BETSY C. MANIFOLD (182450)
manifold@whafh.com
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
750 B Street, Suite 2770
San Diego, CA 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599

Lead Counsel for Plaintiffs and the Settlement Class

[ADDITIONAL COUNSEL APPEAR ON SIGNATURE PAGE]

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 AWARD OF ATTORNEYS' FEES AND EXPENSES AND FOR INCENTIVE COMPENSATION AWARDS; 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 an award of attorneys' fees and expenses and for incentive compensation awards in connection with final approval of the Settlement of the Action, and entry of the [Proposed] Final Order and Judgment, submitted herewith.

This Motion is made pursuant to the Court's Preliminary Approval Order, entered on March 7, 2016. Dkt. 316. As part of the Settlement, Defendants have reserved the right to challenge the request for attorneys' fees and expenses. Plaintiffs' are unaware if Defendants Warner/Chappell Music, Inc. and Summy-Birchard, Inc. will oppose this Motion.

This Motion is based upon this Notice of Motion and Motion for Award of Attorneys' Fees and Expenses and for Incentive Compensation Awards, Plaintiffs' Memorandum of Points and Authorities in Support Thereof, the Declaration of Mark C. Rifkin, the Class Action Settlement Agreement ("Agreement"), the Fifth Amended Complaint, any reply in further support, oral 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*
BETSY C. MANIFOLD

FRANCIS M. GREGOREK
gregorek@whafh.com
BETSY C. MANIFOLD
manifold@whafh.com
RACHELE R. RICKERT
rickert@whafh.com
MARISA C. LIVESAY
livesay@whafh.com
750 B Street, Suite 2770
San Diego, CA 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
MARK C. RIFKIN (*pro hac vice*)
rifkin@whafh.com
RANDALL S. NEWMAN (190547)
newman@whafh.com
JANINE POLLACK (*pro hac vice*)
pollack@whafh.com
270 Madison Avenue
New York, NY 10016
Telephone: 212/545-4600
Facsimile: 212-545-4753

Lead Counsel for Plaintiffs and the Settlement Class

HUNT ORTMANN PALFFY NIEVES DARLING & MAH, INC.
ALISON C. GIBBS (257526)
gibbs@huntortmann.com
OMEL A. NIEVES (134444)
nieves@huntortmann.com
KATHLYNN E. SMITH (234541)
smith@ huntortmann.com
301 North Lake Avenue, 7th Floor
Pasadena, CA 91101
Telephone 626/440-5200

Facsimile 626/796-0107
Facsimile: 212/797-3172

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

GLANCY PRONGAY & MURRAY LLP
LIONEL Z. GLANCY (134180)
lglancy@glancylaw.com
MARC L. GODINO (188669)
mgodino@glancylaw.com
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: 310/201-9150
Facsimile: 310/201-9160
Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

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, the "Plaintiffs") hereby submit this Memorandum of Points and Authorities in support of their motion for an award of attorneys' fees and expenses and for incentive compensation awards in connection with final approval of the Settlement of the Action, and entry of the [Proposed] Final Order and Judgment submitted herewith.[1]

I. INTRODUCTION

This unprecedented Action and the extraordinary results achieved – an end to one of the most infamous copyright disputes of all time, a judicial determination that *Happy Birthday to You* ("*Happy Birthday*" or the "Song") is in the public domain, and a fund of up to $14 million to reimburse those who paid Defendants for the Song – would not have been possible had these four Plaintiffs not taken the initiative to bring the Action and had their counsel not worked tirelessly for more than three years without any assurance of success or payment for their services. By any standard, their accomplishment is outstanding. Plaintiffs fully deserve the modest incentive compensation awards they seek, and Plaintiffs' Counsel have earned the attorneys' fees and reimbursement of expenses they seek. Indeed, Plaintiffs' counsel are seeking significantly ***less*** attorneys' fees than the lodestar value of their work in the Action to date (and no attorneys' fees for their substantial additional work that will be needed to implement the Settlement).

As set forth herein, the fee and expense requests are reasonable, justified, and deserving of full approval.

---

[1] Unless otherwise defined herein, this Memorandum of Points and Authorities incorporates by reference the defined terms set forth in the Revised Class Action Settlement Agreement filed March 3, 2016, and all such terms shall have the same meaning herein.

II. THE REQUEST FOR PAYMENT OF ATTORNEYS' FEES AND OUT-OF-POCKET EXPENSES IS APPROPRIATE

An extraordinary result has been achieved in this Action: the decades-long wrongful copyright claim by Warner and its predecessors-in-interest (and of late, by the Intervenors) has ended.[2] With Defendants' and the Intervenors' consent, the Court has been asked to declare that *Happy Birthday* is in the public domain. In addition, Defendants have agreed to pay up to $14 million – less the fees and expenses approved by the Court – to return fees paid by Settlement Class Members since 1949.

Plaintiffs' Counsel have devoted more than 9,000 hours, with a combined lodestar value of more than $5,178,000 in litigating this risky and complex action, and have incurred $204,461.40 in unreimbursed expenses to achieve this historic victory; they have done so with no assurance of success and no assurance of payment for their work. All four Plaintiffs, as well, devoted many hours to the successful prosecution of the Action. Documentary filmmaker Jennifer Nelson, President of Plaintiff GMTY, who filed the first complaint, devoted hundreds of hours investigating and challenging the disputed copyright claim.

Plaintiffs' Counsel seek attorneys' fees in the amount of $4,620,000 (a ***negative*** multiplier of just 0.892 times their collective lodestar) plus reimbursement of their costs in the amount of $204,461.40. Three Plaintiffs seek incentive compensation of $10,000 each, and Plaintiff GMTY seeks $15,000 for Ms. Nelson's extraordinary efforts. The results achieved, and their efforts in the litigation, support their requests.

Significantly, Plaintiffs' Counsel do not have a "free pass" from Defendants.

---

[2] The Settlement is described at length in the accompanying Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Final Approval of Proposed Class Action Settlement ("Settlement Brief").

As part of the Settlement, Defendants have reserved the right to challenge the request for attorneys' fees and expenses. *See* Revised Settlement Agreement, § 8.1.1. Plaintiffs' Counsel accepted that condition, confident that the results achieved by their hard work – much of which was required by Defendants' extremely vigorous defense of the copyright – support their fee request.[3]

As explained more fully below, Plaintiffs and their counsel are fully deserving of these fee and expense requests.

A. The Excellent Results in the Action Justifies the Fee Request

In a successful class action, such as this Action, Rule 23(h) permits the Court to "award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Section 8.1 of the Revised Settlement Agreement permits Plaintiffs' Counsel to seek attorneys' fees; Plaintiffs' Counsel agreed to seek no more than $4,620,000 (or 33% of the Settlement Fund).

Under the "common fund" or "common benefit" doctrine, "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "[A]ttorneys who create a common fund or benefit for a group of persons may be awarded their fees and costs to be paid out of the fund." *See Franco v. Ruiz Food Prods., Inc.*, No. 1:10-cv-02354-SKO, 2012 U.S. Dist. LEXIS 169057, at *42-43 (E.D. Cal Nov. 27, 2012) (citing *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1029 (9th Cir. 1998)). The Ninth Circuit "has affirmed the use of two separate methods for determining attorneys' fees," giving district courts "discretion to use either a percentage or lodestar method." *Hanlon*,

---

[3] Plaintiffs' Counsel are aware that their "request for attorney's fees should not result in a second major litigation. ***Ideally, of course, litigants will settle the amount of a fee***." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (emphasis added). Because of Defendants' potential reversionary interest in the Settlement Fund, however, this was unavoidable.

150 F.3d at 1029 (citations omitted). "The percentage method means that the court simply awards the attorneys a percentage of the fund sufficient to provide class counsel with a reasonable fee." *Id*. (citing *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989)).

Generally, under the percentage method, the Ninth Circuit "has established 25% of the common fund as a benchmark award for attorney fees." *Hanlon*, 150 F.3d at 1029 (citing *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)). The 25% "benchmark" in contingent class actions assumes, as happened here, that plaintiffs' counsel will bear the risk of non-payment in complex litigation and will provide quality services.

The 25% benchmark percentage may be "adjusted upward or downward to account for any unusual circumstances." *Paul, Johnson, Alston & Hunt*, 886 F.2d at 272.

Indeed, "in most common fund cases, the award exceeds the benchmark." *In re OmniVision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047-48 (N.D. Cal. 2007); *IBEW Local 697 Pension Fund v. Int'l Game Tech., Inc.*, No. 3:09-cv-00419-MMD-WGC, 2012 U.S. Dist. LEXIS 151498, at *12-13 (D. Nev. Oct. 19, 2012) ("the benchmark should be thirty percent rather than the twenty-five percent recommended"); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1175-76 (S.D. Cal. 2007) ("proposed fee of 25% is consistent, if not below, the average award in similar complex actions"); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at *58-59, 61 n.12 (C.D. Cal. June 10, 2005), (awarding fee award of 33-1/3% because "courts in this circuit, as well as other circuits, have awarded attorneys' fees of 30% or more in complex class actions"). Indeed, in *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002), the Ninth Circuit itself approved a fee award of 28% of the $96.8 million settlement).

Ample additional precedent exists in this Circuit and Court for granting fees to plaintiff's counsel that are equal to or greater than the 33% fee requested herein. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000) (affirming award of one-third of the total recovery); *In re Nucoa Real Margarine Litig.*, No. CV 10-00927 MMM (AJWx), 2012 U.S. Dist. LEXIS 189901, at *108 (C.D. Cal. June 12, 2012) (awarding attorneys' fees of "45 percent of the total monetary amount to be paid by [defendant] to resolve the case"); *Weeks v. Kellogg Co.*, No. CV 09-08102 (MMM) (RZx), 2011 U.S. Dist. LEXIS 155472, at *110 (C.D. Cal. Nov. 23, 2011) ("30 percent figure is reasonable in light of awards in other common fund cases"); *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM (SHx), 2008 U.S. Dist. LEXIS 123546, at *54-55 (C.D. Cal. July 21, 2008) (awarding 34% of the value of common fund as attorneys' fee); *Meijer, Inc. v. Abbott Labs.*, No. C 07–05985–CW, slip op. at 4 (N.D. Cal. Aug. 11, 2011) (awarding attorney's fee of 33-1/3% of recovery); and *Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-0324 AWI SKO, 2012 U.S. Dist. LEXIS 160052 (E.D. Cal. Oct. 31, 2012) (court approved attorneys' fees of 33% of the common fund).[4]

Moreover, in common fund or common benefit cases, the Court may also consider injunctive or non-monetary relief in setting attorneys' fees when the value of the injunctive or non-monetary benefit may be measured. *See Staton v. Boeing Co.*, 327 F.3d 938, 973 (9th Cir. 2003). For example, in *Hanlon*, 150 F.3d at 1029, the Ninth Circuit "upheld the use of the common fund doctrine to award attorneys' fees after the parties reached a settlement agreement under which Chrysler would replace defective latches on minivans that it had manufactured. Although the [remedy was] injunctive in nature, the agreement bestowed upon each beneficiary

[4] Because of the nature of copyright claims, there are few (if any) class actions under the Copyright Act. This case was unique.

a clearly measurable benefit: one replacement latch for each minivan owned." *Staton*, 327 F.3d at 973-74.

When the value of injunctive or non-monetary relief cannot be readily ascertained, the Court "should consider the value of the injunctive relief obtained as a 'relevant circumstance' in determining ***what percentage*** of the common fund class counsel should receive as attorneys' fees." *Staton*, 327 F.3d at 974 (emphasis added) (citing *Vizcaino*, 290 F.3d at 1049).

An upward departure from the "benchmark" of 25% is warranted here for at least the following four reasons.

First, the historic results achieved in the Action easily support an award that is slightly higher than the benchmark. The significance of this unprecedented Action cannot be overstated. It ends a notorious and wrongful copyright claim that eluded judicial review for more than eight decades. It ends Defendants' and the Intervenors' claim to own any rights to the Song or to demand payment for use of the Song, which will save the public at least $15 million over the next 21 years. It will declare the Song to be in the public domain. And it provides a substantial cash fund of up to $14 million to be allocated (after Court-approved fees and expenses) among those who paid Defendants to use the Song in the past. Significantly, those Class Members who paid to use the Song during the period June 13, 2009, to the present stand to recover 100% of their payment.

While every settlement is a compromise of sorts – and this Settlement is no exception – few settlements accomplish all of the litigation's main objectives the way this Settlement has. In light of the value of the cash payment as well as the value of the injunctive relief – including, in particular, the present value of the future payments that Defendants and the Intervenors have waived – an attorneys' fee of $4,620,000, which equals 33% of the $14 million Settlement Fund (or just 15.9% of the combined value of the Settlement Fund plus the present value of the

waived fees, is fully justified). Even if the Court decides not to include the present value of the waived fees in setting the percentage of the attorneys' fee, the fact that Plaintiffs' Counsel successfully negotiated for the waiver fully supports a percentage fee award that is slightly higher than the benchmark.

Second, the extraordinarily high level of skill of Plaintiffs' Counsel supports a fee slightly above the benchmark. As the Court knows from observing the work first-hand, the service performed by Lead Counsel and all of Plaintiffs' Counsel in this case has been of the highest caliber. Plaintiffs' Counsel faced a determined adversary in Defendants' Counsel, one of the nation's finest and most prominent law firms, who were paid well for their services by corporate defendants with deep pockets and every incentive to defend their decades-long copyright claim. To say the least, Defendants' Counsel put Plaintiffs' Counsel to the test, and Plaintiffs' Counsel rose to that challenge, providing exceptionally high-quality service from the inception of this Action through to its successful conclusion. Few cases achieve as much notoriety and worldwide acclaim as this Action has, which would not have been possible had Lead Counsel and all of Plaintiffs' Counsel not provided such outstanding service. In sum, the quality of representation by Plaintiffs' Counsel further warrants a fee award that is slightly higher than the benchmark.

Third, the amount of work required from Plaintiffs' Counsel to withstand Defendants' extremely vigorous defense strongly supports a fee above the benchmark. Nothing about this case was simple. Aware of the significance of the Action even before it was commenced, Plaintiffs' Counsel conducted painstakingly thorough legal and historical factual research before filing the first complaint. As a result, Plaintiffs' theory of the case remained consistent throughout. The Court will recall, on the other hand, the shifting defenses offered by Defendants, each of which required Plaintiffs' Counsel to conduct even more historical investigation and to respond to even more creative legal arguments. The Court will also recall

the 1922 publication of the Song with Summy's permission but without a copyright notice – the so-called "smoking gun" – that was "mistakenly" not produced by Defendants until July 2015, ***seven months after*** the cross-motions for summary judgment were filed. *See* Declaration of Mark C. Rifkin in Support of Final Approval of Class Action Settlement and Request for Attorneys' Fees and Expenses ("Rifkin Decl."), ¶ 41.

The nature of the Action, dependent, as it was, on historical documentary evidence – much of which was either missing or obscure – and Plaintiffs' burden to prove a negative fact (that Defendants did ***not*** own a copyright to the Song's lyrics) made the case particularly difficult to prove. Not only did Plaintiffs' Counsel succeed in doing so, but they succeeded on summary judgment, which is an especially rare feat for a plaintiff in any complex litigation. Plaintiffs' Counsel did so only because their preparation of the case and for summary judgment were exhaustive. Again, this factor also supports an attorneys' fee that is slightly higher than the benchmark.

And *fourth*, the novelty and complexity of the Action supports a fee slightly higher than the benchmark. This Action was not only unprecedented, it was legally and factually complex. No court ever has determined the scope of the *Happy Birthday* copyright, and the Copyright Act does not include a mechanism for challenging a disputed copyright claim. Plaintiffs' Counsel's use of the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, and Rule 23 was extremely inventive, and the class action mechanism in particular provides an unique framework for the Court to declare the Song to be in the public domain. Plaintiffs' Counsels' exceptional work in this unprecedented case rightly has been recognized as groundbreaking. *See* Rifkin Decl., ¶¶ 43-46 and Exhibits J, K. This final factor also easily warrants a fee award slightly higher than the benchmark.

Plaintiffs' Counsel's request for attorneys' fee of $4,620,000, which equals

33% of the $14 million Settlement Fund and just 15.9% of the combined value of the Settlement Fund plus the present value of the waived fees, is fully justified under the percentage of the common fund method.

B. Plaintiffs' Counsel's Lodestar Easily Justifies the Fee Request

Moreover, using the "lodestar" approach as a check on the reasonableness of the agreed-upon fee and expense amounts demonstrates it is well within the range commonly awarded in securities, shareholder representative, and other types of complex actions. Indeed, as the Ninth Circuit held in *Staton*:

> Alternatively, particularly where obtaining injunctive relief ***likely accounted for a significant part of the fees expended***, courts can use the common fund version of the ***lodestar method*** either to set the fee award or as a cross-check to assist in the determination of how the 'relevant circumstance' of the injunctive relief should affect a percentage award."

Staton, 327 F.3d at 974 (emphasis added) (citing *Vizciano*, 290 F.3d at 1050 ("lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award")). This approach is especially appropriate in this Action, where many of the Settlement benefits – ending the disputed copyright claims, the waiver of future fees forever, and the Court's declaration that the Song is in the public domain – are injunctive in nature.

Here, as substantiated by the declarations from Lead Counsel and all other Plaintiffs' Counsel, the hard-working attorneys and paralegals spent nearly 9,500 hours in performance of their services on behalf of Plaintiffs and the Class. Those declarations document a cumulative lodestar at current hourly rates for the services performed by all Plaintiffs' Counsel of $5,329,372.80. Under the lodestar approach, the fee requested by Plaintiffs' Counsel reflects a ***negative lodestar***

multiplier of 0.892, which is eminently reasonable.

As discussed above, and as the Court is aware, Plaintiffs' Counsel conducted an exhaustive factual investigation of the Song and the disputed copyright, as well extensive legal research of the claims asserted in the Action. The Settlement was achieved only after three years of contentious and intense litigation, after Plaintiffs withstood Defendants' motion to dismiss, after the Court ruled on the cross-motions for summary judgment, after an informal exchange of damages data, and after the Parties completed nearly all the preparation for the bench trial on the remainder of Claim One for declaratory judgment. *See* Rifkin Decl., ¶¶ 14-17, 19-22, 24, 26-32, 34-42, 48-51. In addition, the Settlement could not have been achieved without a week of intensive negotiations facilitated by David Rotman, Esquire, an experienced and highly respected mediator.

None of the work required to bring this Action to a successful conclusion was easy, and none of it was or could have been completed without the considerable efforts by the attorneys and paralegals of Plaintiffs' Counsel. The successful prosecution of this Action reflects more than three years of their hard work – always at risk of non-payment and, at times, against long odds.

In lodestar/multiplier jurisprudence involving complex class actions, "'multipliers of between 3 and 4.5 have been common'"[5] *Rabin v. Concord Assets Group, Inc.*, No. 89 Civ. 6130 (LBS), 1991 U.S. Dist. LEXIS 18273, at *4 (S.D.N.Y. Dec. 19, 1991) (citation omitted). *See also Rievman v. Burlington N.*

[5] In order to ensure adequate compensation to counsel under the unique circumstances of each case, courts often apply multipliers that reflect counsel's skill and results, and eschew any "arbitrary ceiling on multipliers." *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 131 (N.D. Ill. 1990). Thus, in *Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890, 894 (1st Cir. 1985), the First Circuit reversed a fee award based on a multiplier of almost 2.5 and remanded with instructions to award a fee equal to six times the lodestar.

R.R. Co., 118 F.R.D. 29, 35 (S.D.N.Y. 1987); *Keith v. Volpe*, 501 F. Supp. 403, 414 (C.D. Cal. 1980) (multiplier of 3.5); *Mun. Auth. of Bloomsburg v. Commonwealth of Pennsylvania*, 527 F. Supp. 982, 999-1000 (M.D. Pa. 1981) (4.5 multiplier); *In re Cenco, Inc. Sec. Litig.*, 519 F. Supp. 322, 326-28 (N.D. Ill. 1981) (4 multiplier); *Arenson v. Bd. of Trade of City of Chicago*, 372 F. Supp. 1349, 1358 (N.D. Ill. 1974) (multiplier of 4 awarded). Therefore, in an especially difficult case such as this one, a ***negative*** multiplier of 0.892 is more than reasonable.

Under the lodestar method – taking into account the considerable non-cash injunctive relief obtained in the Settlement and the thousands of hours of work expended by Plaintiffs' Counsel over the course of the litigation – the requested attorneys' fee of $4,620,000 (a ***negative*** multiplier of 0.892 on their combined lodestar) is eminently reasonable and should be granted without reservation.

The Copyright Act provides an analogous basis for awarding attorneys' fees to Plaintiffs' Counsel. Under 17 U.S.C. § 505, "the court in its discretion . . . . may also award a reasonable attorney's fee to the prevailing party as part of the costs." Where a federal copyright claim was asserted in the complaint, the court may award attorneys' fees under 17 U.S.C. § 505 even though the trial concerned a related state law claim, not the federal copyright claim itself. *See InvesSys, Inc. v. McGraw-Hill Cos., Ltd.*, 369 F.3d 16, 19-20 (1st Cir. 2004). Indeed, in *Tobias v. Joy Music, Inc.*, 204 F. Supp. 556, 560 (S.D.N.Y. 1962), the district court awarded attorneys' fees to the successful defendant in a ***declaratory judgment action*** brought to determine the disputed ownership of a song.

Fees may be awarded under 17 U.S.C. § 505 at the Court's discretion; however, that discretion must be exercised evenhandedly: "[p]revailing plaintiffs and prevailing defendants are to be treated alike." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994). That is, those parties who successfully assert a copyright and those – such as Plaintiffs in this case – who successfully seek to limit or invalidate

a copyright are equally entitled to attorneys' fees. For example, in *Diamond Star Bldg. Corp. v. Freed*, 30 F.3d 503, 507 (4th Cir. 1994), the Fourth Circuit held that a successful defense against a meritless claim of infringement justifies an award of attorneys' fees and remanded the case accordingly. As the Ninth Circuit has held, the important consideration is whether an award of attorneys' fees advances the purpose of the Copyright Act. *Fantasy, Inc. v. Fogerty*, 94 F3d 553, 555-56 (9th Cir. 1996). As set forth in the Copyright Clause of the Constitution, the primary purpose of the Copyright Act is not to protect the economic interests of corporate copyright owners, but rather "to promote the Progress of Science and useful Arts." U.S. Const., art. I, § 8. *See Catalog v. Passport Int'l Prods.*, No. CV 03-8514 WJR (CWx), 2004 U.S. Dist LEXIS 26798, at *27 (C.D. Cal. Dec. 17, 2004) (discussing Copyright Clause).

Importantly, attorneys' fee awarded under 17 U.S.C. § 505 need ***not*** relate to the amount of damages recovered. For example, in *Lanard Toys Ltd. v P.C. Woo Inc.*, No. 99-55552, 2000 U.S. App. LEXIS 23801, at *7-8 (9th Cir. Sept. 19, 2000), the Ninth Circuit affirmed the district court's award of attorneys' fees to a successful defendant that was more than ***ten times higher*** than the amount of the claim itself. The Ninth Circuit expressly rejected the plaintiff's argument that such an award could not be granted absent a finding of bad faith, frivolous, or vexatious conduct. *Id*.[6]

---

[6] Other instances where attorneys' fees were awarded under Section 505 substantially in excess of the amount of the claim are as follows:

- *Nat'l Ctr. for Jewish Film v. Riverside Films LLC*, No. 5:12-CV-44-ODW (DTBx), 2012 U.S. Dist. LEXIS 178363 (C.D. Cal. Dec. 14, 2012) (court awarded fees approximately ***10 times higher*** than underlying damages);
- *Teller v. Dogge*, No. 2:12-CV-591 JCM (GWF), 2014 U.S. Dist. LEXIS 139632 (D. Nev. Sept. 30, 2014) (court awarded fees approximately ***33 times higher*** than underlying damages);
- *Curtis v. Illumination Arts, Inc.*, No. C12-0991JLR, 2013 U.S. Dist. LEXIS 167456 (W.D. Wash. Nov. 21, 2013) (fees approximately four times higher than damages);

(footnote continued on following page)

The procedure for awarding fees under Section 505 in the Ninth Circuit is as follows:

> The calculation of a reasonable fee award usually involves two steps. First, the court must calculate the "lodestar figure" by taking the number of hours reasonably expended on the litigation and multiplying it by a reasonable hourly rate . . . . [Next,] the court may consider many of the factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). These factors include the novelty or difficulty of the case, the preclusion of other employment, time limitations, the amount at stake, the results obtained, and the undesirability of the case. *Id*.

MNG Corp. v. Andersen (Atl. Rec. Corp.), No. 05-933-AC, 2008 U.S. Dist. LEXIS 121070, at *6-7 (D. Or. May 14, 2008) (additional citations omitted). These factors are nearly the same as those applicable under the common fund or benefit doctrine, but beginning with the successful attorney's lodestar.

Although Plaintiffs' Counsel seek an award of attorneys' fees under the common fund or benefit doctrine, applying the fee-shifting provisions of Section 505 of the Copyright Act as an analogy also fully supports the requested attorneys' fee award.

- *Washington Shoe Co. v. A-Z Sporting Goods, Inc.*, No. C09-1042RSL, 2013 U.S. Dist. LEXIS 114339 (W.D. Wash. Aug. 12, 2013) (fees approximately four times higher than damages);
- *Magnuson v. Video Yesteryear*, No. C-92-4049 DLJ, 1996 WL 784564 (N.D. Cal. Dec. 26, 1996) (fees approximately ***100 times higher*** than damages); and
- *In re Dad's Kid Corp. Baseball Card Trademark & Copyright Infringement Score Group, Inc.*, No. MDL 958 WJR (CTX), 1994 WL 794773 (C.D. Cal. Dec. 13, 1994), amended, No. MDL 958 WJR (CTX), 1995 WL 253069 (C.D. Cal. Jan. 18, 1995) (fees approximately ***47 times higher*** than damages).

C. Plaintiffs' Counsel's Expenses are Reasonable

Rule 23(h) also permits the Court to "award . . . nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Section 8.1 of the Revised Settlement Agreement permits Plaintiffs' Counsel to seek reimbursement of their reasonable expenses; Plaintiffs' Counsel have agreed to seek no more than $400,000 in costs.

Attorneys who create a common fund or benefit for a class are entitled to be reimbursed for their out-of-pocket expenses incurred in creating the fund or benefit, so long as the submitted expenses are reasonable, necessary, and directly related to the prosecution of the action. *See Roberti v. OSI Sys.*, No. CV-13-09174 MWF (MRW), 2015 U.S. Dist. LEXIS 164312, at *20 (C.D. Cal. Dec. 8, 2015) (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)) (class counsel may recover reasonable expenses typically billed to paying clients in non-contingent litigation); *In re Am. Apparel, Inc. S'holder Litig.*, No. CV 10-06352 MMM (JCGx), 2014 U.S. Dist. LEXIS 184548, at *88 (C.D. Cal. July 28, 2014); *In re OmniVision Techs., Inc.*, 559 F. Supp. 2d at 1048 ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters."); *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1995).

Plaintiffs' Counsel have incurred expenses in the prosecution of this Action in the total amount of $204,461.40, substantially below the cap of $400,000 in costs provided for in the Settlement and Notice. These expenses represent less than 4% of the combined lodestar of Plaintiffs' Counsel. Wolf Haldenstein, which served as Lead Counsel for Plaintiffs throughout the litigation, has incurred the largest amount of expenses, $165,635.98. Of those expenses, online research (both legal and factual research) was by far the largest amount (approximately $68,000 for Wolf Haldenstein and $90,469.02 for all Plaintiffs' Counsel) – as expected,

given the massive historical research done by Plaintiffs' Counsel and the novel and complicated legal issues involved. Meals, hotel, and travel was the other largest expense (more than $30,000 for Wolf Haldenstein and $45,150.69 in total for all Plaintiffs' Counsel) – again, as expected in light of the fact that the case was litigated in this Court rather than the Southern District of New York where the first case was filed and where Wolf Haldenstein has its main office.[7] All the expenses are described in the accompanying declarations of Plaintiffs' Counsel.

From the beginning of the case, Plaintiffs' Counsel were aware they might not recover any of their expenses, and, at the very least, would not recover anything until the Action was successfully resolved. Plaintiffs' Counsel also understood that, even assuming that the Action was ultimately successful, reimbursement for expenses would not compensate them for the lost use of the funds advanced to prosecute the Action.

D. Plaintiffs Are Entitled to Incentive Compensation Awards

Plaintiff GMTY seeks an incentive compensation award of $15,000 and Plaintiffs Siegel, Marya, and Majar seek incentive compensation awards of $10,000 each. Such incentive compensation awards are regularly (if not routinely) granted in the exercise of discretion by courts in this Circuit in similar class and representative litigation. *See, e.g.*, *Staton*, 327 F.3d at 977; *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, at *46-47; *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 U.S. Dist. LEXIS 38667, at *38 (N.D. Cal. April 1, 2011). "Such awards are intended to 'compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk

[7] One of the Plaintiffs' licenses with Warner required it to litigate in California. Therefore, Plaintiffs' Counsel agreed with Defendants' counsel to transfer the original action to this Court, thus increasing the travel expense. *See* Rifkin Decl., ¶ 79(b).

undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.'" *Anderson v. Nextel Retail Stores, LLC*, No. CV 07-4480-SVW (FFMx), 2010 U.S. Dist LEXIS 71598, at *26-27 (C.D. Cal. June 30, 2010) (quoting *In re Mego Fin. Corp.*, 213 F.3d at 463).

The Court should exercise its discretion to award incentive compensation to the four Plaintiffs in this case. Plaintiff Nelson, for example, spent several hundred hours investigating the origin of the Song and the scope of Defendants' copyright and many more hours overseeing the litigation for the Class, all of which she describes in detail in her declaration submitted herewith. The other Plaintiffs likewise spent considerable time and effort investigating or reviewing the claims and overseeing the litigation, which they describe in their own declarations submitted herewith.

The requested incentive compensation awards fall within the range typically granted by courts across the country. For example, in *Heritage Bond*, noting that the plaintiffs pursued a complicated case over three years of active litigation, this Court granted incentive compensation awards to each of the plaintiffs, including $15,000 to one plaintiff who devoted more than 300 hours to the litigation and $12,500 to another plaintiff who spent 200 hours pursuing the litigation. *Heritage Bond*, 2005 U.S. Dist. LEXIS 13555, at *56-57. *See also Bradburn Parent Teacher Store, Inc. v. 3M (Minn. Mining and Mfg. Co.)*, 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007) ($75,000 incentive payment to small business that served as named plaintiff from $39,750,000 settlement); *Glass v. UBS Fin. Servs.*, No. C-06-4068 MMC, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 26, 2007) ($25,000 each to four plaintiffs from $45 million settlement); *In re Ins. Brokerage Antitrust Litig.*, No. 04-5184 (GEB), 2007 U.S. Dist. LEXIS 40729, at *68-69 (D.N.J. June 5, 2007) ($10,000 each to 15 plaintiffs from $121 million settlement fund).

For these reasons, given their substantial contributions to the successful

prosecution of this Action, taking on burdens to challenge the disputed copyright in court that no litigant has ever assumed,[8] the four Plaintiffs should be granted incentive compensation awards in the amount of $15,000 to GMTY and $10,000 to each of the other three Plaintiffs.

E. The Reaction of the Class Also Favors Final Approval

Although the time for members of the Settlement Class members to oppose the fee and expense requests has not yet passed, to date no Settlement Class Member has objected to the request for attorneys' fees and expenses or for incentive compensation awards to the named Plaintiffs. In addition, none of the State Attorneys General has opposed either request. These facts also speak strongly in favor of the reasonableness of both requests.

III. CONCLUSION

For all the foregoing reasons, the Court should approve Plaintiffs' Counsel attorneys' fees in the amount of $4,620,000 and reimbursement of expenses in the amount of $204,461.40 – to be allocated by Lead Counsel among all Plaintiffs' Counsel as provided for in Section 8.1.4 of the Revised Settlement Agreement – for their excellent work and should grant incentive compensation awards of $15,000 to Plaintiff GMTY and $10,000 each to Plaintiffs Siegel, Marya, and Majar for their contribution to the successful conclusion of the Action.

Respectfully submitted,

Dated: April 27, 2016

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP

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

[8] At least potentially, the Court might have awarded attorneys' fees and costs ***against*** the four Plaintiffs under the analogous provisions of the Copyright Act, 17 U.S.C. § 505, had Defendants or the Intervenors prevailed.

FRANCIS M. GREGOREK
gregorek@whafh.com
BETSY C. MANIFOLD
manifold@whafh.com
RACHELE R. RICKERT
rickert@whafh.com
MARISA C. LIVESAY
livesay@whafh.com
750 B Street, Suite 2770
San Diego, CA 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
MARK C. RIFKIN (*pro hac vice*)
rifkin@whafh.com
RANDALL S. NEWMAN (190547)
newman@whafh.com
270 Madison Avenue
New York, NY 10016
Telephone: 212/545-4600
Facsimile: 212-545-4753

Lead Counsel for Plaintiffs

HUNT ORTMANN PALFFY NIEVES DARLING & MAH, INC.
ALISON C. GIBBS (257526)
gibbs@huntortmann.com
OMEL A. NIEVES (134444)
nieves@huntortmann.com
KATHLYNN E. SMITH (234541)
smith@ huntortmann.com
301 North Lake Avenue, 7th Floor
Pasadena, CA 91101
Telephone 626/440-5200
Facsimile 626/796-0107
Facsimile: 212/797-3172

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

GLANCY PRONGAY & MURRAY LLP
LIONEL Z. GLANCY (134180)
lglancy@glancylaw.com
MARC L. GODINO (188669)
mgodino@glancylaw.com
KARA M. WOLKE
kwolke@glancylaw.com
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: 310/201-9150
Facsimile: 310/201-9160
Attorneys for Plaintiffs