

1 FRANCIS M. GREGOREK (144785)  
gregorek@whafh.com  
2 BETSY C. MANIFOLD (182450)  
manifold@whafh.com  
3 RACHELE R. RICKERT (190634)  
rickert@whafh.com  
4 MARISA C. LIVESAY (223247)  
livesay@whafh.com  
5 BRITTANY N. DEJONG (258766)  
dejong@whafh.com  
6 **WOLF HALDENSTEIN ADLER**  
**FREEMAN & HERZ LLP**  
7 750 B Street, Suite 2770  
San Diego, CA 92101  
8 Telephone: 619/239-4599  
9 Facsimile: 619/234-4599

10 *Lead Counsel for Plaintiffs and the Settlement Class*

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., *et al.*, )  
16 Plaintiffs, ) **REPLY DECLARATION OF**  
17 v. ) **RANDALL S. NEWMAN IN**  
18 ) **SUPPORT OF FINAL APPROVAL**  
19 WARNER/CHAPPELL MUSIC, ) **OF CLASS ACTION SETTLEMENT**  
20 INC., *et al.* ) **AND REQUEST FOR ATTORNEYS'**  
21 Defendants. ) **FEES 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 )

1 The undersigned, Randall S. Newman, Esquire, under penalty of perjury,  
2 hereby declares and states as follows:

3 1. I am an attorney duly licensed to practice law in the State of New York  
4 and the State of California. I have personal knowledge of the matters set forth herein  
5 concerning all matters pertaining to this Action and, if called upon, I could and  
6 would competently testify thereto.

7 2. I submit this Reply Declaration in further support of Plaintiffs' motion  
8 for an award of attorneys' fees and reimbursement of expenses (the "Motion").

9 3. In their Opposition to Plaintiff's Motion, Defendants criticize Class  
10 Counsel for the time spent researching and drafting the initial complaints. As an  
11 initial matter, I personally spent a substantial amount of the time researching the  
12 history of *Happy Birthday*, several hundred hours, before I presented my research to  
13 Wolf Haldenstein Adler Freeman & Herz LLP ("Wolf Haldenstein"). In total, I spent  
14 approximately 928 hours researching and drafting the initial complaint, some of  
15 which was time spent working with Wolf Haldenstein.

16 4. My initial research during the investigation and pre-filing period was so  
17 comprehensive that it represented almost one-half of the total time I spent working  
18 on the Action. For the remainder of the litigation, I spent another approximately  
19 1,200 hours of time, but I and my co-counsel constantly referred to and relied upon  
20 the research I conducted during the initial work I did.

21 5. I have worked with Mark C. Rifkin, Esquire, and Wolf Haldenstein in  
22 the past. Based on my prior experience, I knew that Mr. Rifkin and Wolf Haldenstein  
23 would require meticulous preparation before agreeing to participate in this case.  
24 They shared my own view that we should not undertake a case of this significance  
25 unless we were convinced that Defendants did not own the *Happy Birthday*  
26 copyright.

27 6. As I discussed in my Declaration in Support of the Motion, I was  
28 educated and trained as a certified public accountant. As such, I have extensive

1 auditing training and experience. Because the case involved a great deal of historical  
2 document research, with no percipient witnesses alive to provide first-hand testimony  
3 of relevant facts, piecing together the evidence in this case was similar to the work  
4 performed by auditors. Therefore, I believe my background in public accounting as  
5 well as a lawyer made me uniquely qualified to do much of the factual research  
6 required for this case.

7 7. After I read the law review article written by Professor Brauneis, I  
8 essentially audited his article by reviewing all the documents he referred to. In doing  
9 so, I uncovered many factual details that Professor Brauneis had not.

10 **The 1921 Renewal of Good Morning to All**

11 8. For example, Professor Brauneis stated that “‘Good Morning to All’ was  
12 composed and published in 1893, and was under copyright until 1949.” (Def. Ex. 3,  
13 p. 39). However, Professor Brauneis’s statement assumed that the copyright for  
14 “Good Morning to All” was properly renewed in 1921.

15 9. Since I did not know whether Defendants would rely upon the “Good  
16 Morning” copyright, I did not make that assumption. Instead, I spent several days  
17 over a period of weeks investigating whether the “Good Morning” copyright was  
18 properly renewed in 1921, and determined it was likely renewed by the wrong party  
19 under the complex renewal provisions of Section 24 of the 1909 Copyright Act  
20 (covering renewals of subsisting copyrights).

21 10. In his law review article, Professor Brauneis discussed the *Hill v. Harris*  
22 litigation that was brought by Jessica Hill in 1934 against Sam Harris, Irving Berlin  
23 and others over the use of *Happy Birthday* in the Broadway musical *As Thousands*  
24 *Cheer*. Professor Brauneis mentioned that the lawsuit was dismissed for lack of  
25 prosecution, a fact he called “one of the great mysteries of the history of ‘Happy  
26 Birthday to You.’”

27 11. To eliminate the possibility that Defendants might try to exploit the  
28 uncertainty Professor Brauneis noted, over a period of a day or two, I reviewed the

1 entire *Hill v. Harris* case, including Mr. Berlin's undated and undocketed motion to  
2 dismiss, which argued that the copyright was not properly renewed in 1921.  
3 Thereafter, I many spent hours researching detailed information I obtained as the  
4 result of my review of the *Hill v. Harris* case

5 12. Interestingly, Mr. Berlin was a founder of ASCAP. "Happy Birthday"  
6 was added to the ASCAP repertoire while *Hill v. Harris* was pending, and  
7 immediately became ASCAP's most popular song in 1935. It remains the most  
8 popular song in the history of the ASCAP repertoire. That led me to spend several  
9 days reviewing ASCAP records and the relationship between "Happy Birthday" and  
10 ASCAP, including the role of John Sengstack, then the owner of Summy Co., in  
11 ASCAP.

12 13. Many of the facts I uncovered regarding the 1921 renewal were included  
13 in the initial complaint we filed, but were never argued to the Court because  
14 Defendants' defenses made the renewal issue irrelevant. However, before drafting  
15 and filing the complaint, I tried to anticipate as many potential defenses as I could  
16 since we had no idea how Defendants would defend their copyright.

17 14. Professor Brauneis's article did not mention the fact that Summy Co.,  
18 which owned the "Good Morning" copyright, was incorporated in 1895 and was  
19 dissolved in 1920 before the copyright was renewed. Based upon my discovery, we  
20 believed that "Good Morning" became an orphan work in 1920, and were prepared to  
21 argue that issue if necessary.

22 15. Professor Brauneis and I disagreed about whether the 1893 copyright  
23 was properly renewed in 1921.

24 **Researching the Digitized Publications in the New York Public Library**

25 16. The New York Public Library provides searchable online access to  
26 electronic versions of publications dating back to the early 1900s, including early  
27 issues of *Variety* and *Billboard* magazines.

28 17. Over a period of many days, I spent a at least 50 hours reading every

1 article that referred to “Summy,” “Happy Birthday,” “Sengstack,” or “ASCAP” in  
2 *Variety* and *Billboard* from the earliest date they were available until the 1970s.

3 18. Through my research of the online editions of *Variety* and *Billboard*, I  
4 discovered an April 4, 1945, article in *Variety* titled “‘Happy Birthday’ Mixed Up in  
5 Infringement Suit.” That article mentioned that Summy Co. filed two copyright  
6 infringement lawsuits over “Happy Birthday” in the Southern District of New York,  
7 one against Louis Marx & Co. and the other against McLoughlin Brothers, Inc. I  
8 also read an April 7, 1945, article in *Billboard*, titled “Infringement Suit ‘Birthday’  
9 Present to Mark [sic], McL’ghlin,” that mentioned both lawsuits.

10 19. Neither of the lawsuits was discussed in Professor Brauneis’s law  
11 review article.

12 20. With that information, I searched the National Archives and Records  
13 Administration in New York City and located the case numbers for the two lawsuits.  
14 The cases were not properly indexed in the National Archives, which explains why  
15 Professor Brauneis was unaware of them.

16 21. I was only able to locate those cases because of the many hours I spent  
17 reviewing hundreds of old issues of *Variety* and *Billboard* magazines.

18 22. Similarly, while reviewing hundreds of old issues of *Billboard*  
19 magazine, I found a January 19, 1946, article titled “‘On the Town’ Gets on N.Y.  
20 Docket as Publisher Sues.” The article described a third lawsuit that Summy Co.  
21 filed in the Southern District of New York against Paul Feigay and Oliver Smith,  
22 producers of the musical *On the Town*, for infringing *Happy Birthday*.

23 23. With that additional information, I obtained the file for the third lawsuit  
24 from the National Archives in New York City. Professor Brauneis did not find this  
25 case for the same reason he did not find the two other cases: all three cases were not  
26 properly indexed in the National Archives. I was able to locate this third important  
27 case only because of the hours I spent reviewing hundreds of old issues of *Billboard*  
28 magazine.

1           24. I ordered the files for the three lawsuits from the National Archives, and  
2 after copying them, I spent less than a day reviewing all three cases.

3           25. These three lawsuits were important to the Court's summary judgment  
4 decision. As the Court knows, Summy Co. did not assert or rely upon E51990 in any  
5 of the three 1940s infringement lawsuits, relying instead only upon the 1983  
6 copyright for "Good Morning." Interestingly, only Louis Marx & Co. filed an answer  
7 in the three lawsuits, and asserted as a defense that the 1893 copyright was not  
8 properly renewed in 1921, the same argument we were prepared to make if  
9 Defendants relied on the "Good Morning" copyright

10           26. When I discussed these cases with Professor Brauneis, he acknowledged  
11 that his analysis in his article would have been different had he known of them.

12 **The Chain of Title Research**

13           27. Again, because we did not know how Defendants would defend their  
14 copyright, with my background as an auditor and public accountant, I determined  
15 that it was appropriate to investigate the chain of title between Summy Co., the  
16 original owner of E51990, and Defendants.

17           28. Although we were confident that the Court would rule in Plaintiffs'  
18 favor that Defendants and their predecessors never acquired rights to the Song's  
19 lyrics from anyone, we prepared for the possibility that the Court might not do so by,  
20 among other things, examining whether Defendants properly acquired Summy Co.  
21 As the Court is award, the documentary evidence we collected of the chain of title  
22 was extremely complicated.

23           29. I conducted extensive historical research involving inspections of  
24 corporate records in public filings, merger documents, stock transfers, estate papers  
25 and newspaper articles. These are the kinds of records accountants and auditors  
26 frequently inspect as part of due diligence investigations. Obtaining and reviewing  
27 those historical records took weeks to complete.

28           30. Although the chain of title issues were raised and we requested relevant

1 chain of title documents in written discovery, Defendants provided virtually none of  
2 these documents to Plaintiffs during the discovery phase of the litigation.

3 31. My independent historical research uncovered many serious issues with  
4 the chain of title from Summy Co. to Defendants, including many substantial gaps in  
5 the various intervening transfers of ownership.

6 32. We raised these issues with Defendants' counsel during a meeting held  
7 in Los Angeles, California, on October 30, 2014 to discuss the Joint Motion for  
8 Summary Judgment

9 33. After the in-person meeting, Defendants produced some corporate  
10 records and transfer documents they previously withheld from production and failed  
11 to identify. Because they were incomplete and often conflicting, those records and  
12 transfer documents made the transfer of title research even more complicated. I spent  
13 several days reviewing those additional documents.

14 34. Using the analytical skills I developed as a public accountant and  
15 auditor, I carefully reviewed the documents from Defendants and discovered  
16 additional significant gaps in the chain of title, including missing or incomplete  
17 transfers and assignments and no evidence of payment for a stock transfer from  
18 Clayton F. Summy to John F. Sengstack.

19 35. We raised these gaps in our motion for summary judgment (Dkt. No.  
20 182), we identified them in our comprehensive Statement of Uncontroverted Facts  
21 (Dkt. No.183). I submitted a thorough declaration setting forth the basis for  
22 Plaintiffs' chain-of-title challenging, which referred to approximately 25 exhibits,  
23 supporting the motion for summary judgment. (Dkt. No. 189-2). Preparing and  
24 documenting the chain-of-title declaration took many hours over approximately four  
25 weeks for me to complete.

26 **Inspection of Records from The Hill Foundation**

27 36. During the discovery phase of the litigation, we served a subpoena upon  
28 The Hill Foundation, then a non-party to the Action, seeking documents relevant to

1 the Hill Sisters' role in the creation of the Song, as well as all other relevant  
2 documents in its possession.

3 37. I oversaw an on-site inspection of approximately 25 boxes of documents  
4 at the office of counsel for The Hill Foundation in New York City. The Hill  
5 Foundation provided no documents relevant to whether Patty Hill or Mildred Hill  
6 wrote the Song, but it did provide a large quantity of royalty statements, various  
7 relevant correspondence with Summy Co. regarding the Song, and many documents  
8 from litigation against the trustees of the Estate of Jessica Hill.

9 38. Based on my experience as a public accountant and auditor, I was able  
10 to conduct a substantive review of the royalty statements more quickly and  
11 efficiently than the associates from Wolf Haldenstein who accompanied me on the  
12 inspection. In consultation with Mr. Rifkin, I relied upon Wolf Haldenstein's  
13 associates to conduct a preliminary review of the documents and to bring important  
14 documents to my attention for a more detailed analysis.

15 39. By working with the associates of Wolf Haldenstein in this manner, we  
16 were able to complete a review of all 25 boxes of documents in a single day. This  
17 exercise demonstrates how my time as a solo practitioner (billed at partner rates)  
18 reduced the overall expense of the litigation.

19 40. After The Hill Foundation and ACEI intervened in the Action, because  
20 of my experience in trusts and estates law (as well as my auditing and accounting  
21 background) and my prior review of The Hill Foundation's records, Mr. Rifkin  
22 assigned to me the task of investigating their potential ownership claim. To do so, I  
23 reviewed thousands of pages of documents in the New York County Surrogate's  
24 Court, where the estates of Patty Hill and Jessica Hill were probated.

25 41. Because of my background and experience, Plaintiffs' Counsel were  
26 able to complete this investigation in the short amount of time between the  
27 Intervenors' intervention and the completion of all pre-trial preparations on  
28 December 8, 2015, just one week before trial was to begin on December 15, 2015.



1           42. Because of the short time available for the work to be done, Mr. Rifkin  
2 and I worked literally side by side to accomplish the work in as little time as  
3 possible. We believed that, as more experienced senior lawyers, we could complete  
4 the work much more quickly than if Mr. Rifkin had assigned it to more junior  
5 lawyers in the first instance.

6           43. Based upon our detailed review in that short period of time, we were  
7 fully prepared to refute the Intervenors' claim of copyright ownership had the Action  
8 proceeded to trial on December 15, 2015. The trial became unnecessary when the  
9 Intervenors agreed with Defendants to "relinquish their ownership claims to the Song  
10 and all their rights to the Song." See Settlement Agreement § 2.2.1.

11           44. This was an important part of our settlement negotiation, and I believe it  
12 was substantially aided by the work Mr. Rifkin and I completed quickly and  
13 efficiently soon after the Intervenors asserted their claim.

14 **Discovery of Happy Birthday Film Uses**

15           45. In addition to my other practice areas, I have extensive experience  
16 representing entertainers, writers, and producers. I am, therefore, familiar with useful  
17 sources of information in intellectual property cases, including the Internet Movie  
18 Database (IMDb), a comprehensive source of movie content information.

19           46. Using IMDb, I was able to locate many instances where *Happy Birthday*  
20 was used or performed in motion pictures (and at least one feature-length cartoon)  
21 prior to 1935 when E51990 was registered.

22           47. With Mr. Rifkin's assistance, I arranged for Beth A. Landes, Esquire, an  
23 associate of Wolf Haldenstein, to obtain copies of those films and to document the  
24 uses of the Song therein.

25           48. This was another instance where Plaintiffs' Counsel relied upon my  
26 knowledge and experience to efficiently discover relevant information, and then  
27 where I worked with Mr. Rifkin to assign follow-up research to a more junior lawyer  
28 to control costs in the litigation process.

1 **Preparation of the Joint Statement of Facts and Joint Appendix**

2 49. Mr. Rifkin divided the work on the summary judgment cross-motions  
3 among Plaintiffs' Counsel in order to avoid duplication of effort and waste. Mr.  
4 Rifkin assigned to me the responsibility for preparing the initial draft and subsequent  
5 revisions to the Joint Statement of Uncontroverted Facts ("Joint Statement") and  
6 assembling the Joint Appendix. Because of my extensive factual knowledge of the  
7 case, Mr. Rifkin also assigned to me the responsibility for preparing our objections to  
8 Defendants' statement of facts in the Joint Statement. Mr. Rifkin arranged for an  
9 associate and a paralegal of Wolf Haldenstein in California to assist me and to  
10 facilitate completion and filing of the extremely large summary judgment record.

11 50. To complete the Joint Statement and the Joint Appendix, I worked with  
12 Betsy C. Manifold, Esquire, a Wolf Haldenstein partner in California, to coordinate  
13 with Defendants' counsel. Working almost full-time over a period of approximately  
14 10 days, we exchanged multiple drafts of the Joint Statement and Joint Appendix  
15 with Defendants' counsel. The process of editing and revising the Joint Statement  
16 and Joint Appendix was extremely laborious, as Plaintiffs and Defendants responded  
17 to each other's documents, objections, and changes of statements and defenses.

18 51. The process of finalizing the Joint Statement (which was 160 pages  
19 long) and Joint Appendix (which consisted of 126 separate exhibits) was extremely  
20 labor-intensive. Preparing the citations to the Joint Appendix was an arduous task in  
21 and of itself.

22 52. I worked extensively with associates from Wolf Haldenstein on the Joint  
23 Statement and Joint Appendix. However, given the nature of the disputes between  
24 Plaintiffs and Defendants over the Joint Statement and Joint Appendix, I do not  
25 believe they could have been completed any more efficiently (if at all) had the work I  
26 did been assigned in the first instance to a more junior lawyer.

27 **Mediation Efforts**

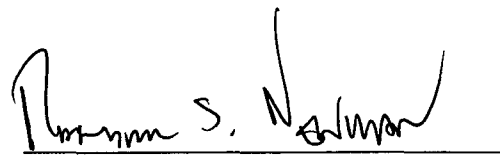
28 53. As part of the settlement negotiation process, Mr. Rifkin requested and

1 obtained information from Defendants concerning the money they collected for use  
2 of the Song. That information was provided to us in spreadsheet form just ten days  
3 before the mediation took place in San Francisco, California, on November 30, 2015.

4 54. Again because of my experience and background as a public accountant  
5 and auditor, Mr. Rifkin asked me to review the spreadsheet, which was incomplete.  
6 Using information Mr. Rifkin and I obtained from our review of the estate records  
7 for Patty Hill and Jessica Hill, I was able to reconstruct much of the missing  
8 information in a day or two, so that we had a more complete and accurate estimate of  
9 the money Defendants had collected for use of the Song since 1949. We used my  
10 reconstruction in the course of our settlement negotiation on November 30, 2015.

11 55. I hereby certify, under the penalty of perjury under the laws of the  
12 United States, that the foregoing statements are true and correct to the best of my  
13 knowledge, information, and belief.

14 Executed this 13th day of June, 2016, at New York, New York.

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18 RANDALL S. NEWMAN

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