more or less than four years before the first-filed complaint; it does not vary according to any improper variables unrelated to the relative strength of an individual Settlement Class Member's claim. *See* Rifkin Decl. at ¶ 66 and Revised Settlement Agreement, Exs. A & B.

VI. CONCLUSION

For all the foregoing reasons, the Court should grant final approval of the Settlement, ending the infamous copyright dispute over the Song, declaring *Happy Birthday* to be in the public domain, and returning up to $14 million to Settlement Class members who paid Defendants for the right to use the Song.

Respectfully submitted,

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the discount applied to the claims of Settlement Class Members for the earlier time period is reasonable in light of the additional risk they would face if the Action were adjudicated on the merits at trial. *See* Rifkin Decl. ¶ 56 & 57.

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