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 9 **UNITED STATES DISTRICT COURT**
 10 **CENTRAL DISTRICT OF CALIFORNIA**
 11 **WESTERN DIVISION**

12 GOOD MORNING TO YOU
 PRODUCTIONS CORP., et al.,
 13
 Plaintiffs,
 14
 v.
 15 WARNER/CHAPPELL MUSIC, INC.,
 16 et al.,
 Defendants.
 17

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

DECLARATION OF KELLY M. KLAUS IN SUPPORT OF 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

1 I, KELLY M. KLAUS, hereby declare:

2 1. I am a member of the firm Munger, Tolles & Olson LLP, counsel for
3 Defendants Warner/Chappell Music, Inc. and Summy-Birchard, Inc. (jointly,
4 “Warner/Chappell”). I am admitted to practice law in the State of California and
5 before this Court. I submit this declaration in support of Warner/Chappell’s
6 Opposition to Plaintiffs’ Motion for Award of Attorneys’ Fees and Expenses.
7 Except where indicated, I have personal knowledge of the facts stated herein. As to
8 those matters stated on information and belief, I am informed of the facts and
9 believe them to be true. If called upon as a witness to testify as to the contents of
10 this declaration, I could and would competently do so.

11 **Class Counsel’s Reported Hours and Lodestar Figures**

12 2. To support their request for fees of \$4.62 million, Class Counsel
13 submitted timely declarations from Mark C. Rifkin (on behalf of Wolf Haldenstein
14 Adler Freeman & Herz LLP (“Wolf Haldenstein”)), Randall S. Newman (on behalf
15 of Randall S. Newman PC (“Newman PC”)), Daniel S. Schacht (on behalf of
16 Donahue Fitzgerald LLP (“Donahue Fitzgerald”)), and Kara M. Wolke (on behalf of
17 Glancy Prongay & Murray LLP (“Glancy Prongay”)). Omel A. Nieves filed an
18 untimely declaration and fee request yesterday (May 26).

19 3. The four timely declarations contain top-line summaries of the number
20 of hours spent by attorneys and staff at each of the respective law firms during eight
21 broad phases of the litigation. They also identify billing rates for the various
22 attorneys and staff. My firm has compiled the hours, billing rates, and lodestar
23 amounts reported in these four declarations. Attached hereto as **Exhibit 1** is a
24 summary of that compilation. My firm has not had sufficient time to consider or
25 process the information in the Nieves declaration. Accordingly, Exhibit 1 does not
26 reflect any figures from that declaration.

27 4. Based on the billing information submitted by Wolf Haldenstein,
28 attorneys at that firm collectively billed 4,106.3 hours during the course of this

1 litigation (\$2,808,519.50 in fees). Associates accounted for 1,203.2 of these hours
2 (\$480,124.00 in fees) and partners accounted for 2,904.3 of these hours
3 (\$2,329,517.50 in fees). This means that associates accounted for only 29.3% of
4 Wolf Haldenstein’s total hours (or 17.1% of the fees) and partners accounted for
5 70.7% of Wolf Haldenstein’s total hours (or 82.9% of the total fees).

6 **Initial Complaints in this Litigation**

7 5. In June 2013, Plaintiff Good Morning to You Productions Corp.
8 (“GMTY”) filed the initial complaint in this litigation in the United States District
9 Court for the Southern District of New York. *Good Morning to You Productions*
10 *Corp. v. Warner/Chappell Music, Inc.*, No. 1:13-CV-4040 (S.D.N.Y. filed June 13,
11 2013). GMTY was represented by Wolf Haldenstein and Newman PC.

12 6. Within one week, Plaintiff Robert Siegel, represented by the same
13 counsel, filed a substantially similar complaint in this Court. *Siegel v.*
14 *Warner/Chappell Music, Inc.*, No. 2:13-CV4418 (C.D. Cal. filed June 19, 2013).

15 7. The day after Siegel filed his complaint, Plaintiff Rupa Marya,
16 represented by Wolf Haldenstein, Newman PC, and Donahue Fitzgerald, filed
17 another substantially similar complaint in this Court. Dkt. 1.

18 8. Plaintiff Majar Productions LLC (“Majar”) filed another very similar
19 complaint in this Court in mid-July 2013. *Majar Productions, LLC v.*
20 *Warner/Chappell Music Inc.*, No. 2:13-CV5164 (C.D. Cal. filed July 17, 2013)

21 9. The initial four complaints were consolidated into a Second Amended
22 Complaint (“SAC”) in September 2013. Dkt. 59.

23 **Prof. Brauneis’s 2008 Article and Repository of Records**

24 10. The SAC alleged that “[v]arious legal scholars and copyright and music
25 industry experts agree with [Plaintiffs’ theory in this lawsuit], questioning the
26 validity of Defendants’ assertion of copyright in the Song, and supporting the
27 conclusion that *Happy Birthday* properly exists in the public domain.” Dkt. 59 ¶ 8.
28 The SAC further alleged: “For example, Professor Robert Brauneis, Professor of

1 Law and Co-Director of the Intellectual Property Law Program at George
2 Washington University, and a leading legal scholar in intellectual property law, has
3 stated that it is ‘doubtful’ that *Happy Birthday* ‘is really still under copyright.’” *Id.*

4 11. In May 2014, during a meet-and-confer in this litigation, Mr. Rifkin,
5 Plaintiffs’ lead counsel, told me that Prof. Brauneis was serving as a consultant for
6 Plaintiffs in the case. Mr. Rifkin told me that Prof. Brauneis had been having
7 discussions with individual Plaintiffs and/or their counsel since at least May 2012.

8 12. Attached hereto as **Exhibit 2** is a true and correct copy of the Social
9 Science Research Network (“SSRN”) webpage from which Prof. Brauneis’s article,
10 “Copyright and the World’s Most Popular Song,” is and has been available since
11 (according to the “Date posted”) March 21, 2008.

12 13. Attached hereto as **Exhibit 3** is a true and correct copy Prof. Brauneis’s
13 article, downloaded from the SSRN website referenced in the preceding paragraph.
14 Page 2 of this article (Ex. 3 at 17) states that over 100 documents “have been
15 published on the website of the Jacob Burns Law Library at The George
16 Washington University Law School in conjunction with this article.”

17 14. I am informed and believe that the online repository of documents
18 relating to *Happy Birthday* that Prof. Brauneis made publicly available in March
19 2008 is still available today at the same URL cited in footnote 10 of the initial SSRN
20 publication of Brauneis’s article (Ex. 3 at 17 n.10). Attached hereto as **Exhibit 4** is
21 a true and correct copy of the home page of the online repository.

22 **Discovery and Other Proceedings**

23 15. I am informed and believe that, during the course of this litigation:
24 (a) Warner/Chappell produced approximately 2,930 pages of documents; (b)
25 Plaintiffs produced approximately 6,360 pages of documents and 23,290 pages
26 comprising complete volumes of the Catalog of Copyright Entries; (c) third parties
27 (including the Hill Foundation, before it intervened) produced approximately 785
28 pages of documents; and (d) the Hill Foundation and ACEI, following their

1 intervention in late 2015, produced approximately 4,775 pages of documents.
2 Collectively, excluding Plaintiffs' production of copies of Catalogs of Copyright
3 Entries, approximately 14,850 pages of documents were exchanged in discovery.

4 16. During discovery, Class Counsel deposed three individuals:

5 (a) Warner/Chappell's Rule 30(b)(6) witness, (b) Warner/Chappell's Vice President
6 of Administration, and (c) ASCAP's Rule 30(b)(6) witness. Class Counsel deposed
7 ASCAP's Rule 30(b)(6) witness on two occasions. The initial deposition lasted 39
8 minutes and the continued deposition lasted 45 minutes. Class Counsel defended
9 one deposition, that of their expert musicologist.

10 17. Class Counsel filed two joint discovery motions. The first challenged
11 the timeliness and adequacy of Warner/Chappell's privilege log and certain of its
12 privilege claims. Dkts. 101. Class Counsel withdrew that joint stipulation
13 following a telephonic hearing with Magistrate Judge Wilner and subsequent meet-
14 and-confers between the parties. Dkt. 114. The second discovery motion sought to
15 overrule a different privilege claim that Warner/Chappell asserted over a document
16 produced by ASCAP. Dkt. 124. Magistrate Judge Wilner denied Plaintiffs' motion.
17 Dkt. 132. Plaintiffs asked this Court to overturn Judge Wilner's order, Dkt. 145,
18 and this Court denied Plaintiffs' motion for review, Dkt. 164.

19 18. Class Counsel's first four complaints expressly alleged that the *Happy*
20 *Birthday* lyrics were included on the E51990 deposit copy. Dkt. 1 ¶ 91 ("The lyrics
21 to *Happy Birthday to You* were included on the work registered with the Copyright
22 Office as Reg. No. E51990"); Dkt. 21 ¶ 94 (same); Dkt. 59 ¶ 98 (same); Dkt. 72 ¶
23 98 (same).

24 19. Plaintiffs revised their allegation regarding the E51990 deposit copy in
25 their Fourth Amended Complaint filed in April 2014. Dkt. 95 ¶ 98.

26 20. After Class Counsel filed a Fourth Amended Consolidated Complaint
27 alleging that "[s]ome lyrics to *Happy Birthday to You* may have been included on
28 the work registered with the Copyright Office as Reg. No. E51990," *id.* (emphasis

1 added), Warner/Chappell arranged for staff from its U.K. affiliate to search for
2 deposit records at the British Library. Warner/Chappell's U.K. affiliate was able to
3 locate the British Museum's December 1935 deposit records for *Happy Birthday*.
4 Class Counsel refused to consent to Warner/Chappell's request that the Court
5 consider these records on summary judgment. Dkt. 236 (opposition to Defendants'
6 motion for leave to file supplemental evidence).

7

8 I declare under penalty of perjury under the laws of the United States that the
9 foregoing is true and correct to the best of my knowledge, information and belief,
10 and that this declaration was executed this 27th day of May 2016, at San Francisco,
11 California.

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KELLY M. KLAUS

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