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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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

Plaintiffs,

v.

WARNER/CHAPPELL MUSIC, INC., et al.,

Defendants.

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES

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

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INTRODUCTION

Class Counsel ask the Court to award them $4.62 million in fees—fully a third of the common fund and almost one-third more than the Ninth Circuit's 25% benchmark for common fund awards. Class Counsel have not justified this significant upward departure. This case was not unusually work-intensive or complex. Over a three-year period it involved just a handful of hearings, two dispositive motions, four depositions, and a small document production. Class Counsel argue that their claimed lodestar—more than 9,000 hours incurred by four different law firms—validates the reasonableness of their request. In fact, Class Counsel's lodestar proffer provides no basis for the required cross-check, because the numbers are simply aggregated. What little information Class Counsel have provided raises significant questions about whether Class Counsel's fee request and their simultaneous request to recover more than $200,000 in claimed expenses are reasonable. The Court should either deny the motion or, at a minimum, require Class Counsel to produce appropriate time and expense information (along with an opportunity for Warner/Chappell to review and object in writing to the same) for the following reasons:

First, Class Counsel have not identified the actual tasks that individual attorneys performed or how much time they wrote down for any given task. This makes it impossible for Warner/Chappell to respond to—or the Court to evaluate—Class Counsel's claim that their above-benchmark request is justified by the purported reasonable expenditure of effort and resources on Plaintiffs' side.

Second, the information Class Counsel have provided shows that many of the time reports are excessive. Class Counsel report expending hundreds of hours on a single opposition to a motion to dismiss, thousands of hours on limited discovery, and thousands more hours on a summary judgment motion.

Third, Class Counsel's top-line summary shows that their lodestar is improperly comprised of an overabundance of time recorded by partners rather than

by more junior attorneys with lower billing rates. Lead Counsel's partners account for *70%* of that firm's attorney hours. The result, of course, is to drive up the claimed amount of the lodestar with more hours at higher billing rates. Ninth Circuit law makes it clear that the Court should reduce the lodestar so as not to reward Class Counsel's inefficient inflation of fees.

Fourth, Class Counsel have failed to provide evidence showing that their hourly rates are reasonable for the Central District of California.

Fifth, Class Counsel have failed to show that their out-of-pocket expenses are reasonable. They have submitted no receipts and offer only bare-bones descriptions of their incurred costs.

BACKGROUND

Class Counsel argue for a significant upward adjustment from the Ninth Circuit's 25% benchmark. The case is exceptional, they say, because the result they obtained could not have been achieved had Class Counsel "not worked tirelessly for more than three years." Mot. at 1.

Class Counsel, however, submit only top-line summaries of the hours spent by attorneys at each firm during broad phases of the litigation. Rifkin Decl. at 4-19 & Exs. B-I; Newman Decl. at 3-9 & Exs. B-I; Schacht Decl. at 2-6; Wolke Decl. at 2-6. They provide no information about how much time any individual lawyer spent on any particular task.[1]

[1] The hours and lodestar figures cited in this opposition are compiled from the four declarations Class Counsel timely filed in support of their fee request. This compilation is presented in Exhibit 1 to the Declaration of Kelly M. Klaus ("Klaus Decl."). This opposition and Klaus Decl. Ex. 1 do not address the hours and lodestar figures in the Nieves Declaration, which, without explanation, was filed only yesterday (May 26). Dkt. 330. Because the Nieves declaration was filed 29 days late, Dkt. 316 at 9-10, there is insufficient time for Warner/Chappell to consider and respond to it. Accordingly, Warner/Chappell requests that the Court strike the Nieves declaration.

Based on the limited information Class Counsel have provided, there are serious questions about the reasonableness of the claimed hours, billing rates, and expenses at each of the broad stages of this litigation.

Initial Complaints. Class Counsel claim they spent 1,568 hours—resulting in a lodestar subcomponent total of $908,904—for work related to researching and drafting the initial four class action complaints.

Class Counsel filed their essentially identical complaints in June and July 2013. While the complaints were lengthy and cited a number of historical facts, Class Counsel were hardly writing on a blank slate. In 2008, Prof. Robert Brauneis wrote a law review article, entitled "Copyright and the World's Most Popular Song." Prof. Brauneis's article questioned whether Patty and Mildred Hill wrote the *Happy Birthday* lyrics, whether they forfeited or abandoned their rights in the song, whether they assigned their rights to Warner/Chappell's predecessor (or simply granted an implied license), whether the E51990 copyright registration covered the lyrics, and whether Warner/Chappell's predecessor validly renewed the copyright. Klaus Decl. Ex. 3 at 17, 40-70. Prof. Brauneis created a public website that contained more than 100 historical documents relating to *Happy Birthday*, including Copyright Office records, court filings, and publications of the song. Klaus Decl. ¶¶ 13-14 & Exs. 3-4. Prof. Brauneis worked as a litigation consultant for Class Counsel, *id*. ¶ 11; Rifkin Decl. ¶ 14, and the initial class complaints (like the subsequent iterations) track many of Prof. Brauneis's theories. *Compare* Dkt. 1, *with* Klaus Decl. Ex. 3 at 17, 40-70.

The firms that filed the first two complaints, Wolf Haldenstein and Randall S. Newman PC, claim to have spent 1,294 hours (almost 54 entire days) simply preparing the complaints. A third law firm filed another substantially similar complaint (Dkt. 1), and did so with Wolf Haldenstein and Newman. Klaus Decl. ¶¶ 5-7. That third law firm recorded an additional 234.8 hours for this apparently duplicative effort.

Opposition to Motion to Dismiss. Class Counsel claim they spent 469.5 hours—resulting in a lodestar subcomponent total of $273,747—opposing Warner/Chappell's motion to dismiss the Second Amended Complaint.

Warner/Chappell filed a straightforward motion to dismiss, raising questions as to copyright preemption, the specificity of certain allegations, and the applicable statute of limitations. Dkt. 52. In response, Class Counsel filed an opposition brief and a 3-page request for judicial notice. Dkts. 61-63. For this single 25-page brief addressing pure questions of law and attendance at the hearing on this motion, Class Counsel billed well over 400 hours. Moreover, each of the four firms billed a significant number of hours on the same motion: Wolf Haldenstein billed 196.5 hours, Donahue Fitzgerald billed 108.2 hours, Newman billed 101.1 hours, and Glancy Prongay billed 63.7 hours. While even Lead Counsel's 196.5 hours seem high for opposing a motion to dismiss, there is no apparent value added by the 273 combined hours from the other three firms. The Court ultimately ruled against Plaintiffs on the only legal questions it resolved at the motion to dismiss stage (it deferred ruling on the state law claims). Dkt. 71.

Discovery. Class Counsel claim they spent 2,751.3 hours—resulting in a lodestar subcomponent total of $1,479,351—during the discovery phase of the litigation. Mr. Rifkin, the lead partner on the case, alone billed 505 hours on discovery. Rifkin Decl. Ex. E.

Discovery involved a limited amount of written discovery, two joint discovery motions, and the exchange of a small number of documents. Excluding Plaintiffs' production of complete volumes of the Catalog of Copyright Entries, less than 15,000 total *pages* were exchanged. Klaus Decl. ¶ 15. Discovery also involved few depositions. Class Counsel took just three depositions (one was continued over two days for a combined total of under 1.5 hours). Class Counsel defended only the single deposition of their expert musicologist. *Id*. ¶ 16.

Summary Judgment. Class Counsel claim they spent 2,500.4 hours—resulting in a lodestar subcomponent total of $1,397,169—during the summary judgment phase of the litigation.

Plaintiffs' and Warner/Chappell's cross-motions for summary judgment required two principal briefs: an initial 50-page joint brief and a supplemental 24-page joint brief. Dkts. 182, 219. The parties also filed a joint appendix of exhibits and a joint statement of uncontroverted facts. Dkts. 183,187-94. Both parties filed motions to supplement the record and Class Counsel filed a separate motion to strike exhibits. Dkts. 197, 223-24. There were two summary judgment hearings. Although two firms accounted for most of the billing time during summary judgment—2,013.2 hours—the other two firms still billed 283.5 and 203.7 hours, respectively. Collectively, this adds up to more than 104 *entire* days of billing.

ARGUMENT

I. Class Counsel Have Not Justified a Fee Award Exceeding the Ninth Circuit's 25% Benchmark

A. Legal Standard

"In a common fund case, the district court has discretion to apply either the lodestar method or the percentage-of-the-fund method in calculating a fee award." *Fischel v. Equitable Life Assurance Soc'y*, 307 F.3d 997, 1006 (9th Cir. 2002). Under either method, courts require that fee awards "be reasonable under the circumstances." *In re Am. Apparel, Inc. S'holder Litig.*, 2014 WL 10212865, at *20 (C.D. Cal. July 28, 2014) (citation omitted). The Ninth Circuit encourages district courts "to guard against an unreasonable result" by cross-checking fee requests against a second method. *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944-45 (9th Cir. 2011). Accordingly, even when the percentage method is applied, as Class Counsel request, courts typically "use the lodestar method to cross-check the reasonableness of the percentage to be awarded." *In re Cadence Design Sys., Inc. Sec. & Derivative Litig.*, 2012 WL 1414092, at *4 (N.D. Cal. Apr. 23, 2012).

The Ninth Circuit has set the "benchmark" award under the percentage method at 25% of the fund, which may "then be adjusted upward or downward to account for any unusual circumstances involved in this case." *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). A departure from the 25% benchmark requires a showing of "special circumstances." *Bluetooth*, 654 F.3d at 942.

B. Class Counsel Have Not Carried Their Burden to Establish the Reasonableness of the Requested 33% Fee Award

Under the Ninth Circuit's 25% benchmark, Class Counsel would receive $3.5 million. Class Counsel instead seek attorneys' fees of 33% of the common fund, or $4.62 million. Class Counsel state *seven* times that their request is just "slightly higher" than the 25% benchmark. But a fee request that is almost one-third more than the benchmark—which amounts to an additional $1.12 million—is not slightly higher than the benchmark. Class Counsel have not demonstrated that there are "special circumstances" here that justify a fee award above the 25% benchmark.

1. The Results Do Not Justify Class Counsel's Fee Request

Class Counsel argue that the settlement is extraordinary because it ends a "wrongful" practice. That is incorrect. Nothing in the Settlement Agreement suggests wrongful conduct took place. Likewise, the Court did not rule that Clayton F. Summy Co.'s (or its successors') licensing of *Happy Birthday* was "wrongful." The Court ruled that the evidence before it did not support that Summy had rights in the song's lyrics when it registered the E51990 copyright in 1935. This limited ruling did not address the propriety of Summy's or anyone else's actions. The ruling also was subject to an unresolved motion for reconsideration and alternative request for interlocutory appeal when the parties agreed to settle. In any event, the Court's ruling did not address whether the Hill Foundation retained a common law copyright in the lyrics following the 1935 registrations or the 1944 transfers. The Court allowed the Hill Foundation and the Association of Childhood Education

International ("ACEI") (to whom Jessica Hill bequeathed her interest in the Hill Foundation) to intervene in this litigation to try to prove just that. If the Hill Foundation did retain the common law copyright, then instead of paying Summy (or its successors)—who shared their royalties with the Hill Foundation per the parties' agreements (and later shared their royalties with ACEI)—licensees simply would have had to pay the Hill Foundation (or ACEI) directly.

Class Counsel also are wrong in asserting that Warner/Chappell "consent[ed]" to *Happy Birthday* being declared public domain. Mot. at 2. Warner/Chappell only agreed not to oppose Class Counsel's request that the Court issue such a declaration once the settlement is completely final (as provided in the Settlement Agreement), and Warner/Chappell and ACEI then have disclaimed their interest in the song.

Class Counsel next contend that the settlement "will save" the public $15 million because Warner/Chappell is agreeing not to license the song under its claim of ownership. Mot. at 6. This, too, is incorrect. Class Counsel extract this figure from a declaration that purports to estimate the *revenue* Warner/Chappell would receive from *Happy Birthday*. Dkt. 301-2. But Warner/Chappell's projected revenue is not equivalent to would-be licensees' projected savings. Warner/Chappell's projected ASCAP-based revenue, for example, does not amount to savings on the part of ASCAP licensees. ASCAP issues blanket licenses, covering the use of all compositions in its repertoire. Class Counsel have not provided and cannot provide evidence that the result in this case will affect the cost of the blanket license (it will not). Nor is it plausible to suggest that this settlement will reduce the cost of similar blanket licenses issued by foreign collecting societies.

Class Counsel also argue that their $4.62 million fee request is reasonable because it is only 15.9% of $29 million, which is the sum of the $14 million Settlement Fund *plus* the supposed $15 million in public savings. Mot. at 6-7. This argument fails because the value of the common fund—*i.e.*, the dominator to which to apply the 25% benchmark—must be based on monetary benefits to *the class*. In

Weeks v. Kellogg Co., 2013 WL 6531177 (C.D. Cal. Nov. 23, 2013), for example, Judge Morrow calculated the fee percentage based on the settlement value "directly benefit[ting] individual class members" and excluded from that amount a *cy pres* donation valued at $2.5 million. *Id*. at *25-28. Class Counsel have not valued and cannot value the monetary "savings" that individual members of the *Settlement Class* will realize—let alone do so with the requisite "precision." *Id*. at *28 (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003)).

Class Counsel do not address how the settlement value compares to the maximum recovery the proposed class could have achieved. In their motion for final approval, Class Counsel estimate that Period One Class Members paid $11 million in license fees and Period Two Class Members paid approximately $35-$40 million in license fees. Dkt. 322 at 14. This means that the $14 million settlement achieved 27.5% to 30% of the maximum recovery. Class Counsel have not shown that this result warrants fees nearly one-third above the benchmark. *See, e.g.*, *Hawthorne v. Umpqua Bank*, 2015 WL 1927342, at *5 (N.D. Cal. Apr. 28, 2015) (awarding 25% in fees instead of 33% and noting that recovery of 37.7% of the maximum recoverable at trial was "deserving of approval," but "not an 'exceptional' or 'unusual' award").

2. The Amount of Work Does Not Justify Class Counsel's Request for a Significant Upward Adjustment from the 25% Benchmark

The amount of work involved in litigating this case was not unusual. In fact, the workload was significantly reduced by the lack of percipient witnesses and the limited documentary evidence. Class Counsel have billed a substantial number of hours in this litigation. But they have not provided sufficient records for Warner/Chappell to respond in detail to the reasonableness of Class Counsel's billing practices—or for the Court to evaluate the same. In particular, Class Counsel have not indicated how much time any particular lawyer spent on any particular

task. However, the information that Class Counsel have submitted so far strongly suggests that they duplicated efforts and overbilled in litigating this case.[2]

Although Wolf Haldenstein served as Lead Counsel, the three other firms each billed a significant number of hours at every stage of the litigation except during trial preparation (only Wolf Haldenstein and Newman billed during this phase). The breakdown of each firm's total hours is as follows: Wolf Haldenstein billed 5,473 hours, Newman billed 2,193 hours, Donahue Fitzgerald billed 894 hours, and Glancy Prongay billed 493 hours. The value added by this apparently overlapping and excessive billing is far from clear.

Class Counsel billed 1,568 hours researching and drafting the initial complaints ($908,903.50 in fees), for example, even though Prof. Brauneis had already laid the groundwork, posted many of the documents to his website, and served as Class Counsel's consultant.[3] Further, Donahue Fitzgerald spent 234.8 hours drafting a complaint that was substantially identical to the previous two complaints, which Wolf Haldenstein and Newman had already spent 1,294.2 hours drafting.

Class Counsel also claim to have billed 469.5 hours ($273,747 in fees) drafting a single 25-page brief opposing Warner/Chappell's motion to dismiss and attending one hearing on that motion. Donahue Fitzgerald and Glancy Prongay billed 171.9 hours toward this effort even though Wolf Haldenstein and Newman also billed 297.6 hours on the same brief.

Class Counsel also billed 2,500.4 hours during the summary judgment phase of the litigation ($1,397,169 in fees). Whereas cross-motions for summary

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[2] Class Counsel claim to have spent "more than 9,000 hours" (Mot. at 2) or "nearly 9,500 hours" litigating this case (*id*. at 9). Adding up the figures in their declarations results in a total of 9,052.8 hours.

[3] Notably, Prof. Brauneis's 2008 website provided links to all but one of the documents the Court ultimately cited in granting partial summary judgment to Plaintiffs. *Compare* Klaus Decl. ¶ 14 & Ex. 4, *with* Dkt. 244 at 28-41.

judgment in this district often involve three briefs per side (75 pages total), the parties here filed only two joint summary judgment briefs (a total of 37 pages total per side). The parties filed a substantial index and statement of facts and a few ancillary motions, yet 2,500.4 hours still seems excessive. *See, e.g., Am. Apparel*, 2014 WL 10212865, at *27 ("In our view, it should not take four experienced, highly paid attorneys 480 hours to prepare one summary judgment motion and to prepare for and conduct a four-day trial when all pretrial discovery had been completed.") (quoting *Campon v. City of Blue Springs, Missouri*, 289 F.3d 546, 553 (8th Cir. 2002)). Moreover, Donahue Fitzgerald and Glancy Prongay spent 487.2 hours during this phase of the litigation even though the other two firms also billed 2,013.2 hours during this time.

As noted, Class Counsel claim to have recorded 2,751.3 hours (translating to $1,479,351 in claimed lodestar fees) for discovery. Discovery involved relatively few documents. Warner/Chappell produced about 2,900 pages, Plaintiffs produced less than 6,400 pages (excluding volumes of the Catalog of Copyright Entries), and third parties and Intervenors produced less than 5,600 pages. Klaus Decl. ¶ 15. By contemporary class action standards, 15,000 pages of documents is a small population. Class Counsel deposed just three individuals: (1) Warner/Chappell's Rule 30(b)(6) witness, (2) Warner/Chappell's Vice President of Administration, and (3) ASCAP's Rule 30(b)(6) witness. They deposed ASCAP's witness on two occasions, with the initial deposition and the continued deposition lasting less than 1.5 hours in total. *Id*. ¶ 16. Class Counsel defended just one deposition, that of their expert musicologist. Class Counsel filed two joint discovery motions (they withdrew one and lost the other). *Id*. ¶ 17.

In short, while Class Counsel's bills are high, they appear unreasonably so—if anything, the amount of work involved was less than in a comparable consumer or securities class action. Indeed, the very cases that Class Counsel cite in support of an upward departure from the 25% benchmark show that the level of work required

in this case was not extraordinary. In *In re Heritage Bond Litig*., 2005 WL 1594403 (C.D. Cal. June 10, 2005), for example, the court awarded an upward adjustment, but only after emphasizing that class counsel:

- "reviewed, analyzed and coded approximately 1.1 *million documents*"—compared to less than 8,500 *pages* produced by Warner/Chappell or third parties;
- "took *34* depositions and defended depositions of all of the representative plaintiffs throughout California"—compared to *four* depositions here; and
- briefed "numerous discovery motions, a motion for class certification, nineteen motions to dismiss, a motion for stay, and … three motions for summary judgment"—as opposed to two dispositive motions, two discovery motions, and a handful of ancillary motions.

Id. at *19-20 (emphasis added). *See also Garcia v. Gordon Trucking, Inc*., 2012 WL 5364575, at *2, 9 (E.D. Cal. Oct. 31, 2012) (upward adjustment warranted, in part, by "extensive" motion practice, 16 depositions, dozens of witness interviews, and complicated data restructuring and analysis); *Fernandez v. Victoria Secret Stores, LLC*, 2008 WL 8150856, at *1, 10-12 (C.D. Cal. July 21, 2008) (upward adjustment, based on discounted common fund value, reasonable in part due to numerous motions, 20 depositions, and extensive mediation sessions in multiple cities).

3. Neither the Novelty Nor Complexity of this Case Justify Class Counsel's Request

This case was neither exceptionally novel nor complex. For the most part, it involved basic copyright principles. Class Counsel suggest that it was novel because no court had previously determined the scope of the *Happy Birthday* copyright, but that proves nothing. If the opposite were true, Class Counsel would not have had a case. Class Counsel also cite their "extremely inventive" use of the Declaratory Judgment Act and Rule 23. But this does not support their request for

an extra $1.12 million in fees either. Class Counsel are not the first to seek a declaration that a copyrighted work is in the public domain or even the first to file a class action seeking a declaratory judgment under the Copyright Act.[4] Once again, Class Counsel's own cases show that this litigation was not unusually complex. *Cf. Garcia*, 2012 WL 5364575, at *8-9 (emphasizing the "complexity of the legal issues" involved during extensive motion practice); *Fernandez*, 2008 WL 8150856, at *10-13 (emphasizing that it was a "legally novel and factually complex" case involving an unprecedented application of California labor law); *Heritage Bond*, 2005 WL 1594403, at *20 (noting that the case involved "highly complex issues" of securities law and "numerous bonds offered over a course of several years" and "a multitude of plaintiffs and over forty defendants").

Class Counsel also claim that Warner/Chappell offered "shifting defenses" that necessitated substantial additional work, whereas Class Counsel's theory of the case remained consistent throughout. This caricature of Warner/Chappell's conduct is highly inaccurate. And, Class Counsel themselves changed positions on numerous issues, requiring Warner/Chappell—not the class—to litigate points that should have been (and in some cases were) undisputed. For example, Class Counsel's first four complaints expressly alleged that the *Happy Birthday* lyrics were included on the E51990 deposit copy. Klaus Decl. ¶ 18. Plaintiffs revised this allegation only after their Lead Counsel—in oral argument on the motion to dismiss—flagged a point that Prof. Brauneis had noted in his article about the Copyright Office no longer having the E51990 deposit copy, and after Warner/Chappell pointed out that Plaintiffs' complaints all had included the *Happy Birthday* lyrics with the deposit copy. Oct. 7, 2013, Dkt. 69, Hr'g Tr. at 48:6-18, 53:1-20; Dkt. 95, ¶ 98. Plaintiffs' revision required Warner/Chappell to search

[4] *See, e.g.*, *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684 (9th Cir. 2000); *Diagnostic Unit Inmate Council v. Films Inc.*, 88 F.3d 651, 652 (8th Cir. 1996); *MRC II Distrib. Co. v. Coelho*, 2012 WL 3810257, at*1 (C.D. Cal. Sept. 4, 2012); *White v. Kimmell*, 94 F. Supp. 502, 504 (S.D. Cal. 1950).

through the British Museum for deposit records. Even after Warner/Chappell later obtained those records, Class Counsel objected to the evidence. Klaus Decl. ¶ 20. Class Counsel also ignore that at the first summary judgment hearing, Class Counsel suggested that Jessica Hill created the song while Mildred Hill played the piano, while at the second summary judgment hearing, Class Counsel argued that *Patty* wrote the song *entirely apart from* Mildred. *Compare* Mar. 23, 2015, Dkt. 208, Hr'g Tr. at 67-68, *with* July 29, 2015, Dkt. 230, Hr'g Tr. at 15-21.

The point of these examples (and others Warner/Chappell could cite) is not to throw mud, but instead to rebut Class Counsel's claim that they were a model of perfect consistency and had to adjust their positions to Warner/Chappell's shifting theories. Here, as in most cases, the parties discovered additional facts and conformed their theories to the evidence. None of this required extraordinary efforts by Class Counsel.

4. Class Counsel's Skill Does Not Justify Fees Nearly One-Third Above the Benchmark

Class Counsel argue that they deserve $1.12 million more than the $3.5 million benchmark because both sides performed high-caliber work. But this does not make the case exceptional. In the context of national class action lawsuits, it is not unusual for counsel to be skillful advocates. *Arnett v. Bank of Am., N.A.*, 2014 WL 4672458, at *13 (D. Or. Sept. 18, 2014). In *Arnett*, for example, the court concluded that while class counsel were all "highly skilled, have significant class action experience, and expended significant effort pursuing the litigation," this did not justify an upward departure from the Ninth Circuit's benchmark. *Id.* The Court should reach the same conclusion here.

II. The Lodestar Cross-Check Does Not Demonstrate that Class Counsel's $4.62 Million Fee Request Is Reasonable

A. Legal Standard

Cross-checking a percentage-based award against what the lodestar award would be is "the best practice." *Am. Apparel*, 2014 WL 10212865, at *23 (citation omitted). This is particularly true where, as here, counsel request an award that significantly exceeds the Ninth Circuit benchmark. Class Counsel contend that their lodestar fee award would be $5,329,372.80, which, they argue, demonstrates the reasonableness of their request for $4.62 million in fees. But a lodestar is not determined simply by adding up the total of each attorney's cumulative hours multiplied by his or her claimed hourly rates. A lodestar must be based on the number of hours *reasonably* spent multiplied by the *reasonable* hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

Because Class Counsel have not explained how much time any lawyer spent on any individual task, it is impossible to determine the number of hours reasonably spent. Likewise, it is impossible to determine reasonable rates for the attorneys and legal staff who work for Class Counsel because Class Counsel have not submitted evidence of each attorney's and paralegal's level of experience. Nor have Class Counsel offered evidence of prevailing market rates in this district. Based on the limited evidence that Class Counsel have provided, both the hours expended and the rates charged appear to be facially unreasonable.[5]

[5] Class Counsel argue that they are also entitled to fees under the Copyright Act's provision allowing courts to award "reasonable attorney's fee[s] to the prevailing party." 17 U.S.C. § 505. This provision does not justify Class Counsel's inflated fee request. Even assuming § 505 somehow were to apply, Class Counsel have offered no reason why this would entitle them to a higher award than they otherwise would receive under the percentage method cross-checked against the lodestar amount.

A. Class Counsel Have Not Established that Their Claimed Hours Were Reasonably Expended

"[T]he fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of the hours worked." *Am. Apparel*, 2014 WL 10212865, at *26 (citation omitted). "Although detailed billing reports are not required, the court must have some information regarding what a particular attorney was doing during the hours billed to evaluate the reasonableness of the fees charged." *Weeks*, 2013 WL 6531177, at *32-33 (discussing cases with adequate billing reports). Sufficient evidence of how attorneys spent their time is necessary to ensure: (1) "the time devoted to particular tasks was reasonable," *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 623 (9th Cir. 1993); (2) "there was [not] improper overlapping of hours," *id.*; (3) that tasks performed were commensurate with the attorney's experience, and thus billing rate, *Zucker v. Occidental Petroleum Corp.*, 968 F. Supp. 1396, 1402 (C.D. Cal. 1997); and (4) that bills reflect working time, and not time traveling or performing tasks not customarily billed to clients, *Jankey v. Beach Hut*, 2006 WL 4569361, at *4-5 (C.D. Cal. Dec. 19, 2006).

"Where the documentation is inadequate, the district court is free to reduce an applicant's fee award accordingly." *Weeks*, 2013 WL 6531177, at *33 (citation omitted). In *Ko v. Natura Pet Products, Inc.*, 2012 WL 3945541 (N.D. Cal. Sept. 10, 2012), for example, the court granted a benchmark award rather than the requested 35% because the billing records, which even included narrative entries, lacked "sufficient factual detail to enable the Court to determine whether the hours billed were justified." *Id.* at *12-13.

1. Class Counsel's Time Records Are Insufficient

Class Counsel claim to have spent "nearly 9,500 hours in performance of their services on behalf of Plaintiffs and the Class." Mot. at 9. But Class Counsel have submitted no time records to support this claim. Instead, Class Counsel submitted

their own declarations identifying only the total number of hours they claimed to have spent during eight broad phases of the litigation, without any description of the specific tasks performed or time spent on those tasks.

First, Class Counsel's summaries do not allow the Court to evaluate whether the time expended by each attorney was reasonable. *Intel*, 6 F.3d at 623. For example, it is impossible to determine if it was reasonable for Mr. Newman to bill 928 hours prior to filing the initial complaint, Newman Decl. Ex. B, or for Mr. Rifkin to bill 505 hours during discovery, Rifkin Decl. Ex. E, without any information about how much time these attorneys spent on any particular task during those sweeping phases of the litigation.

Second, the summaries do not allow the Court to determine whether the claimed hours reflect improper duplication of efforts or overstaffing. *Intel*, 6 F.3d at 623. For example, it is not clear why Donahue Fitzgerald needed to spend 234.8 hours drafting a complaint that duplicated the two complaints that had already been filed. This is demonstrated by the fact that Glancy Prongay billed 39 hours drafting its own "tag along" complaint. Class Counsel's contention that numerous attorneys and staff from four different law firms reasonably expended nearly 9,500 hours on a case involving just a few depositions and two dispositive motions cries out for a thorough evaluation of Class Counsel's time records.

Third, the summaries preclude consideration of whether Class Counsel delegated tasks appropriately within their respective firms. *Intel*, 6 F.3d at 623. During discovery, for example, partners at Wolf Haldenstein billed 848 hours and associates at the firm billed only 638 hours. Rifkin Decl. Ex. E. Without information about the specific discovery-related tasks performed by any of these partners or associates, it is impossible to assess whether resources were allocated appropriately and efficiently. *Zucker*, 968 F. Supp. at 1402 (concluding that "work billed by senior Class counsel should have been delegated to attorneys who charge at lower rates").

Fourth, the summaries do not indicate whether Mr. Rifkin or Mr. Newman billed for their time traveling from New York to Los Angeles. Nor do Class Counsel address whether such bills would be reasonable or appropriate. *See Jankey*, 2006 WL 4569361, at *4-5 (unreasonable to bill travel time absent evidence that it is customary to do so within the district). Nor is it clear from the summaries how much time Class Counsel billed for speaking with reporters or whether this time was "directly and intimately related to the successful representation of a client." *Davis v. City & Cty. of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992), *vacated in part on other grounds*; *see* Rifkin Decl. ¶¶ 32, 42 (noting that Wolf Haldenstein billed time giving interviews to the media).

2. Class Counsel's Hours Appear Excessive

The Supreme Court has made clear that fee awards should exclude "hours that are excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434. The billing summaries on their face suggest that Class Counsel billed an excessive number of hours to this case. For example, it seems excessive for Class Counsel to have spent 1,568 hours researching and drafting the initial complaints in this action. Although the complaints are detailed and rely on numerous historical records, many of those records were already compiled by Prof. Brauneis, who served as Class Counsel's consultant for the litigation. Dkt. 1; Klaus Decl. ¶¶ 11-14 & Exs. 2-4.[6]

It also appears excessive for Class Counsel to have spent a total of 469.5 hours preparing a single 25-page opposition brief to Warner/Chappell's motion to dismiss the Second Amended Complaint and appearing at a single hearing. Even if Warner/Chappell's standard-length motion were "complex and, in part, novel," Rifkin Decl. ¶ 24—and it was not—this would not have justified the excessive hours Class Counsel billed to this task. *See, e.g., Am. Apparel*, 2014 WL 10212865, at

[6] Notwithstanding the extensive hours spent on the initial complaints, these complaints had to be re-pleaded because they were unclear. Dkt. 71. The time spent on that effort is not included in the 1,568 hours dedicated to drafting the initial complaints.

*27 (quoting *Campon*, 289 F.3d at 553 (unreasonable to spend 480 hours preparing a summary judgment motion and preparing for and conducting a four-day trial)).

Likewise, it appears excessive for Class Counsel to have spent 2,751.3 hours during discovery given that the document productions were small, there was limited written discovery, and there were only a few depositions and a few discovery-related motions. Further, while the summary judgment index was substantial and there was a lengthy statement of facts, there were only two summary judgment briefs and two hearings. It does not seem reasonable for Class Counsel to have expended a total of 2,500.4 hours on that phase of the litigation alone. As a general matter, Class Counsel appear to have billed duplicative work throughout the litigation, with partners at all four firms billing for overlapping tasks.

3. Class Counsel Appear Not to Have Appropriately Delegated Tasks

Class Counsel's billing summaries suggest that Class Counsel failed to delegate tasks to associates who billed at much lower rates. This is pertinent because if senior partners record time for work that could have been done by junior attorneys, then the lodestar will be inflated by an inefficient allocation of work assignments. *See Zucker*, 968 F. Supp. at 1402. During the course of the litigation, partners at Wolf Haldenstein billed 70.7% of the firm's time, with associates billing just 29.3% of the aggregate time. Klaus Decl. ¶ 4. This distribution of labor is the *opposite* of what Judge Morrow found reasonable in *American Apparel*, where 66% of the attorney work was assigned to "lower-billing associates, staff attorneys, and of counsel." *Am. Apparel*, 2014 WL 10212865, at *26. In fact, two Wolf Haldenstein partners, who charge hourly rates of $820 and $770, respectively, accounted for 42.6% of the *entire* Lodestar. Rifkin Decl. Exs. B-I; Mot. at 9. Class Counsel's failure to appropriately allocate resources at a minimum warrants a substantial reduction in their lodestar. *See, e.g.*, *MacDougal v. Catalyst Nightclub*, 58 F. Supp. 2d 1101, 1106 (N.D. Cal. 1999) (reducing award where a partner with

30 years of trial experience billed for tasks that "could have been undertaken by less experienced associates").

B. Class Counsel Have Not Established that Their Billing Rates Are Reasonable

A fee applicant "must submit 'satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Weeks*, 2013 WL 6531177, at *31 (internal citation and alteration omitted). To establish the prevailing market rate in the community—here, the Central District of California—the applicant may rely on declarations from counsel or survey data. *Id*.

Class Counsel have submitted no acceptable evidence demonstrating the reasonableness of their claimed rates. They do not cite court decisions suggesting their rates are reasonable. They do not cite surveys suggesting their rates are reasonable. They do not even state in their declarations that their rates are consistent with prevailing market rates in this district. *Weeks*, 2013 WL 6531177, at *31. They simply proclaim that the rates they list are their "usual" and "customary" rates. *E.g.*, Rifkin Decl. ¶ 13. But Mr. Rifkin practices in New York. His "usual" rate is not necessarily consistent with the prevailing market rate in the Central District of California, which is the relevant market. *Id*. Moreover, Mr. Newman quotes the rate that Wolf Haldenstein *currently* charges for his work, Newman Decl. ¶ 13, but does not state that this is the rate he charged when he was a solo practitioner—let alone state that the rate is consistent with prevailing rates in the Central District. Similarly, Class Counsel have not stated whether the claimed rates are what they charge their paying clients now, as opposed to what they charged in 2013 through 2015, *i.e.*, while litigating the case. Class Counsel have given the Court no basis for finding that their requested hourly rates are reasonable.

C. Class Counsel Cannot Make the Lodestar Calculation Appear More Favorable by Using an Unjustified Multiplier

Even if Class Counsel ultimately submit evidence of *reasonable* hours billed at *reasonable* rates, there would be no basis for applying a positive multiplier to establish that a 33% fee award is warranted. The lodestar amount is "presumptively reasonable." *Bluetooth*, 654 F.3d at 941-42 (quotation marks and citation omitted). A district court may adjust a lodestar up or down "by an appropriate positive or negative multiplier reflecting a host of reasonableness factors." *Id.* (citation omitted). Upward adjustments are limited to "rare, exceptional cases." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1212 (9th Cir. 1986).

The Ninth Circuit considers the following factors in deciding whether to apply a lodestar multiplier: (1) time and labor required; (2) novelty and difficulty of the questions involved; (3) requisite legal skill necessary; (4) preclusion of other employment due to acceptance of the case; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) amount at controversy and the results obtained; (9) experience, reputation, and ability of the attorneys; (10) "undesirability" of the case; (11) nature and length of the professional relationship with the client; and (12) awards in similar cases. *Bluetooth*, 654 F.3d at 941-42 & n.7 (citation omitted).

Based on the limited and incomplete information in the record, and for the reasons discussed *supra* at 6-13, there is no basis for the Court to find a multiplier appropriate here. *See Weeks*, 2013 WL 6531177, at *34 n.157 ("Given the difficulty of accurately calculating the lodestar, the court need not address counsel's contention that they are entitled to a lodestar enhancement.").

III. Class Counsel Have Not Submitted Sufficient Information to Justify Their Claimed Expenses

Courts have discretion to award "reasonable" costs and expenses under Fed. R. Civ. P. Rule 23(h). Travel expenses, legal research, photocopying and the like are typically recoverable as long as they are reasonable. Courts have discretion to reimburse reasonable consulting and expert fees as well. *Am. Apparel*, 2014 WL 10212865, at *27-28. But counsel must submit sufficient records for the court to determine whether claimed costs are reasonable and appropriate. *See id*. at *29 (concluding that amounts charged for travel were reasonable based on records showing the costs of airfare, hotels, rental cars, and per diem food expenses).

Class Counsel request reimbursement of $204,461.40 in costs. Mot. at 14. Through declarations, they describe the broad categories of expenses they claim to have reasonably incurred—for example, legal research, transportation, expert fees, and copying costs. This is insufficient. For example, Class Counsel do not provide receipts, or even an itemized list, demonstrating that their travel expenses were reasonable. Consequently, the Court cannot tell if "class counsel seek reimbursement for 'first class airplane tickets, luxury hotel accommodations, and gourmet dinner meetings' at the expense of a common fund recovery." *Am. Apparel*, at *29 (citation omitted). Similarly, Wolf Haldenstein claims that it spent $21,309.71 on photocopying and reproduction, Rifkin Decl. ¶ 78, but they have not "submitted receipts from which the court [may] determine whether the amounts are reasonable." *Am. Apparel*, at *29. In *American Apparel*, Judge Morrow awarded only half of the $12,000 claimed photocopy expenses because it found that amount high for litigation that lasted a year longer than this case. *Id*. Class Counsel have not justified their substantially higher copying costs here. The Court should deny the expense request or require Class Counsel to submit records sufficient to prove the reasonableness of their claimed expenses.

CONCLUSION

For the foregoing reasons, the Court should deny Class Counsel's request for attorneys' fees. Alternatively, the Court should (1) deny Class Counsel's request for attorneys' fees without prejudice, (2) direct Class Counsel to file a corrected submission supported by sufficient records to establish the reasonableness of Class Counsel's claimed hours and billing rates, and (3) grant Warner/Chappell a reasonable opportunity to review the revised submission and supporting evidence and to submit an opposition to the renewed request. Likewise, the Court should deny Class Counsel's request for expenses or require it to submit records sufficient to demonstrate the reasonableness of the claimed expenses.[7]

DATED: May 27, 2016

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[7] Warner/Chappell does not object to Plaintiffs' request for incentive awards and so it is not responding to the arguments on that issue. To the extent that those arguments overlap with Class Counsel's arguments regarding their fee request, Warner/Chappell does object to the arguments.