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11 **UNITED STATES DISTRICT COURT**
 12 **CENTRAL DISTRICT OF CALIFORNIA -**
 13 **WESTERN DIVISION**

14	GOOD MORNING TO YOU)	Lead Case No. CV 13-04460-GHK (MRWx)
15	PRODUCTIONS CORP., <i>et al.</i> ,)	
16	Plaintiffs,)	REPLY MEMORANDUM OF
17)	POINTS AND AUTHORITIES IN
18	v.)	FURTHER SUPPORT OF
19	WARNER/CHAPPELL MUSIC,)	PLAINTIFFS' COUNSEL'S
20	INC., <i>et al.</i>)	REQUEST FOR ATTORNEYS' FEES
21	Defendants.)	AND EXPENSES
22)	Room: 650
23)	Judge: Hon. George H. King, Chief
24)	Judge
25)	Date: June 27, 2016
26)	Time: 9:30 a.m.
27)	
28)	

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1 Even with the widespread notice and extensive media coverage given to the
2 Action and to the Settlement, no Settlement Class Member has objected to any part
3 of the Settlement, including Plaintiffs' Counsel's request for attorneys' fees and
4 reimbursement of their out-of-pocket expenses, and only three foreign rights
5 societies have requested exclusion from Settlement Class. *See* Reply Declaration of
6 Mark C. Rifkin in Further Support of Plaintiffs' Motion for Final Approval of
7 Settlement and Request for Attorneys' Fees and Expenses ("Rifkin Reply Decl."), ¶¶
8 3-4. Defendants alone oppose the request for fees and expenses. Fee requests "should
9 not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437
10 (1983). Having obtained "exceptional results" here, including the historic vindication
11 of significant individual rights to use *Happy Birthday* at the risk of not prevailing or
12 recovering any attorneys' fees, Plaintiffs' Counsel "should recover a fully
13 compensatory fee," and even an "enhanced award may be justified." *Id.* at 435. In
14 fact, Plaintiffs' Counsel welcome the scrutiny that Defendants' opposition invites
15 because Plaintiffs' request appears even more reasonable after such scrutiny.¹

16 **I. THE SPECTACULAR RESULTS ACHIEVED IN THE ACTION**
17 **FULLY SUPPORT PLAINTIFFS' COUNSEL'S FEE REQUEST**

18 In their effort to reduce Plaintiff' Counsel's fees, Defendants attempt to
19 downplay the successful outcome in the Action. That is pure nonsense. Plaintiffs
20 sought to achieve three goals here: (1) a judicial determination that the Song is in the
21 public domain; (2) an end to Defendants' and the Intervenors' demand for payment
22 for the Song; and (3) a cash payment to Class members who paid for the Song in the
23

24
25 ¹ Defendants' opposition makes clear that the fee request in this case does not
26 present the additional risk of "a package deal," where counsel structure the
27 settlement around an advance understanding on the plaintiff's attorneys' fees. *Cf. In*
28 *re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011)
(questioning such an arrangement in that case).

1 past.² Through the tireless efforts of Plaintiffs’ Counsel over three long years of
2 arduous litigation, the Settlement accomplishes all three goals. By any objective
3 measure, this Action was an “extraordinary” case and a complete success for
4 Plaintiffs.

5 The attorneys’ fees awarded to Plaintiffs’ Counsel should take into
6 consideration the resounding victory they achieved through their hard-fought efforts.
7 *See Bluetooth*, 654 F.3d at 942 (“Foremost” among considerations for an fee award is
8 “the benefit obtained for the class.”) This case, and the Court’s historic summary
9 judgment ruling – the finality of which is fully preserved by the Settlement – have
10 been widely acclaimed around the world. *See* Declaration of Mark C. Rifkin in
11 Support of Final Approval of Class Action Settlement and Request for Attorneys’
12 Fees and Expenses (“Rifkin Decl.”) (Dkt. 324), ¶¶ 43-46. Defendants’ denial
13 notwithstanding, the extraordinary results achieved in the Action easily support
14 Plaintiffs’ Counsel’s fee request.

15 While some may have wanted Defendants to return even more of the money
16 they took from the public under their bogus copyright claim for a song they never
17 owned, the fact is that \$14 million is a substantial settlement payment. In fact, based
18 upon the Settlement Administrator’s current estimate, it appears that all Period One
19 Settlement Class Members will receive ***approximately 87% of their claims*** and that
20 all Period Two Settlement Class Members will receive ***100% of their discounted***

22 ² As noted in *Chalmers v. City of Los Angeles*, 796 F.2d 1205 (9th Cir. 1986)
23 (the case relied upon by Defendants for this point) (Defendants’ Opposition to
24 Plaintiffs’ Motion for Award of Attorneys’ Fees and Expenses (“Def. Br.”) at 20
25 (Dkt. 332)), the vindication of any significant individual rights, the complexity of the
26 litigation, the ‘great benefit’ to the class, the ‘riskiness of the lawsuit,’ and the
27 contingent nature of the action all strongly suggest an enhanced fee award and are
28 considered “extraordinary” circumstances. *Chalmers*, 796 F.2d at 1211-13 (business
owner challenged application of municipal ordinance to its business of selling T-
shirts). All of these “extraordinary” circumstances are present here.

1 *claims*, even after Plaintiffs’ Counsel are paid in full. It also appears that the Net
2 Settlement Fund will be *almost completely exhausted* by the payment of those
3 claims. *See* Rifkin Reply Decl., ¶¶ 7-8.³

4 **A. The Settlement Ends Defendants’ Wrongful Practices and**
5 **Achieves a Complete Victory for the Class**

6 Defendants argue that the results achieved in the Action do not justify
7 Plaintiffs’ Counsel’s request for \$4.62 million in attorneys’ fees. In a stunning
8 display of arrogance, Defendants oppose the fee request by denying that this case
9 exposed (and now ends) their *decades of wrongdoing*, arguing that the Court’s
10 summary judgment decision – the finality of which is assured by the Settlement in
11 the face of Defendants’ motion for reconsideration and alternative request for
12 interlocutory appeal – “did not address the propriety of Summy’s or anyone else’s
13 actions.” Def. Br. at 6. Defendants demonstrate a profound disregard for reality.⁴

14 In its historic summary judgment ruling, based upon the wealth of evidence
15 uncovered by Plaintiffs’ Counsel, the Court found as a matter of fact that Defendants
16

17 ³ Even if some small portion of the Settlement Fund were unclaimed, the Court
18 should consider the entire sum of \$14 million (plus the \$15 million in future savings)
19 in awarding attorneys’ fees to Plaintiffs’ Counsel. In *Williams v. MGM-Pathe*
20 *Communs. Co.*, 129 F.3d 1026 (9th Cir. 1997), the Ninth Circuit held that the district
21 court “abused its discretion by basing the fee on the class members’ claims against
22 the fund rather than on a percentage of the *entire fund* or on the lodestar.” *Id.* at 1027
23 (emphasis added). In *Williams*, as here, any unclaimed portion of the settlement fund
24 would be returned to the defendants. Likewise, in *Masters v. Wilhelmina Model*
25 *Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007), the Second Circuit held that the district
26 court committed reversible error by “calculat[ing] the percentage of the Fund on the
27 basis of the claims made against the Fund, rather than on the *entire Fund* created by
28 the efforts of counsel.” *Id.* at 436-37 (emphasis added).

⁴ Not coincidentally, that same disregard for reality explains how Defendants
and their predecessors could demand and collect millions of dollars from thousands
of innocent victims – sometimes as much as \$100,000 for a single use – *for a Song*
they never owned.

1 do not own, and their predecessors (including Summy) never owned, a copyright to
2 the Song. Through Plaintiffs' Counsel's diligent efforts, the entire world now knows
3 that Defendants and their predecessors, exploiting the draconian penalties for willful
4 infringement recoverable under the Copyright Act, demanded payment for use of the
5 Song – *which they never owned* – since 1935. Of course Defendants engaged in
6 wrongful conduct: demanding licensing fees for rights they and their predecessors
7 never owned. Defendants' misconduct – *selling what you don't own* – is the very
8 essence of wrongdoing. Perhaps even more importantly, the Settlement preserves the
9 finality of the Court's summary judgment decision. Defendants' argument that the
10 Settlement does not end any “wrongful practice” pushes credibility past the breaking
11 point, and the Court should swiftly reject it.

12 Defendants argue as well that Plaintiffs' Counsel did not achieve a complete
13 victory because the Court's summary judgment decision did not resolve the
14 Intervenors' claim to own the Song's copyright. Def. Br. at 6-7. That argument is
15 simply wrong. No one disputes that the Court's decision left unresolved whether the
16 Intervenors, as successors to the Hill Sisters, owned the copyright. But the
17 *Settlement* forever resolves that question as well. Under the Settlement, Defendants
18 *and the Intervenors* “relinquish their ownership claims to the Song and all their
19 rights to the Song.” Settlement Agreement (Dkt. 302) § 2.2.1. Thus, whatever claim
20 the Intervenors may have had is extinguished for all time by the Settlement. In their
21 zeal to oppose Plaintiffs' Counsel's fee request, Defendants apparently would have
22 the Court ignore this very important aspect of the Settlement.

23 Defendants also argue that Plaintiffs' Counsel are not entitled to \$4.62 million
24 in fees because they did not consent to the Song being declared in the public domain.
25 Defendants' argument is merely an exercise in hyper-technical hair-splitting. As an
26 integral part of the Settlement, the Court will declare that the Song is in the public
27 domain. Settlement Agreement § 2.2.2. Defendants and the Intervenors – the only
28 parties who ever claimed to own any rights to the Song – expressly agreed not to

1 oppose entry of a declaratory judgment that the Song is in the public domain. *Id.*⁵
2 Defendants’ desperate argument that they did not consent to the Song being declared
3 in the public domain simply misses the point that, as a result of the Settlement, the
4 Song *will* be in the public domain.

5 **B. The Total Settlement Value Includes the \$14 Million**
6 **Settlement Fund Plus \$15 Million in Future Savings**

7 Defendants also argue that Plaintiffs are not entitled to a fee award above the
8 Ninth Circuit’s 25% “benchmark” for attorneys’ fees in common fund cases.⁶

9 ⁵ In addition, despite worldwide notice and extensive media coverage of the
10 Settlement, no one else has come forward to claim an ownership interest in any
11 *Happy Birthday* copyright. *See* Rifkin Reply Decl., ¶ 4. Defendants even questioned
12 whether such media coverage even related to Plaintiffs’ Counsel’s representation of
13 Plaintiffs. Def. Br. at 17 (citing *David v. City & Cnty. of San Francisco*, 976 F.2d
14 1536, 1545 (9th Cir. 1992). As the Court noted in *David*, a civil rights case on
15 behalf of female and minority firefighters, press conferences and public relations
16 work “is directly and intimately related to the successful representation of a client”
17 and civil rights attorneys may do the same and be compensated. *Id.* at 1545. Media
18 coverage here did “contribute, directly and substantially, to the attainment” of
19 Plaintiffs’ litigation goals. *Id.*

20 ⁶ In “most common fund cases, the award exceeds that [25%] benchmark.” *In re*
21 *Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2007)
22 (citations omitted). In *Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-0324 AWI
23 SKO, 2012 U.S. Dist. LEXIS 160052 (E.D. Cal. Oct. 31, 2012), cited by Defendants
24 (Def. Br. at 11), the district court noted that “the typical range of acceptable
25 attorneys’ fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement
26 value.” In another case cited by Defendants (Def. Br. at 11), *In Fernandez v. Vict.*
27 *Secret Stores LLC*, No. CV 06-04149 MMM (SHx), 2008 U.S. Dist. LEXIS 123546
28 (C.D. Cal. July 21, 2008), the Court awarded a fee of \$2.89 million (equal to 34% of
an \$8.5 million settlement fund, for a multiplier of 1.8 times the lodestar of
approximately \$1.6 million.

Defendants’ so-called ‘windfall’ cases, applying a downward adjustment to the
percentage of the fund requested (Def. Br. at 5), are not applicable. For example, in
Fischel v. Equitable Life Assur. Soc’y of the United States, 307 F.3d 997, 1011 (9th
Cir. 2002), the district court awarded a fee based on lodestar alone, rather than value
of settlement fund. The district court was concerned about a windfall for plaintiffs’
(continued...)

1 Defendants’ argument ignores the fact that the Settlement achieves not just the \$14
2 million Settlement Fund, but also ends the demand for payment for the Song (which
3 adds approximately \$15 million more to the value of the Settlement – based upon the
4 uncontroverted calculation submitted by a respected intellectual property valuation
5 expert, Daniel R. Roche), ends Defendants’ bogus copyright claim, and declares the
6 Song to be in the public domain.⁷ Leaving apart the inestimable value of the judicial
7 declaration that the Song belongs to the public, the total cash value of the Settlement
8 is **actually \$29 million**, not just the \$14 million Settlement Fund. Plaintiffs’
9 Counsel’s request for \$4.62 million in fees is **just 15.9% of the total cash value of**
10 **the Settlement**, substantially below the 25% benchmark.⁸

11 Defendants assert that Mr. Roche’s calculations do not take into consideration
12 how the change will affect the cost for ASCAP’s blanket license. Def. Br. at 7. That
13 assertion is patently false. As Mr. Roche stated clearly in his declaration, he

14 _____
(...continued)

15 counsel because the settlement was reached early in the litigation, with no discovery
16 and before any protracted litigation of any kind. The Ninth Circuit reversed for a
17 determination as to whether it provided “adequate compensation” because the district
18 court failed to consider an appropriate risk multiplier for non-payment and delay. *See*
19 *also In re Cadence Design Sys., Inc. Sec. & Derivative Litig.*, No. C-08-4966 SC,
20 2012 U.S. Dist. LEXIS 56785 (N.D. Cal. Apr. 23, 2012) (fee request of \$9.54
21 million, which was 25% of a \$38 million common fund, was reduced as
unreasonable based on a lodestar of just \$2.5 million in fees and was adjusted to \$7.2
million with a risk multiplier of 2.88) (Def. Br. at 5).

22 ⁷ Defendants do not dispute the fundamental legal principle that injunctive or
23 non-monetary relief may be considered in setting attorneys’ fees in a common fund
case. *See Staton v. Boeing Co.*, 327 F.3d 938, 973 (9th Cir. 2003).

24 ⁸ *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011),
25 which Defendants cite five times (Def. Br. at 5, 6, 20), is easily distinguishable. In
26 that case, there was no monetary benefit to the class at all, and the degree of success
27 was dubious. Here, Plaintiffs have obtained a \$14 million cash payment, a direct
28 savings of another \$15 million (based upon an expert valuation), and a declaration
that the Song is in the public domain.

1 calculated the value of future payments both with and without ASCAP: “Because
2 Plaintiffs do not know whether [ASCAP] will or will not continue to charge and
3 collect for the Song, I estimated the projected future earnings *with and without*
4 *ASCAP earnings*.” Declaration of Daniel R. Roche, CPA/ABV, ASA in Support of
5 Approval of Proposed Class Action Settlement (Dkt. 801-2), ¶ 9 (emphasis added).
6 The range of savings Mr. Roche calculated – \$14 million to \$16.5 million – *reflects*
7 *eliminating the ASCAP earnings* from the calculation. Plaintiffs’ Counsel simply
8 used \$15 million (slightly below the mid-point of that range) for convenience.⁹

9 Defendants urge the Court to ignore the additional \$15 million benefit because
10 it supposedly will not go to the Settlement Class. Def. Br. at 7-8. They cite *Weeks v.*
11 *Kellogg Co.*, No. CV 09-08102 (MMM) (RZx), 2011 U.S. Dist. LEXIS 155472, at
12 *100-104 (C.D. Cal. Nov. 23, 2011) (emphasis added), in which the Court declined
13 to include the value of a *cy pres* donation that did not benefit any class members in
14 calculating the attorneys’ fee percentage in that case, finding “no *indirect* benefit to
15 the class from the defendant’s giving the money to” a charity. Here, by sharp
16 contrast, as Defendants surely know, the \$15 million savings will be shared by many
17 Settlement Class Members. A large number of Settlement Class Members (such as
18 motion picture, television, and recording studios) paid Defendants or their
19 predecessors to use the Song many times over the years, and undoubtedly would
20 have continued to do so in the future but for the resounding success achieved in this
21 case. All those Settlement Class Members will receive a *direct financial benefit* – a

22
23 ⁹ Defendants offer no alternative calculations or expert declaration of their own,
24 just mere speculation that the cost for the blanket license will be the same 10 or 15
25 years from now as it is today. While it is extremely unlikely that ASCAP will
26 continue to charge for the Song after it enters the public domain, no one knows what
27 part of the cost of the blanket license is attributable to *Happy Birthday* (or to any
28 song for that matter). Nor does anyone know what ASCAP will charge for its blanket
license next year, five years from now, or 20 years from now. Absent any factual
support, the Court should disregard Defendants’ sham hypothesis entirely.

1 dollar-for-dollar saving – from the \$15 million that Defendants will not charge for
2 the Song in the future. In addition, many more Settlement Class Members will
3 receive an *indirect financial benefit*, in that they will be encouraged to use the Song
4 more often in the future because they will not be required to pay for it. Accordingly,
5 Defendants’ argument is just plain wrong.

6 Significantly, in *Weeks*, the Court elected to award plaintiffs’ counsel **30**
7 ***percent of the direct cash payment*** to class members as their fee. In doing so, the
8 Court justified the upward departure from the 25% benchmark by noting the value of
9 the *cy pres* payment. The Court also noted that the fee award, which equaled 16.2%
10 of the total value of the settlement (including the *cy pres* contribution) was an
11 appropriate discount given that half of the settlement value was not going to **any**
12 class members. Thus, *Weeks* fully supports Plaintiff’s Counsel’s fee request in this
13 case, in which Plaintiffs’ Counsel seek a fee of **just 15.9%** of the total Settlement
14 value, and the Court should swiftly reject Defendants’ misplaced argument.

15 **C. The Novelty and Complexity of the Action Fully Supports**
16 **Plaintiffs’ Counsel’s Fee Request**

17 Defendants also deny that this case was novel and complex. Defendants’
18 argument is absurd. As the Court well knows, this Action raised many issues that
19 were novel and extremely complicated. Several legal issues had no clear answer and
20 required creative research and argument. For example, on the issue of abandonment,
21 the Court observed: “both Parties have cited numerous cases in support of their
22 respective positions regarding abandonment. Unfortunately, we can discern no clear
23 rule for what does or does not constitute abandonment.” Dkt. 244 at 23. The case also
24 was extremely complicated factually because of its age and the lack of any percipient
25 witnesses. Many of the most important documents (including the deposit copy for
26 E51990 and the written transfers from Jessica Hill to Summy Co.) were missing, and
27 other documents were practically impossible to find (such as the complaints filed by
28 Summy Co. in the 1940s).

1 The factual and legal disputes were made far more complicated because
2 Defendants could not produce *any* of the most important documents in the case,
3 including the original copyright certificate, the deposit copy for E51990, and the
4 agreements transferring rights from Jessica Hill to Summy Co. In place of those
5 fundamental documents – which the owner of a property right as important and
6 valuable as the *Happy Birthday* copyright would be expected to possess – Defendants
7 offered hypothetical copies of the work they theorize was covered by E51990, and
8 even went so far as to submit an ersatz copyright “certificate,” Ex. 101, falsely
9 insisting (without any legal or factual basis) that the actual, *certified* copyright
10 certificate that Plaintiffs’ Counsel obtained from the Register of Copyrights was *not*
11 the genuine certificate.

12 Plaintiffs’ Counsel’s task was made infinitely more difficult and time-
13 consuming by Defendants’ misplaced, “scorched-earth” defense of its bogus
14 copyright claim. In addition to raising every conceivable legal defense (many of
15 which were nothing more than faulty, hyper-technical legal arguments), they also
16 offered a plethora of convoluted, often conflicting, baseless factual defenses of the
17 copyright. Defendants’ Answer to the Fourth Amended Complaint asserted ten
18 affirmative defenses along with a reservation of rights to assert additional legal
19 defenses.¹⁰ Dkt. 99 at 29-31. Each of those defenses required a thorough
20 investigation and response from Plaintiffs’ Counsel.

21 Most importantly, throughout the litigation, taking advantage of missing
22 copyright records, Defendants variously insisted – without *any* factual support
23 whatsoever – that the Song’s lyrics were written by Mildred Hill, by Patty Hill, by
24 Preston Ware Orem, by Mildred and Patty together, and by Mildred (and/or Patty)

26 ¹⁰ Defendants’ affirmative defenses included lack of particularity, statute of
27 limitations, laches, waiver, estoppel, lack of standing, lack of damages, unjust
28 enrichment, and unconstitutional. Dkt. 99 at 29-31.

1 together with Mr. Orem. Apparently, Defendants offered all those various (and
2 constantly shifting) factual hypotheses to support their copyright ownership claim,
3 falsely arguing that the copyright registration covered any and all work done by
4 Mildred (based upon their fallacious assertion that her name was on the missing
5 copyright certificate), by Mr. Orem (based upon his status as Summy Co.’s
6 employee), and by Patty (based upon Defendants’ unsubstantiated assertion that her
7 name was on the missing deposit copy). Eventually, after insisting throughout the
8 litigation that Mr. Orem wrote the lyrics, Defendants admitted he did not do so,
9 refuting their own unsubstantiated factual argument. Mr. Orem was the only one of
10 the three would-be “authors” connected in any way to the copyright by any evidence,
11 and his contribution was limited to the piano arrangement he composed.

12 In addition, the Court will recall that Defendants inexplicably withheld a
13 crucial document – the illegible copy of the authorized 1927 publication of *Happy*
14 *Birthday* in *The Everyday Song Book* without a copyright notice¹¹ – until *seven*
15 *months after* the cross-motions for summary judgment were filed. Defendants’ 11th-
16 hour production of that illegible document – which they simply say was “mistakenly”
17 not produced – prompted even more investigation by Plaintiffs’ Counsel, who
18 eventually located several prior publications of *The Everyday Song Book*, including a
19 1922 publication without a copyright notice.

20 All these factors made this case novel and highly complex.

21 **II. THE EXHAUSTIVE WORK DONE BY PLAINTIFFS’ COUNSEL**
22 **FULLY SUPPORTS THEIR FEE REQUEST**

23 Defendants next argue that Plaintiffs’ Counsel are not entitled to \$4.62 million
24 in attorneys’ fees because they have overstated the amount of work they actually
25 performed and because their hourly rates may be excessive. Both of those arguments
26

27 ¹¹ That publication without a copyright notice would have extinguished any
28 copyright under Section 9 of the 1909 Copyright Act, 17 U.S.C. § 9.

1 are entirely baseless.¹²

2 As the Court already knows, the Action was actively litigated for three years
3 before the Settlement was achieved. The Court observed first-hand the excellent
4 quality of Plaintiffs' Counsel's written work and of their oral advocacy as well. That
5 work was the result of Plaintiffs' Counsel's exhaustive and meticulous preparation,
6 representing just a small fraction of the time they invested in the Action to achieve
7 this overwhelming success: the proverbial tip of the iceberg.

8 Plaintiffs and Defendants vigorously disputed many legal and factual issues,
9 there was active motion practice, and discovery was often contentious. The summary
10 judgment proceedings were lengthy and extremely complex. Plaintiffs and
11 Defendants submitted two rounds of briefing, as well as supplemental briefing, on
12 the cross-motions for summary judgment, and the factual record they compiled was

13 ¹² In *Fischel*, 307 F.3d at 1007, cited by Defendants (Def. Br. at 5), the Ninth
14 Circuit held that there is a "strong presumption" that the lodestar represents a
15 reasonable fee. The other cases Defendants cite in support of their argument that
16 Plaintiffs' Counsel's hours are not reasonable (Def. Br. at 15-18) are easily factually
17 distinguishable. In *Jankey v. Beach Hut*, No. CV 05-3856 SVW (JTx), 2006 U.S.
18 Dist. LEXIS 96365, at *11-12 (C.D. Cal. Dec. 19, 2006), the district court noted that
19 it need not "examine and assess the validity of each billed task," but refused to
20 compensate plaintiffs' counsel for travel time for his repeated inspections of a raised
21 concrete pad which prevented reasonable wheelchair access *after* informing counsel
22 that such inspections were *not* recoverable travel time. In *Zucker v. Occidental*
23 *Petroleum Corp.*, 968 F. Supp. 1396, 1402 (C.D. Cal. 1997), the Court found class
24 counsel's hours were reasonable "for the necessary tasks that accompany litigation
25 such as this," but criticized their practice of billing by the quarter-hour (which did
26 not occur here) rather than in tenths (as Plaintiffs' Counsel did here). In *Ko v. Natura*
27 *Pet Prods.*, No. C 09-02619 SBA, 2012 U.S. Dist. LEXIS 128615, at *33 (N.D. Cal.
28 Sept. 10, 2012), the plaintiffs' counsel claimed to have interviewed more than 100
factual witness and reviewed 12,000 pages of documents, but provided no billing
entries or records reflecting whether the work was actually done. In *Intel Corp. v.*
Terabyte Int'l, Inc., 6 F.3d 614, 623 (9th Cir. 1993), the Ninth Circuit reversed a fee-
shifting award because the district court "merely awarded the fees without
elaboration."

1 enormous. Two hearings were held before the Court ruled on the cross-motions for
2 summary judgment. The Court is well-aware of the meticulous preparation of
3 Plaintiffs' Counsel for the summary judgment hearings –Plaintiffs' success could not
4 have been achieved without their counsel's exhaustive preparation.¹³ In addition, all
5 the preparations necessary for a bench trial on Claim One were completed before the
6 Parties entered into the Settlement Agreement on December 8, 2015, the same day on
7 which the all the pre-trial filings were due. *See* Rifkin Reply Decl., ¶ 20.

8 **A. Plaintiff's Counsel's Meticulous Pre-Suit Investigation Was**
9 **Necessary, Reasonable, and Appropriate**

10 First, Defendants complain that Plaintiffs' Counsel's work on the initial
11 complaints "seems excessive" or "appears excessive." *See* Def. Br. at 17-18. Their
12 half-hearted criticism is misplaced. To the contrary, the 1,296 hours spent on their
13 extensive pre-suit investigation and drafting was commensurate with the difficulty of
14 the task they undertook.¹⁴

15 ¹³ By comparison, *Campos v. City of Blue Springs*, 289 F.3d 546, 549 (8th Cir.
16 2002), cited by Defendants (Def. Br. at 10), was a routine individual employment
17 discrimination case. The district court found that the hours billed for a simple
18 summary judgment motion, which the plaintiff lost, in part, in that case did not
19 generate anything like the complex summary judgment record in this case (consisting
20 of over 120 exhibits and a voluminous statement of facts covering a detailed history
21 of over 100 years), and did not require anything like the sophisticated research and
22 analysis required here. Judge Morrow in *American Apparel* also found *Campos* to be
23 inapplicable for the same reasons in her analysis of a securities class action fee
award. *In re American Apparel, Inc S'holder Litig.*, No. CV-10-06352 MMM
(JCGx), 2014 U.S. Dist. LEXIS 184548, at *86-87 (C.D. Cal. July 28, 2014).

24 ¹⁴ Plaintiffs' Counsel spent 1,568 hours in this phase of the litigation. Lead
25 Counsel and Mr. Newman spent 1,294 hours investigating potential claims and
26 drafting initial complaints for Plaintiffs GMTY and Siegel. Unbeknownst to them,
27 Plaintiff Rupa's counsel was doing a concurrent investigation of her claim based on a
28 live performance and recording of HBTY. Plaintiff Rupa's investigation was 234.8
hours and focused on the different aspects of her claim and utilized different research
tools. *See* Reply Declaration of Daniel R. Schacht in Support of Motion for
(continued...)

1 Before the first complaint was filed, Plaintiffs' Counsel were aware of the
2 historical significance of the litigation as an unprecedented copyright challenge to the
3 world's most famous song. Recognizing the worldwide attention the case was certain
4 to receive, and anticipating the vigorous defenses that Defendants were certain to
5 mount, an exhaustive pre-suit investigation (as documented in the declarations
6 previously submitted to the Court) was not only reasonable and appropriate, but was
7 necessary under these circumstances. *See* Rifkin Reply Decl., ¶¶ 9-16. Plaintiffs'
8 Counsel's expectations were spot-on: media around the world took note, reporting
9 extensively on the Action from the day it was filed. That media attention has
10 continued to this day. And Defendants, represented by one of the country's premier
11 and most experienced copyright law firms, left virtually no issue undisputed and
12 spared virtually no expense in defense of their copyright claim. Plaintiffs prevailed
13 only because of the diligent preparation and exhaustive work by Plaintiffs' Counsel.

14 Plaintiffs' Counsel were especially mindful of the historic nature of the
15 analysis and ruling they would ask the Court to make (to rule that the Song belongs
16 to the public). The history of *Happy Birthday* began more than a century ago and was
17 factually complex not merely because of this substantial passage of time but due to
18 the Song's complicated "paper" trail as well. No other litigant had ever gathered all
19 of this material into one action and, as a result, no court had ever ruled on the scope
20 or validity of the *Happy Birthday* copyright. Plaintiffs' Counsel were keenly aware
21 that, in an exercise of the utmost care, the Court would rightly demand scrupulous
22 proof before resolving the copyright dispute over the famous song. Therefore,
23 Plaintiffs' Counsel completed a comprehensive pre-filing investigation and used their
24 maximum efforts to conduct the litigation in a manner befitting the significance of
25 the Action and of the request Plaintiffs would make of the Court. *See* Rifkin Reply

26
27 _____
(...continued)

28 Attorneys' Fees, ¶ 7.

1 Decl., ¶¶ 9-28.

2 Most of the pre-suit investigation was done by Randall S. Newman and Mark
3 C. Rifkin. Mr. Newman, a solo practitioner at the time, spent 928 hours conducting
4 extensive historical research and drafting the initial complaint. *See* Rifkin Reply
5 Decl., ¶¶ 9-16; Reply Declaration of Randall S. Newman in Support of Final
6 Approval of Class Action Settlement and Request for Attorneys’ Fees and Expenses
7 (“Newman Reply Decl.”), ¶¶ 3-4. Because of the Song’s long history, many of the
8 relevant records were not readily available. Consequently, to complete the research
9 necessary to mount the challenge, Mr. Newman spent several months scouring
10 records of the Copyright Office, from the Library of Congress, in the National
11 Archive, the New York Courts, several public libraries, and other public sources of
12 information. Newman Reply Decl., ¶¶ 16-26. The result of Mr. Newman’s efforts,
13 supplemented by additional research conducted by Lead Counsel, was a meticulously
14 prepared initial complaint, setting forth Plaintiffs’ claims in detail.

15 Reflecting Plaintiffs’ Counsel’s diligent preparation, the basis of those claims
16 – neither Mildred Hill nor Mr. Orem wrote the *Happy Birthday* lyrics; Mr. Orem,
17 Summy Co.’s employee-for-hire, composed only a specific piano arrangement of
18 *Happy Birthday*; the copyright application for E51990 never claimed that Mildred
19 Hill or Mr. Orem wrote the lyrics; in the copyright application, Summy Co. claimed
20 to own only a copyright in the new work done by Mr. Orem (*i.e.*, the piano
21 arrangement he composed); the copyright covered only the piano arrangement
22 composed by Mr. Orem; and the copyright did not cover the Song’s lyrics – has been
23 remarkably consistent throughout the litigation. Ultimately, the Court agreed, ruling
24 that Defendants and their predecessors never owned a copyright in the Song’s lyrics,
25 and owned at most only a copyright in the piano arrangement that Mr. Orem
26 composed. Dkt. 244 at 42-43.

27 Defendants also argue that in commencing the Action, Plaintiffs’ Counsel
28 merely relied upon work done by Robert Brauneis, Professor of Law and Co-Director

1 of the Intellectual Property Program at the George Washington University Law
2 School, and author of “Copyright and the World’s Most Popular Song,” 56 JOURNAL
3 OF THE COPYRIGHT SOCIETY OF THE U.S.A. 335 (2009). That superficial argument is
4 entirely baseless. To be sure, Plaintiffs’ Counsel have the utmost respect for Prof.
5 Brauneis and his excellent scholarship, which helped inform them of the copyright
6 dispute. In fact, Plaintiffs’ Counsel worked with Prof. Brauneis to investigate the
7 case and worked with him during the prosecution of the Action. However, it is
8 simply untrue that Plaintiffs’ Counsel merely used Prof. Brauneis’s work to
9 commence this Action.

10 In fact, as Prof. Brauneis readily admits, many of the facts in Plaintiffs’ initial
11 complaints, many of the facts litigated throughout the Action, and many of the facts
12 supporting the Court’s summary judgment decision, were *not* part of his copyright
13 analysis. *See* Declaration of Robert Brauneis in Support of Plaintiffs’ Motion for
14 Award of Attorneys’ Fees (“Brauneis Decl.”), ¶¶ 6-17. For example, Prof. Brauneis
15 was unaware of the three lawsuits filed by Summy Co. in the 1940s after registering
16 E51990, none of which even mentioned the copyright. *See* Brauneis Decl., ¶ 8. Mr.
17 Newman, through his own diligent efforts, located them. *See* Newman Reply Decl., ¶
18 18-25. Those actions were important to the Court in granting partial summary
19 judgment for Plaintiffs. *See* Dkt. 244 at 37.

20 **B. The Song’s Long and Convoluted History and Paucity of**
21 **Formal Discovery, Required Plaintiffs’ Counsel to Conduct**
22 **Exhaustive Independent Factual Research**

23 Next, Defendants argue that the 2,751 hours Plaintiffs’ Counsel spent on
24 discovery “appears excessive . . . given that the document productions were small,
25 there was limited written discovery, and there were only a few depositions and a few
26 discovery-related motions.” Def. Br. at 18. That argument completely misconstrues
27 the work Plaintiffs’ Counsel were required to do during the discovery phase of the
28 litigation to achieve victory for the Class.

It is true that Defendants produced little formal discovery – in fact, they

1 produced *less than half* the number of documents that Plaintiffs produced – and their
2 designated fact witnesses claimed to know virtually *nothing* about the Song.
3 Defendants’ written discovery responses were often inaccurate or incomplete. *See pp.*
4 *20-21 infra*. Because Defendants provided little *formal* discovery, Plaintiffs were
5 required to conduct extensive *informal* discovery on their own. That extensive
6 informal discovery – much of which required inventive historical research of obscure
7 ancient documents – required significant time, and accounts for most of the 2,751
8 hours Plaintiffs’ Counsel spent on discovery in this case.

9 Of course, the extensive independent factual research done by Plaintiffs’
10 Counsel enabled them to achieve complete success in the Action. Without the
11 detailed knowledge they obtained through their own significant efforts, Plaintiffs’
12 Counsel would not have been able to prevail on the cross-motions for summary
13 judgment, proving that Defendants and their predecessors-in-interest never owned a
14 copyright to the *Happy Birthday* lyrics.

15 Moreover, Plaintiffs’ Counsel expended that massive discovery effort, with no
16 assurance of payment, to achieve success against powerful corporate defendants with
17 deep pockets, who were fully committed to defending their disputed copyright claim
18 and were represented by one of the country’s premier defense firms.

19 **C. Lead Counsel Supervised Plaintiffs’ Counsel to Ensure**
20 **Efficient Effort Commensurate With the Work Required**

21 Defendants also argue that Plaintiffs’ Counsel’s lodestar appears inflated
22 because it was impossible for them to determine whether Class Counsel properly
23 delegated tasks between partners and associates. They cite *Zucker v. Occidental*
24 *Petroleum Corp.*, 968 F. Supp. 1396 (C.D. Cal. 1997), as support for their argument.
25 In that case, the plaintiff’s counsel requested a multiplier of 2.13 times their
26 combined lodestar. The Court refused to apply a multiplier on the lodestar in that
27 case because, quite unlike the Settlement here, that settlement provided no cash
28 benefit to the class. *Id.* at 1401-02. The Court reduced plaintiff’s counsel’s lodestar

1 by \$10,237.50, from \$1,223,677 to \$1,213,439.50 – by *less than one percent* – after
2 finding that some of the work done by partners could have been done by associates.
3 *Id.* at 1402.¹⁵

4 Defendants’ complaint that they were unable to decide for themselves whether
5 the work was properly delegated between partners and associates is unavailing. It is
6 hardly their place to second-guess how Plaintiffs’ Counsel allocated work to achieve
7 the clear victory here. “Competent plaintiffs’ counsel are in the best position to
8 determine how their time and the time of their associates can best be allocated.”
9 *Muehler v. Land O’Lakes, Inc.*, 617 F. Supp. 1370, 1379 (D. Minn. 1985). *See also*
10 *O’Bannon, Jr. v. N.C.A.A.*, 114 F. Supp. 3d 819, 836 (N.D. Cal. 2015) (“Court does
11 not see why such integral litigation tasks cannot be reasonably assigned to partners as
12 well as associates”).

13 The work in this case was extremely complex, and the issues were
14 groundbreaking. And the division of hours – 78.7% partners and 21.3% associates –
15 is not unusual in a case as novel and complex as this one.¹⁶ Those percentages are not
16 out of line with other cases in this district.¹⁷ For example, in *In re CytRx Corp. Sec.*

17 ¹⁵ Even if the Court were to similarly reduce Plaintiffs’ Counsel’s partner and
18 associate lodestar by one percent (*i.e.*, \$48,289.45), the fee request would be virtually
19 unaffected. Plaintiffs’ Counsel’s total lodestar would be reduced to \$5,130,553.35,
20 which still yields a *negative* multiplier of 0.90 times their lodestar if their fee request
of \$4.62 million is granted in full.

21 ¹⁶ By way of comparison, in *In re Energy Future Holdings Corp.*, No. 14-10979
22 (CSS) (D. Del. Bankr.), as between partners and associates, partners of Munger,
23 Tolles & Olson LLP (“Munger”), which firm represented Defendants in this Action,
billed 71.3% of the lodestar.

24 ¹⁷ Defendants’ reliance on *MacDougal v. Catalyst Nightclub*, 58 F. Supp. 2d,
25 1101, 1106 (N.D. Cal. 1999) (Def. Br. at 18) on this issue is misplaced. In
26 *MacDougal*, the highest billing partner (with 30 years of trial experience) billed for
27 clerical work which could have been done by paralegals or clericals, made multiple
28 site inspections, and billed for filing, service and faxing of documents. *Id.* at 1105.
(continued...)

1 *Litig.*, No. CV 14-1956-GHK (JPWx) (Dkt. 161) (C.D. Cal. May 18, 2016), partners
2 accounted for 76.9% of the total lodestar of plaintiff’s counsel. Although the Court
3 found some excessive and inefficient billing in that case, the Court used the full
4 \$1,419,225 lodestar as a cross-check in awarding a fee of \$2,125,000, “represent[ing]
5 a lodestar multiplier of approximately 1.5.”¹⁸ Here, Plaintiffs’ Counsel request a
6 *negative multiplier* of just 0.89 times their lodestar.¹⁹ Undoubtedly, given all the
7 relevant factors, the requested fee (actually *less* than the lodestar) is eminently
8 reasonable even if the Court determines that some of the billing was excessive or
9 inefficient in this case.

10 **D. Defendants’ Own Aggressive Conduct Accounted for Much of**
11 **the Work Done by Plaintiffs’ Counsel**

12 Defendants’ denial notwithstanding, as the Court is well aware, Defendants’
13 own aggressive conduct during the litigation necessitated much of the work done by

14 _____
15 (...continued)

16 paralegals or secretaries as appropriate with nominal supervision. Rifkin Reply
17 Decl., ¶ 31.

18 ¹⁸ Recognizing that it was merely “conducting a cross-check, not a true lodestar
19 analysis,” the Court expressly declined to “fix a precise lodestar amount” or make
20 any specific adjustments to the plaintiff’s lodestar in that case. The Court “simply
21 note[d] that the lodestar appears inflated.” *Id.* at 1.

22 Likewise, in *American Apparel*, 2014 U.S. Dist. LEXIS 184548, a case heavily
23 relied upon by Defendants, the Court held that the “best practice” for assessing a
24 percentage fee is to make a “rough fee computation” through a “less exhaustive
25 cataloging and review of counsel’s hours,” which “need entail neither mathematical
26 precision nor bean-counting.” *Id.* at *75-76 (citations omitted). The Court concluded
27 that the “lodestar calculation need not be precise when it is being used as a cross-
28 check on a percentage-of-the-fund award,” as it is being used here. *Id.* at *87.

29 ¹⁹ Curiously, without any explanation, Defendants argue that Plaintiffs’ Counsel
are not entitled to a “*positive multiplier*” on their lodestar. Def. Br. at 20 (emphasis
added). But Plaintiffs’ Counsel do *not* seek a positive multiplier on their time, they
seek a negative multiplier. That said, the factors discussed by Defendants would
support a positive multiplier in this case.

1 Plaintiffs’ Counsel. For example, throughout the litigation, Defendants relied upon a
2 presumption from the registration certificate for E51990 that Mildred Hill wrote the
3 *Happy Birthday* lyrics – leaving apart the fact that they offered no evidence of ever
4 acquiring any rights to the lyrics from Mildred. Plaintiffs had no way of knowing the
5 basis for that presumption until all their discovery efforts were complete. This is
6 because Defendants never produced the registration certificate for E51990 and the
7 document they relied upon for the presumption was, in fact, ***not a registration***
8 ***certificate at all.***

9 The Court will recall that Defendants offered Ex. 101, an unofficial photocopy
10 of a “Copy of Registration,” which they falsely asserted was the registration for
11 E51990. The Court also will recall that Plaintiffs vigorously disputed that Ex. 101
12 was the registration certificate for E51990, offering instead Ex. 48, the Certified
13 Registration Certificate signed and sealed by Maria A. Pallante, the Register of
14 Copyrights and Associate Librarian for Copyright Services, as the official
15 registration certificate for E51990. That should have ended the dispute, but
16 Defendants, with no factual or legal basis whatsoever, refused to accept the signed
17 and sealed registration certificate for what it was. Plaintiffs were forced to move to
18 exclude the ersatz certificate, and Defendants sheepishly conceded the point only
19 after making them file the motion to exclude. *See* Dkt. 244 at 12-13 n.4.

20 The dispute over Ex. 101 was not inconsequential. That document (which was
21 ***not*** a registration certificate) included Mildred Hill’s name, whereas ***the actual***
22 ***registration certificate***, Ex. 48, did ***not include her name.*** Since Defendants based
23 their case on a presumption that Mildred Hill wrote the Song’s lyrics, it was
24 imperative that they offer Ex. 101 as the registration certificate to justify the
25 presumption, even though they had no basis for doing so. To end the charade, not
26 only were Plaintiffs’ Counsel required to obtain an official, signed and sealed copy of
27 the registration certificate from the Register of Copyrights, but Defendants also made
28 them litigate which document was the “real” registration certificate even though

1 there was no basis for Defendants to dispute the genuineness of Ex. 48, any more
2 than there was a basis for them to insist that Ex. 101 was genuine.

3 Likewise, a significant fact in the Court's summary judgment decision was
4 that Preston Ware Orem, Summy's employee-for-hire, did *not* write the *Happy*
5 *Birthday* lyrics. Dkt. 244 at 12-14. As the Court observed in discussing the
6 registration certificate for E51990: "If, as Defendants assert, the new matter being
7 registered included the lyrics, then, contrary to the registration certificate, Mr. Orem
8 could not have been the author of the new matter. Conversely, if Mr. Orem were the
9 author of the new matter, then the lyrics could not have been a part of the
10 registration." *Id.* at 14.

11 Although Defendants admitted in their Answer that Mr. Orem did not write the
12 Song's familiar lyrics, they claimed throughout discovery that he did. For example,
13 in sworn answers to Plaintiffs' First Set of Interrogatories, Interrogatory No. 4,
14 Defendants stated under oath as follows:

15 Insofar as Warner/Chappell's copyrights are concerned, copyright
16 registration certificates E51990 and E51988 attribute authorship of the
17 lyrics of *Happy Birthday to You* to either or both of Mildred J. Hill (in
18 the case of both registration certificates) or Preston Ware Orem (in the
19 case of registration certificate E51990). Warner/Chappell is aware of
20 historical evidence suggesting that Mildred Hill's sister, Patty Hill, also
21 may have been involved in writing the lyrics in conjunction with
22 Mildred Hill. Warner/Chappell is not aware of any facts indicating that
23 any such involvement by Patty Hill would have rendered those lyrics in
24 any way not original to either Mildred Hill or Preston Ware Orem, or
25 that such involvement would have any effect on the validity of
26 Warner/Chappell's copyrights. Warner/Chappell is not aware of any
27 facts indicating that the authorship of such lyrics was not original to any
28

1 or all of Mildred Hill, Patty Hill or Preston Ware Orem.
2 Warner/Chappell is not aware of the date of the writing of such lyrics by
3 any or all of Mildred Hill, Patty Hill, or Preston Ware Orem.

4 Plaintiffs' Counsel did not know which story Defendants would tell at trial,
5 and Defendants would not clarify their convoluted position on authorship when
6 depositions were taken. On the basic question whether Mr. Orem wrote the lyrics,
7 their designated person most knowledgeable, Thomas Marcotullio, an attorney and
8 Vice President of Mergers and Acquisitions for Warner Music Group, gave the
9 following testimony:

10 Q. Do you agree that Orem did not write the familiar lyrics to *Happy Birthday*
11 *To You*?

12 A. I'm not sure what the question is, other than what I've responded to.

13 Q. If you agree with that allegation, that Orem did not write the familiar lyrics
14 to *Happy Birthday To You*.

15 A. I'm not sure that's in the scope of our conversations. I'm not sure what the
16 legal conclusion is. I may understand what the words say and I can read. I
17 don't know what the implications are from a legal perspective.

18 Tr. Marcotullio at 182:2-15 (June 3, 2014).

19
20 Confronted with that opaque testimony, Plaintiffs were compelled to
21 investigate and respond to all the various permutations of authorship offered in
22 Defendants' contorted position on the simple question whether Mr. Orem in fact
23 wrote the Song's lyrics. In the end, Defendants had ***no evidence that Mr. Orem***
24 ***wrote the Song's lyrics***, and the Court accepted their admission that he did not. Dkt.
25 244 at 14. However, by obfuscating the question throughout discovery (and during
26 the summary judgment drafting process), Defendants forced Plaintiffs' Counsel to
27 spend considerable time investigating and responding to their baseless contrary
28

1 factual assertions. Having put Plaintiffs' Counsel to the task, Defendants can hardly
2 be heard to criticize them for doing so.

3 In addition, the Court will recall that Defendants concealed a "smoking gun,"
4 the 1922 publication of *Happy Birthday* in *The Everyday Song Book* without a
5 copyright notice. Defendants failed to produce that highly important evidence until
6 July 2015, seven months *after* Plaintiffs and Defendants cross-moved for summary
7 judgment. They offered no excuse for their failure, claiming only that it was not
8 timely produced by "mistake." *See* Rifkin Decl., ¶ 41.

9 These are just a few examples of how Defendants' defense of the bogus
10 copyright – showing little regard for the factual record and a willingness to obfuscate
11 even the most obvious facts – made the task of Plaintiffs' Counsel much more
12 difficult than it should have been. Defendants cannot complain now that Plaintiffs'
13 Counsel met these challenges and overcame all the obstacles thrown in their way to
14 achieve this hard-fought and widely acclaimed victory.

15 For Plaintiffs' Counsel, prosecuting this Action was like putting together a
16 massive jigsaw puzzle while Defendants turned some of the pieces over and took
17 other pieces of the puzzle off the board. Having brought this litigation upon
18 themselves by making a bogus copyright claim for decades, and having made
19 Plaintiffs' Counsel's job monumentally more difficult by making specious, baseless
20 arguments in defense of the bogus copyright, Defendants are in no position to blame
21 Plaintiffs' Counsel for working too hard to end the deception.

22 **E. Plaintiffs' Counsel's Hourly Rates are Reasonable, And Well**
23 **Below Defendants' Counsel's Own Hourly Rates**

24 Defendants also complain that Plaintiffs' Counsel have not provided
25 comparative fee information for them to assess the reasonableness of their hourly
26 rates and collective lodestar. Def. Br. at 19. Plaintiffs' Counsel devoted a total of
27 7,680.49 partner and associate hours to the case, with a combined total lodestar of
28 \$4,828,944.80 (excluding paralegal time). The average partner billing rate for all

1 Plaintiffs' Counsel was \$693.83 per hour. The average associate billing rate was only
2 \$383.76 per hour. Plaintiffs' Counsel had a blended hourly billing rate of \$627.71 per
3 hour for all the attorneys who worked on the case. *See* Rifkin Reply Decl., ¶ 22.

4 The hourly rates of Plaintiffs' Counsel compare favorably to rates recently
5 approved in this Court. In *Roberti v OSI Systems, Inc.*, No. 2:13-cv-09174-MWF,
6 2015 U.S. Dist. LEXIS 164312, at *19-20 (C.D. Cal. Dec. 8, 2015), the Court
7 recently approved partner rates between \$700 and \$975 per hour and associate rates
8 of \$525 per hour. Those rates are substantially **higher** than the rates Plaintiffs'
9 Counsel have billed in this case. Moreover, the Court awarded attorneys' fees in *OSI*
10 *Systems* that were approximately 2.2 times the lodestar of plaintiff's counsel, while
11 Plaintiffs' Counsel seek a **negative** multiplier in this case.²⁰ Likewise, in *American*
12 *Apparel*, 2014 U.S. Dist. LEXIS 184548, at *80-82, the company's counsel had an
13 average partner billing rate of \$1,035 and an average associate rate of \$620, and
14 counsel for the individual defendants had an average partner billing rate of \$715 – all
15 well **above** the average rates billed by Plaintiffs' Counsel here.

16 Although Defendants did not provide any billing information for their own
17 counsel, the billing rates of Defendants' counsel are also quite informative. For
18 example, in *Bergstein v. Stroock & Stroock & Lavan*, No. BC483164, 2013 Cal.
19 Super. LEXIS 593, at *12 (L.A. Super. Ct. Feb. 14, 2013), *aff'd*, 236 Cal. App. 4th
20 793 (2015), the Superior Court approved as reasonable Munger's billing rates
21 ranging between \$445 per hour for the most junior associates to \$920 per hour for
22 senior partners. The Superior Court noted, "Whether outrageous or not, in the Los
23

24 ²⁰ According to a 2014 survey by the NATIONAL LAW JOURNAL, for the largest
25 firm in the Los Angeles market, average partner billing rates were \$665 per hour, and
26 average associate billing rates were \$401 per hour. *See* Rifkin Reply Decl., Ex. A.
27 Again, the average hourly rates charged by Plaintiffs' Counsel in this case compare
28 favorably to those average rates. *See American Apparel*, 2014 U.S. Dist. LEXIS
184548, at *80-82.

1 Angeles legal community, attorney billing rates of *\$1000 per hour and above are no*
2 *longer unheard of.*” *Id.* (emphasis added).

3 In a more recent fee application submitted by Munger on October 15, 2015, in
4 the bankruptcy proceeding *In re Energy Future Holdings Corp.*, No. 14-10979 (CSS)
5 (Dkt. 6477) (D. Del. Bankr.) the firm billed \$4,265,994.90 in fees over the *four-*
6 *month period* from May 1 through August 31, 2015. Munger claimed an *average*
7 partner billing rate of \$901 per hour and *average* billing rates for of counsel and
8 associates of \$680 and \$553 per hour, respectively. Plaintiffs’ Counsel’s average
9 hourly rate for partners in this case (\$693.83) is \$217 *lower* than Munger’s average
10 rate for partners, and Plaintiffs’ Counsel’s average hourly rate for associates
11 (\$383.76) is \$169 *lower* than Munger’s average rate for associates.²¹ This simple
12 apples-to-apples comparison should end Defendants’ misplaced criticism.

13 **F. Plaintiffs’ Counsel Have Offered to Provide Their Detailed**
14 **Time Billing Records to the Court**

15 While Plaintiffs’ counsel did provide Defendants and the Court with a
16 breakdown of information as to the total time spent by all involved attorneys on the
17 various phases of this litigation, Defendants complain that Plaintiffs’ Counsel failed
18 to give them the underlying detailed time to review. Def. Br. at 15-17. Plaintiffs’
19 Counsel will submit detailed records of the time spent by the partners, associates, and
20 paralegals in the daily timesheets required to be filed and served by June 17, 2016
21 pursuant to this Court’s June 10, 2016 Minute Order (Dkt. 334). *See* Rifkin Reply
22 Decl., ¶ 28. At Defendants’ insistence, the Settlement is not final until all appeals –
23 including any potential appeal from the Court’s fee and expense award – are

24
25 ²¹ This comparison is not meant to criticize Munger’s hourly rates. THE
26 AMERICAN LAWYER recently reported that the top hourly rates for partners at major
27 U.S. firms *rose to \$2,000 per hour* in 2015. *See* Julie Triedman, *Billing \$2K an*
28 *Hour? Study Says Clients Will Pay If Lawyers Deliver*, AMERICAN LAWYER (May 12,
2016). *See* Rifkin Reply Decl., Ex. B.

1 exhausted. Plaintiffs' Counsel would not ordinarily share detailed billing records
2 with an adversary, particularly before the case is fully and finally resolved.

3 **G. Plaintiffs' Counsel's Out-of-Pocket Expenses Were Entirely**
4 **Reasonable**

5 Finally, Defendants argue that Plaintiffs' Counsel have not adequately
6 substantiated their request for \$204,461.40 in litigation costs with detailed records.
7 Def. Br. at 21. In particular, they question Plaintiffs' Counsel's copying and
8 reproduction costs and travel and meal costs. All these charges are supported by Lead
9 Counsel's detailed billing records. *See* Rifkin Reply Decl., ¶¶ 35-40. Plaintiffs'
10 Counsel are prepared to furnish the Court with detailed billing records for all the
11 costs they incurred in prosecuting this Action (including photocopying and
12 reproduction costs as well as coach class airfare and business hotel accommodations
13 paid for Plaintiffs' Counsel to attend hearings, the settlement mediation, and other
14 proceedings in the Central District, where the parties agreed this case would be
15 litigated, or in San Francisco, where the mediation took place). *See* Rifkin Reply
16 Decl., ¶ 40; In light of the amount of work done in this Action over three years, these
17 costs are extremely modest.

18 **III. CONCLUSION**

19 For all these additional reasons, Plaintiffs respectfully request that the Court
20 overrule Defendants' opposition and grant Plaintiffs' Counsel's request for \$4.62
21 million in fees and \$204,461.40 in out-of-pocket expenses in full.

22
23 Dated: June 13, 2016

Respectfully submitted,
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