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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,	)	<b>RESPONSE TO DEFENDANTS'</b>
17		)	<b>STATEMENT REGARDING CLASS</b>
18	v.	)	<b>COUNSEL'S BILLING RECORDS</b>
19	WARNER/CHAPPELL MUSIC,	)	Room: 650
20	INC., <i>et al.</i>	)	Judge: Hon. George H. King, Chief
21	Defendants.	)	Judge
22		)	Date: TBD
23		)	Time: TBD

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1 **I. INTRODUCTION**

2 The Settlement, which has now received the Court’s final approval, preserves  
3 the finality of the Court’s summary judgment decision, ends Defendants’ decades of  
4 wrongdoing, declares that *Happy Birthday* is in the public domain, saves  
5 approximately \$15 million in future payments over the remaining 14 years of the  
6 copyright (had it covered the Song’s melody and lyrics), and creates a fund of up to  
7 \$14 million in compensation for past royalties demanded by Defendants for a song  
8 they never owned (an approximate 90% refund for Settlement Class Members).

9 For their hard work achieving this *complete victory*, Plaintiffs’ Counsel seek  
10 attorneys’ fees of just *15.9% of the \$29 million value of the Settlement*, leaving  
11 apart the inestimable value of the judicial declaration that *Happy Birthday* is in the  
12 public domain. That percentage is well below the Ninth Circuit’s 25% benchmark in  
13 common fund cases, notwithstanding Defendants’ constant, misguided attempt to  
14 measure the fee request against just the cash portion of the Settlement, and is a  
15 negative multiplier of Plaintiffs’ Counsel’s combined lodestar of more than \$5.1  
16 million.<sup>1</sup> Even at 33% of the \$14 million fund for past payments, ignoring the \$15

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17  
18 <sup>1</sup> Plaintiffs file this response pursuant to the Court’s June 27, 2016 Order (Dkt.  
19 347). Defendants’ Statement (Dkt. 354-1 (“Def. Br.”) at 6 n.1) notes an inaccuracy  
20 in the lodestar total for Plaintiffs’ Counsel set forth in the fee motion (\$5,329,372.80)  
21 when compared with the total of the lodestar sums set forth in the four declarations  
22 submitted with the motion (\$5,176,596.80) on April 27, 2016 (Dkt. 324, Exs. B-I  
23 (Rifkin Decl.); Dkt. 323-1, Exs. B-I (Newman Decl.); Dkt. 323-2 at 2-6 (Schacht  
24 Decl.); Dkt. 323-3 at 2-6 (Wolke Decl.)). The higher amount (which appears only  
25 once in the briefing), based on an earlier calculation that did not include voluntary  
26 lodestar reductions, was included in error. However, the *lower* amount was used  
27 throughout the briefing. The small difference does *not* impact the relevant  
28 calculations provided to the Court. After April 27, 2016, Hunt Ortmann submitted  
another \$56,458.50 in lodestar, which brought the total lodestar to \$5,233,055.30.

In addition, since the fee application was submitted, Wolf Haldenstein has  
incurred approximately \$338,000 in lodestar working to resolve various notice and  
administrative issues with the Settlement Administrator, communicating with  
(continued...)

1 million of future benefits, in light of the extraordinary success achieved in this case,  
2 the diligence of Plaintiffs’ Counsel throughout the litigation, the complexity and risk  
3 of the Action, and the time Plaintiffs’ Counsel devoted to the Action, that modest  
4 upward departure from the benchmark would be warranted.

5 The Court will review the detailed daily timesheets of Plaintiffs’ Counsel as a  
6 lodestar cross-check on the reasonableness of the attorneys’ fees they seek. *See In re*  
7 *CytRx Corp. Sec. Litig.*, No. CV 14-1956-GHK (JPWx), slip op., Dkt. 161 (C.D. Cal.  
8 May 18, 2016). As the Court noted in *CytRx*, the lodestar-cross check is *not* a full-  
9 blown lodestar analysis: “As we are conducting a cross-check, not a true lodestar  
10 analysis, *we need not fix a precise lodestar amount.*” *Id.* at 1 (emphasis added). In  
11 *CytRx*, the Court awarded a fee of \$2,125,000, or approximately 1.5 times the  
12 *reported* lodestar of plaintiffs’ counsel in that case, which the Court found was “fair,  
13 reasonable, and adequate.” *Id.* at 2. After conducting a similar lodestar cross-check  
14 analysis here, the Court could cut Plaintiffs’ Counsel’s lodestar *in half*, and the full  
15 \$4.62 million fee still would be only slightly higher than 1.5 times their *reduced*  
16 lodestar.<sup>2</sup>

17 \_\_\_\_\_  
18 (...continued)

19 Defendants’ counsel on notice and claim issues, preparing an emergency motion to  
20 enforce the Settlement Agreement when Defendants threatened not to permit them to  
21 provide material to Settlement Class Members, and reviewing periodic updates from  
22 and assisting Settlement Class Members in the preparation and submission of claims,  
all of which is included in the timesheets provided to the Court and Defendants’  
counsel. Defendants have not questioned any of that additional time.

23 <sup>2</sup> Even if the Court agreed with *all* of Defendants’ arguments and thus reduced  
24 Class Counsel’s lodestar by approximately \$1.4 million to \$3,261,256, as  
25 Defendants’ suggest (Def. Br. at 21), such a reduction still does not change the  
26 reasonableness of the fee request. In this common fund recovery, where Plaintiffs  
27 achieved a complete victory, a lodestar multiplier is appropriate. *See, e.g., In re*  
28 *Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994)  
(lodestar multipliers fair in contingency cases “because of the equitable notion that  
those who benefit from the creation of the fund should share the wealth with the  
(continued...)

1 Defendants' Response to Class Counsel's Billing Records – their third brief  
2 opposing Plaintiffs' Counsel's fee request<sup>3</sup> – adds virtually nothing to the Court's  
3 consideration of the request as reasonable compensation for Plaintiffs' Counsel's  
4 diligent efforts in achieving a complete victory in this Action. Defendants merely  
5 repeat (with some minor added detail) the same broad-brush arguments they made in  
6 their first two briefs opposing the fee request; indeed, the tables of contents in the last  
7 two briefs are practically identical.<sup>4</sup> Their opposition is a losing party's lament that

8  
9 \_\_\_\_\_  
10 (...continued)

11 lawyers whose skill and effort helped create it.”). Thus, even at Defendants'  
12 suggested \$3.26 million lodestar, Class Counsel's fee request of \$4.62 million  
13 represents an approximate 1.42 multiplier. *See also* 3 Herbert Newberg & Alba  
14 Conte, *NEWBERG ON CLASS ACTIONS*, § 14.03 at 14-5 (3d ed. 1992) (“Multiples  
15 ranging from one to four are frequently awarded in common fund cases when the  
16 lodestar method is applied.”). Notwithstanding the substantial extra time and  
17 resources both parties and this Court have expended as a result of Defendants'  
18 challenge to Class Counsel's fee request, the net result is unchanged: Class Counsel's  
19 fee request is reasonable and should be approved given the extraordinary results  
20 achieved (close to 90% compensation for Settlement Class Members and complete  
21 declaratory and injunctive relief).

22  
23 <sup>3</sup> It is unclear whether the Response is intended to “expand[] upon” or  
24 “replace[]” their second opposition to the fee application, Dkt. 345. *See* Def. Br. at  
25 5.

26  
27 <sup>4</sup> At the Final Approval Hearing, the Court instructed Defendants to limit their  
28 submission to “a more robust opportunity for response to the [billing] records.” Tr.  
June 27, 2016, at 8:7-10 (Dkt. 358). Defendants simply ignore the Court's specific  
instruction not “to go back to go back to anything that was already in the original  
motion which you have already commented on.” *Id.*

Defendants' only new argument (Def. Br. at 20-21), that the Court should  
disregard Hunt Ortmann's time (just \$56,000 out of more than \$5 million in lodestar  
for all Plaintiffs' Counsel) because it was not timely produced, is wholly without  
merit. Defendants received Hunt Ortmann's billing records on May 26, 2016, nearly  
six weeks before they submitted their most recent fee objection. They had more than  
sufficient time to review the **13 pages of billing records** from Hunt Ortmann, and  
they will have another opportunity to comment on the time on July 19, 2016.

1 Plaintiffs' Counsel "worked too hard" in achieving complete victory here. "By and  
2 large, the court should defer to the winning lawyer's professional judgment as to how  
3 much time he was required to spend on the case; after all, he won, and *might not*  
4 *have, had he been more of a slacker.*" *Moreno v. City of Sacramento*, 534 F.3d  
5 1106, 1112 (9th Cir. 2008).

6 Nothing Defendants have said so far in any of their briefs opposing Plaintiffs'  
7 Counsel's modest fee request changes that in the least. Certainly, they have not said  
8 anything that would prompt the Court to cut Plaintiffs' Counsel's lodestar by 50% in  
9 any event. To avoid needless repetition, Plaintiffs' Counsel will respond only to the  
10 handful of new comments Defendants direct to Plaintiffs' Counsel's billing records.

## 11 **II. ARGUMENT**

### 12 **A. Plaintiffs' Counsel's Billing Practices Allow a Meaningful** 13 **Cross-Check On Lodestar**

14 Plaintiffs' Counsel worked collaboratively to litigate this complex and novel  
15 class case against Defendants with highly skilled legal firepower. Plaintiffs'  
16 Counsel's time, which was demonstrably productive based on the truly exceptional  
17 result achieved, is adequately detailed in their billing records and serves as more than  
18 a sufficient "cross-check" on the reasonableness of the requested fee. Defendants'  
19 hindsight analysis in cherry picking a few limited entries in the over 300 pages of  
20 detailed records is unpersuasive and wasteful of the Court's time. For convenience,  
21 Plaintiffs address Defendants' billing record issues in the same order as Defendants  
22 raised them. Def. Br. at 5-6.

#### 23 **1. Block Billing**

24 Defendants' first argument – which they make on nearly every page of their  
25 Response – repeats their prior argument that Plaintiffs' Counsel recorded their time  
26 in inappropriate "block billing." Defendants are wrong. What they call "block  
27 billing" is *not* block billing. "Block billing" is 'the time-keeping method by which  
28 each lawyer and legal assistant enters the *total daily time spent working on a case,*

1 rather than itemizing the time expended on specific tasks.’” *Welch v. Metro. Life Ins.*  
2 *Co.*, 480 F.3d 942, 945 n.2 (9th Cir. 2007) (quoting *Harolds Stores, Inc. v. Dillard*  
3 *Dep’t Stores, Inc.*, 82 F.3d 1533, 1554 n.15 (10th Cir. 1996)) (emphasis added). That  
4 did not happen here.

5 For example, Defendants argue that “Mr. Rifkin[] block billed almost all of his  
6 time entries.” Def. Mem. at 7. They criticize six particular time entries (out of more  
7 than 500 separate time entries he made). A review of those six time entries shows  
8 Mr. Rifkin’s billing practices. Mr. Rifkin did not enter single daily entries for the  
9 total time spent working on the Action that day; rather, he itemized the specific tasks  
10 performed:

11 (1) 8.5 hours billed on July 24, 2014 (Dkt. 337 at 33), for Mr. Rifkin to  
12 prepare for a hearing on whether documents produced by non-party  
13 ASCAP were privileged, travel to Los Angeles for the hearing, meet with  
14 his partner Betsy C. Manifold regarding the hearing, and to exchange  
15 emails with his client regarding the hearing. Each activity described related  
16 to the *same* task. The travel time alone (from New York to Los Angeles)  
17 accounted for at least 8.5 hours, during which Mr. Rifkin prepared for the  
18 hearing and exchanged emails with his client. Separating the time entry  
19 into separate, related activities would simply have added to the total  
20 amount of time recorded. There can be no genuine dispute that Mr. Rifkin  
21 spent at least that time on the hearing that day.

22 (2) 2.0 hours separately billed on July 24, 2014 (Dkt. 337 at 33), for finalizing  
23 an expert report; conferring with his associate Beth A. Landes about the  
24 expert report; conferring with his assistant, Lailah Greene, about the expert  
25 report; and exchanging emails with Mr. Newman about the expert report.  
26 All four activities related to the same task: the expert report. There is no  
27 dispute that Mr. Rifkin spent that time working on the expert report.  
28 Moreover, that Mr. Rifkin recorded two separate time entries for two

1 separate tasks on the same day refutes Defendants’ argument that he  
2 “block billed.”

3 (3) 8.5 hours billed on June 14, 2013 (Dkt. 337 at 11), the day after the first  
4 complaint was filed in the Action, exchanging email with a consultant  
5 regarding media inquiries about the commencement of the action;  
6 conferring with Mr. Newman and their client regarding commencement of  
7 the action and subsequent media inquiries; conferring with his partner,  
8 Janine Pollack, and their associates, Ms. Landes and Giti Baghban, about  
9 the commencement of the action; and exchanging emails with another  
10 client about the commencement of the action. There is no dispute that Mr.  
11 Rifkin spent that time on those activities – all of which related to  
12 commencement of the action – on that day.

13 (4) 0.8 hours separately billed on June 14, 2013 (Dkt. 337 at 11), exchanging  
14 phone calls with other Plaintiffs’ Counsel, Daniel J. Schacht and  
15 conferring with Mr. Newman and Ms. Pollack regarding strategies for  
16 working together with Mr. Schacht’s firm in the Action. There is no  
17 dispute that Mr. Rifkin spent that time on those activities. As with the first  
18 two time entries, the fact that Mr. Rifkin recorded two separate time entries  
19 for two separate tasks on the same day again refutes Defendants’  
20 unfounded argument that he “block billed.”

21 (5) 9.5 hours billed on December 2, 2015 (Dkt. 337 at 51), to travel back to  
22 New York from the mediation; to confer with Mr. Newman and Ms.  
23 Manifold regarding the mediation; to exchange email with David Rotman,  
24 the mediator, regarding the mediation; and to exchange email with other  
25 Plaintiffs’ Counsel about the mediation. Defendants do not dispute that  
26 Mr. Rifkin spent that time on those activities on that day.

27 (6) 2.0 hours separately billed on December 2, 2015 (Dkt. 337 at 51), to draft  
28 and revise Plaintiffs’ trial brief, phone calls with other Plaintiffs’ Counsel

1 regarding the trial brief, and with his client regarding the status of the trial  
2 brief. Once again, there is no dispute that Mr. Rifkin spent that time on  
3 those activities. As with four earlier time entries, that Mr. Rifkin again  
4 recorded two separate time entries for two separate tasks on the same day  
5 yet again refutes Defendants' unfounded argument that he "block billed."  
6 As these pairs of time entries demonstrate, Mr. Rifkin did not simply enter the total  
7 time he spent working on the Action each day in a single block entry; rather, he  
8 itemized the specific details of a task performed, as well as the time expended on  
9 specific tasks in separate time entries. *Cf. Welch*, 480 F.3d at 945 n.2.

10 Defendants appear to believe that combining multiple related activities in a  
11 single time entry, without allocating specific portions of time to each activity, is  
12 block billing. It is not. Recently, in *Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11-  
13 07098-AB (SHx), 2015 U.S. Dist. LEXIS 54063 (C.D. Cal. Mar. 24, 2015), a fee-  
14 shifting case under the Copyright Act, in which the Court was required to conduct a  
15 strict lodestar analysis,<sup>5</sup> the Court discussed block billing at length. The Court  
16 explained that detailed time entries combining multiple tasks, each of which is  
17 identified but for which specific amounts of time are *not* set forth, do *not* constitute  
18 improper "block billing" and do *not* risk potential "bill padding." *Id.* at 80. By way  
19 of example, the Court found that the following single entry for 12.8 hours on a single  
20 day was *not* "block billing":

21 Review emails from and confer with A. Bridges, J. Golinveaux, T.  
22 Kearney regarding Perfect 10's preliminary injunction motion,  
23 DMCA notices, and motion to seal; confer with J. Golinveaux  
24 concerning discovery; draft email to client concerning preliminary  
25

26 <sup>5</sup> Even in that context, as the Court noted, "[t]he essential goal in shifting fees  
27 (to either party) is to do rough justice, *not to achieve auditing perfection.*" *Id.* at 81  
28 (quoting *Fox v. Vice*, 563 U.S. 826, 838 (2011)) (emphasis added).

1           injunction motions; review exhibits, pleadings, and DMCA notices;  
2           review and revise draft letters to Perfect 10.

3 *Id.* at 80-81 (finding “such specific itemizations of counsels’ tasks sufficient to  
4 evaluate the reasonableness of Defendants’ request”).<sup>6</sup> Mr. Rifkin’s time entries were  
5 at least as detailed as (if not more so than) the particular time entry which the Court  
6 found was *not* “block billing” in *Perfect 10*.

7           Defendants also criticize Ms. Pollack’s time for block billing. Ms. Pollack, a  
8 highly regarded practitioner with more than 20 years of experience, billed just 58.7  
9 hours on the matter. Defendants do not identify a single time entry from Ms. Pollack  
10 which they believe is block billing. Like Mr. Rifkin’s practice, Ms. Pollack’s practice  
11 is to record time entries on a single task, even if the task involved multiple activities  
12 or steps. For example, on May 20, 2013, Ms. Pollack billed 3.5 hours to meet with  
13 Mr. Newman and Mr. Rifkin to discuss the potential litigation, to review a draft  
14 complaint, and participate in an office conference regarding the potential litigation.  
15 (Dkt. 337 at 123). On July 12, 2013, she billed 1.5 hours to meet internally with Wolf  
16 Haldenstein lawyers to discuss next steps in the litigation (including a visit to the  
17 Copyright Office) and exchange email with lawyers at the firm regarding next steps  
18 in the litigation. (Dkt. 337 at 124). On February 3, 2014, Ms. Pollack billed an hour  
19 to meet with Wolf Haldenstein lawyers to review documents and discuss discovery  
20 issues. (Dkt. 337 at 125). Defendants do not deny that Ms. Pollack spent that time  
21 performing those tasks on those days, or that her work was reasonably related to the  
22 successful prosecution of the Action. Ms. Pollack’s time entries are also more  
23

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24 <sup>6</sup> Even in the fee-shifting context, counsel “is not required to record in great  
25 detail how each minute of his time was expended.” *Hensley v. Eckerhart*, 461 U.S.  
26 424, 437 n.12 (1983). Instead, counsel meets his burden by simply listing his hours  
27 and “identify[ing] the general subject matter of his time expenditures.” *Davis v. City*  
28 *of San Francisco*, 976 F.2d 1536, 1542 (9th Cir. 1992) (fee shifting under Civil  
Rights Act) (quoting *Hensley*, 461 U.S. at 437 n.12).

1 detailed than the time entry found adequate in *Perfect 10*.

2 Next, Defendants criticize Mr. Newman for block billing. Their criticism is  
3 completely unfounded, and demonstrates a profound misunderstanding of the work  
4 that Mr. Newman performed. They argue that many of Mr. Newman’s time entries  
5 consist of a single time entry per day with a purportedly “vague” description of the  
6 work he did. Defendants criticize in particular four time entries by Mr. Newman for  
7 “[r]eview[ing] and [r]evising’ the complaint.” Def. Br. at 8 (quoting Dkt. 337 at  
8 216). On April 24, April 25, May 6, May 7, May 11, May 15, May 17, and May 20,  
9 2013, Mr. Newman in fact spent many hours reviewing and revising multiple drafts  
10 of the initial complaint. Dkt. 337 at 216. His time entries expressly identify no less  
11 than *nine* separate drafts of the complaint. *Id.* Defendants have no basis to complain  
12 about the time entries – which are completely accurate – merely because Mr.  
13 Newman did not specify how many minutes he spent on each paragraph of each  
14 draft. *See Perfect 10*, 2015 U.S. Dist. LEXIS 54063 at \*81.

15 Finally, the cases Defendants cite on block billing are either readily  
16 distinguishable (fee shifting, not common fund, cases) or inapplicable. For example,  
17 in *Welch*, the Ninth Circuit vacated as improper an across-the-board reduction by the  
18 district court of plaintiffs’ counsel fees by 20% in a successful ERISA challenge for  
19 the improper denial of benefits under a long term disability plan due to block billing.  
20 The Ninth Circuit noted that an across-the-board reduction of 20% effectively served  
21 as a 40% penalty on the half of the hours that were found to be block billed. *Welch*,  
22 480 F.3d at 948. Defendants’ own proffered authority contradicts their argument that  
23 all of Plaintiffs’ Counsel’s time should be reduced by 30% (or by \$1.5 million) for  
24 block billing when Defendants identify only approximately 1,000 hours, or \$575,000,  
25 as block billed, which Plaintiffs’ Counsel dispute in any event. *See* Def. Br. at 9.  
26 Defendants even concede that a substantial portion of Plaintiffs’ Counsel’s time is

1 *not* block billed, making any across the board improper as a matter of law.<sup>7</sup> Def. Br.  
2 at 8 n.2.

## 3 **2. Vague Descriptions of Class Counsel’s Work**

4 Defendants also complain that Plaintiffs’ Counsel’s timesheets are “replete  
5 with vague entries.” Def. Br. at 10. Again, their argument is unwarranted. As  
6 Defendants’ own case law notes, “plaintiff’s counsel need not record in great detail  
7 how each minute of his time was expended” but simply identify the general subject  
8 of the time expenditure. *Dubose v. County of L.A.*, No. CV 09-7832 CAS (AJWx),  
9 2012 U.S. Dist. LEXIS 81362, at \*17 (C.D. Cal. June 11, 2012) (Section 1983 case  
10 from a traffic stop and arrest in which time was reduced based on failure to delineate  
11 time between successful and unsuccessful claims and vague entries of “legal  
12 research” without any context or detail). *See* Def. Br. at 10.<sup>8</sup> For example,

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13  
14 <sup>7</sup> Defendants’ concession also distinguishes *Gunderson v. Mauna Kea Props.,*  
15 *Inc.*, No. 08-cv-00533 KSC, 2011 U.S. Dist. LEXIS 155072, at \*34 (D. Haw. May 9,  
16 2011), in which the Court noted it would ordinarily “only reduce the hours billed in  
17 the block style” but since nearly all of the hours were block billed, an across-the-  
18 board reduction was appropriate. *See* Def. Br. at 6. *See also Lahiri v. Universal*  
19 *Music & Video Distrib. Corp.*, 606 F.3d 1216, 1222-23 (9th Cir. 2010) (reduced  
20 specific block billing entries); *Mayer v. RSB Equity Group, LLC*, No. CV 10-9096  
21 ODW (AJWx), 2011 U.S. Dist. LEXIS 71879 at \*5 (C.D. Cal. July 5, 2011)  
22 (violation of the Fair Debt Collection Practices Act) (reduced fee from 21 hours to 14  
23 hours after a review of the fee records).

24 <sup>8</sup> Defendants’ other cases are also inapplicable. *See* Def. Br. at 10. In *United*  
25 *States v. One 2008 Toyota Rav 4 Sports Util. Vehicle*, No. 2:09-cv-05672-SVW-  
26 PJW, 2012 U.S. Dist. LEXIS 158417 (C.D. Cal. Oct. 18, 2012), described by the  
27 Court as a “simple forfeiture case involving a single vehicle,” the Court found that  
28 the “complexity of legal issues and the breadth of factual evidence” may warrant  
more than one attorney, the duplication of efforts by multiple attorneys, and the  
presence of other senior counsel, but not in that case. *Id.* at \*17-19. Unlike this  
Action, the Court observed that “nearly every other entry in counsel’s declaration  
involves a phone call or email” with other attorneys, staff or clients and that the  
“sheer frequency” of such communications with a vague description (telephone call)  
(continued...)

1 Defendants criticize eight of Mr. Rifkin’s time entries for referring to meetings and  
2 correspondence without identifying the subject matter of them. Their jaundiced  
3 criticism ignores the context of those time entries, which makes the subject matter of  
4 the meetings and correspondence entirely clear. On August 30, 2013, Mr. Rifkin  
5 received an email from Ms. Manifold regarding the motion to dismiss hearing. As the  
6 time entry shows, he responded to that email later that same day. Obviously, his  
7 response concerned the same subject matter. Dkt. 337 at 15. On September 4, 2013  
8 (which Defendants mis-identify as “9/14/13”), Mr. Rifkin reviewed and revised the  
9 response to the motion to dismiss. He also conferred with Ms. Landes regarding the  
10 motion to dismiss response, as the context makes clear. *Id.* On September 5, 2013,  
11 Mr. Rifkin reviewed press coverage of the Action and exchanged email with  
12 Katherine Ragsdale, a media consultant, regarding the press coverage. *Id.* On January  
13 29, 2014, Mr. Rifkin exchanged emails with Mr. Newman and their client. At the  
14 time, Plaintiffs’ Counsel were working on the joint planning report and the initial  
15 disclosures, to which the emails related. *Id.* at 20-21. On February 3 and 4, 2014, Mr.  
16 Rifkin conferred with Ms. Landes and exchanged emails with Mr. Newman and Ms.  
17 Manifold regarding several issues, including copyright research, a judgment search,  
18 the law review article by Prof. Robert Brauneis, and scheduling issues, as set forth in

19 \_\_\_\_\_  
(...continued)

20 without more context raised an issue of excessive billing. *Id.* at \*28. The exact  
21 opposite is true here, where the case complexities (multiple clients and counsel,  
22 complex factual history) and the substantive work noted in the timesheets show that  
23 the phone calls and email were reasonably spent and created cost saving efficiencies  
24 among the litigation team. *See also Keith v. Volpe*, 644 F. Supp. 1317, 1322 (C.D.  
25 Cal. 1986) (vague entries lumped together as “a single claimed item of compensable  
26 time [with] all work performed in the same week on the same billable matter”). The  
27 issue in *Hensley*, 461 U.S. at 432, a prevailing party analysis under Section 1988,  
28 was “to clarify the proper relationship of the results obtained to an award of  
attorney’s fees.” As the Supreme Court noted, “[w]here a plaintiff has obtained  
excellent results, his attorney should recover a fully compensatory fee” and in some  
cases of exceptional success, such as this, an enhanced award is justified. *Id.* at 435.

1 four separate time entries over those two days. *Id.* at 21. On February 5, 7, and 10,  
2 2014, Mr. Rifkin exchanged telephone calls and emails with Mr. Newman and Ms.  
3 Manifold and conferred with Ms. Landes regarding initial discovery requests, the  
4 joint report, updated discovery drafts, the Rule 26 planning report, and copyright  
5 records, all of which are set forth in six separate entries over those three days. *Id.*

6 Defendants’ pedantic, fly-specking review of a handful of Mr. Rifkin’s time  
7 entries is nonsensical.<sup>9</sup> More detailed time records are unnecessary for the Court to  
8 conduct the requisite lodestar cross-check in this common fund fee application.

### 9 3. Billing Hours Recorded

10 Defendants review over 310 pages of detailed time records and then cherry  
11 pick various times records which ended in whole and half increments. For example,  
12 in Mr. Newman’s time records, Defendants picked out 16 records out of 452 time  
13 entries and ending in half or whole increments. Defendants then note another  
14 \$120,000 of total time billed by Ms. Pollack and Mr. Godino ending in whole or half  
15 increments.<sup>10</sup> *See* Def. Br. at 12-13. However, Defendants fails to correlate these  
16

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17 <sup>9</sup> Defendants’ argument that Ms. Landes’ time entries are too vague is even  
18 more bizarre. For example, on May 30, 2013, Ms. Landes billed 7.0 hours for  
19 “copyright research and declaratory judgment [sic] [action].” Dkt. 337 at 157. On  
20 August 22, 2013, she billed 6.0 hours for “Analyzing the preemption cases;  
21 Reviewing for accuracy the contract claim that D.S. pulled up. Made correction.”  
22 *Id.* at 159. On February 3, 2014, Ms. Landes billed 11.0 hours for “Research  
23 question; copyright in works in public domain; and working on interrogatories.” *Id.*  
24 at 162. Far from being hopelessly vague, these time entries accurately reflect the  
25 work Ms. Landes performed each day and are sufficient to aid the Court in  
26 performing its lodestar cross-check.

27 <sup>10</sup> Defendants also note that Ms. Landes billed approximately 87% of her daily time  
28 entries in whole or half increments (also failing to provide any correlation to the  
actual tasks for which Ms. Landes billed). Def. Br. at 13. In *MacDonald v. Ford  
Motor Company Co.*, No. 13-cv-02988-JST, 2016 U.S. Dist. LEXIS 70809, at \*24  
(N.D. Cal. May 31, 2016) relied upon by Defendants, the district court reduced by  
10% the time billed by two attorneys in half-hour increments. While Plaintiffs’  
(continued...)

1 randomly picked time entries with actual examples of over-billing as required by  
2 their own Ninth Circuit authority. *See Welch*, 480 F.3d at 949 (upholding reduction  
3 expressly correlated to actual overbilling for tasks such as drafting letters, telephone  
4 calls and interoffice conferences) (Def. Br. at 6); *Haw. Def. Found. v. City & County*  
5 *of Honolulu*, No. 12-cv-00469 JMS-RLP, 2014 U.S. Dist. LEXIS 83871, at \*20-21  
6 (D. Haw. June 19, 2014) (reduction of larger time if tasks more likely than not took  
7 only a portion of the time billed, resulting in excessive hours). (Def. Br. at  
8 12). Addressing Plaintiffs' Counsel's time records for the second time now,  
9 Defendants still fail to explain how these entries are improper, other than ending in  
10 half or whole increments.

11 Next, in a summary fashion, Defendants argue that Class Counsel has a  
12 "practice" of billing "very large number of hours in single days." Def. Br. at 13. Not  
13 surprisingly, in a three-year litigation which settled on the eve of a bench trial, after  
14 fact and expert discovery was completed and a complex and exhaustive summary  
15 judgment motion was fully briefed, argued and decided, Class Counsel did work  
16 some very long hours in a single day. Here, Defendants point to *one* 20-hour day by  
17 Ms. Manifold, *two* 18.5-hour days by Mr. Rifkin, and over a dozen entries by Mr.  
18 Newman (a solo practitioner at the time) of 15 hours as warranting a substantial  
19 reduction in time simply because they worked a large number hours in one day. Def.  
20 Br. at 12. For example, Ms. Manifold's 20-hour day is detailed in a two page single-  
21 spaced time entry, references 62 specific tasks all completed in order to file the  
22 extensive and exhaustive summary judgment papers (over 120 exhibits, joint brief,  
23 over 400 detailed statements of facts referencing the factual record). *See* Dkts. 337 at  
24

25 \_\_\_\_\_  
(...continued)

26 Counsel dispute that any reduction is appropriate, at most, Defendants appear to  
27 suggest a 10% reduction or approximately \$43,000, for the time billed by Ms. Landes  
28 (\$427,272 in total), a trivial reduction of the \$5.3 million in Plaintiffs' Counsel's  
combined lodestar. *See* Def. Br. at 14.

1 96-97, 167-184, 187-195, 197-198, 202, 203, 210-211, 219, 224-225, 232-233, 236,  
2 239-240. The record includes 14 telephone calls with Defendants' counsel alone to  
3 finalize changes to the joint brief, filing certain records under seal and the copious  
4 joint appendix including the drafting, revision and exchange of 33 different drafts of  
5 the numerous documents required for a joint filing. There is no indication, as with  
6 the other time records identified, that this billing represents inflated hours or that this  
7 single entry by Ms. Manifold referenced by Defendants is part of a pattern of  
8 excessive or routine over billing.

9 Furthermore, Defendants' case law does not support their argument.<sup>11</sup> In  
10 *Alvarado v. Fed-Ex Corp.*, No. C 04-0098 SI, 2011 U.S. Dist. LEXIS 112997, at \*58  
11 (N.D. Cal. Sept. 30, 2011), which included a fee dispute between plaintiffs' counsel  
12 as well as objections by Defendants to the fee request, the facts were very  
13 different. A 40% reduction for "pervasive inflation" was imposed because of block  
14 billing with 10 to 40 hours in a single entry, repeated billing for excessively long  
15 days, and inflated excessive billing for e-filing (1.2 hours to file a case management  
16 report), letters (1.5 hours for a three line letter) and other routine or clerical  
17 tasks. No such pattern or practice exists here and not a single reference provided by  
18 Defendants supports an argument of "pervasive inflation" over the course of this  
19 three-year, hard-fought litigation. The bottom line is that Plaintiffs' Counsel worked  
20 tirelessly to achieve an exceptional result based on their efforts.

#### 21 **4. Reasonable Staffing of Attorneys throughout the** 22 **Litigation Stages**

23 The declarations of Plaintiffs' Counsel break down the key stages of the  
24 litigation addressed by Defendants' Statement (pre-filing investigation and initial  
25 complaint; opposition to motion to dismiss, discovery, summary judgment) and then

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26 <sup>11</sup> *Cotton v. City of Eureka*, 889 F. Supp. 2d 1154 (N.D. Cal. 2012) addresses  
27 whether counsel's hourly rates were reasonable within the district (which Defendants  
28 do not challenge here). See Def. Br. at 13.

1 further break down the time spent on each task by individual attorneys. *See* Dkts.  
2 323-1 at 4-10, 16-22; 323-2 at 4-10; 323-3 at 4-8; 324 at 5-20, 78-92. Defendants do  
3 *not* challenge the total lodestar for the Amended Complaint Drafting (\$305,027)  
4 Trial Preparation (\$263,050), Settlement Negotiations (\$304,266), or Settlement  
5 Approval and Administration (\$245,082).<sup>12</sup> Def. Br. at 15-19.

6 As to the remaining time, Defendants argue that Wolf Haldenstein’s  
7 coordination and staffing of these litigation stages was “inefficient,” “duplicative,”  
8 and “excessive.”<sup>13</sup> Def. Br. at 14-18. In *MacDonald*, one of the few class  
9 action cases cited by Defendants, the district court rejected this exact argument that  
10 “inefficiencies resulting from this overstaffing renders Plaintiffs’ attorneys’ fees  
11 request unreasonable.” *MacDonald*, 2016 U.S. Dist LEXIS 70809, at \*8. The court  
12 recognized that “litigating complex statutory cases often requires a team structure  
13 and [courts] do not penalize attorneys for working collaboratively.” *Id.* The court  
14 found plaintiffs’ counsel’s decisions reasonable as they were “litigating a putative  
15 class action against one of the world’s largest automotive manufacturers” and  
16 declined to reduce the lodestar on this basis. *Id.* at \*9. Similarly Plaintiffs here were  
17 litigating against one of the largest music and media companies in the world over one  
18 of the most well-recognized songs in the world.

19 In *MacDonald*, defendants also complained about the duplication of plaintiffs’  
20 counsel’s efforts as Defendants do here. The Court found such duplication of efforts,  
21 to the extent it exists, to be appropriate in that it “will often result in a savings of  
22

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23 <sup>12</sup> Plaintiffs’ Counsel also have incurred an additional \$338,783.50 in additional  
24 time in Settlement Administration. *See* Dkt. 337 at 203 (difference between Wolf  
25 Haldenstein’s current lodestar (\$3,552,904.50) and previously submitted lodestar  
(\$3,164,121) (Dkt. 324 at 5), then subtracting \$50,000 for fee-related time).

26 <sup>13</sup> Defendants’ demand for ‘task coding’ in the time records is unsupported by  
27 any authority, and the descriptions and time references are sufficiently clear on their  
28 face to identify the stage in which the time was billed.

1 attorney time by ensuring that all attorneys on a team are kept apprised of important  
2 information.” *Id.* at \*12. *See also Probe v. State Teachers’ Retirement Sys.*, 780  
3 F.2d 776, 785 (9th Cir. 1986), *cert. denied*, 476 U.S. 1170 (1986) (“[I]n an important  
4 class action litigation such as this, the participation of more than one attorney does  
5 not constitute an unnecessary duplication of effort.”).

6 In fact, as the Court recognized in *Lauderdale v. City of Long Beach*, No. CV  
7 08-979 ABC (JWJx), 2010 U.S. Dist. LEXIS 146002, at \*25 (C.D. Cal. Jan. 11,  
8 2010) in which defense counsel sought to recover fees after prevailing in a class  
9 action, “having multiple attorneys attend depositions, meetings and settlement  
10 conferences [can allow] counsel to contribute creative solutions, reduce[] the need  
11 for inter-office communications after meetings, and ameliorate[] disagreements over  
12 what actually went on at meetings.” *See also Thompson v. County of Santa Clara*,  
13 No. C-83-0700 JPV (JSB), 1990 U.S. Dist. LEXIS 11263, at \*56 (N.D. Cal. Aug. 2,  
14 1990) (appropriate for plaintiffs to send more than one attorney to appear at  
15 conferences and meetings given complex legal and factual nature of the case).

16 Defendants’ repeat their criticism of the pre-filing investigation and initial  
17 complaint, describing it as “substantial” and then summarizing the detailed research  
18 conducted by Mr. Newman regarding the 1790 and 1909 Copyright Acts, historic  
19 references and other ancient source materials, *See* Def. Br. at 14-15. In light of the  
20 risks involved and complexity of the factual background, Plaintiffs’ Counsel have a  
21 duty to make a reasonable pre-filing inquiry of the merits of their clients’ claims  
22 prior to filing suit. *See* Fed. R. Civ. P. 11. And a complex class action requires  
23 extensive pre-litigation preparation. *Thompson*, 1990 U.S. Dist. LEXIS 11263, at \*56  
24 (citing *Burnett v. Gratton*, 468 U.S. 42, 50-51 (1984)). Plaintiffs’ Counsel’s  
25  
26  
27  
28

1 extensive research efforts were necessary and reasonable and undoubtedly  
2 contributed to their success.<sup>14</sup>

3 **B. Compensation for Travel and Media Time is Customary and**  
4 **Appropriate**

5 **1. Travel Time**

6 Defendants oppose Plaintiffs' Counsel's travel time not on the basis that the  
7 time records were inadequate or deficient in any respect, but rather on the basis that  
8 billing for travel is not customary or appropriate. Contrary to Defendants' argument,  
9 compensation for reasonable and necessary travel time has long been permitted under  
10 Ninth Circuit precedent. *See Davis*, 976 F.2d at 1543. The practice in Los Angeles is  
11 to bill for reasonable and necessary travel time. *See, e.g.*, Declarations of Dinah  
12 Perez and Marc L. Godino submitted herewith.

13 Travel time is routinely compensated in the Ninth Circuit. *See, e.g., Contreras*  
14 *v. City of L.A.*, No. 2:11-cv-1480-SVW-SH, 2013 U.S. Dist. LEXIS 49412, at \*17  
15 (C.D. Cal. Mar. 28, 2013) ("district courts have routinely awarded fees for time spent  
16 traveling"); *Banas*, 47 F. Supp. 3d at 971 (relied upon by Defendants at Def. Br. at  
17 10) (fee request granted for travel time for multiple attorneys to attend depositions,  
18 hearings and mediations and found to be "not excessive"); *Thalheimer v. City of San*  
19 *Diego*, No. 09cv2862-IEG (BGS), 2012 U.S. Dist. LEXIS 59315, at \*12-13 (S.D.  
20 Cal. Apr. 26, 2012) ("when a lawyer travels for one client he incurs an opportunity  
21 cost that is equal to the *fee* he would have charged that or another client if he had not  
22 been traveling").<sup>15</sup>

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23 <sup>14</sup> Defendants' own case law highlights the potential risk to an unsuccessful  
24 plaintiff in a complex case. In *Banas v. Volcano Corp.*, 47 F. Supp. 3d 957 (N.D.  
25 Cal. 2014), cited in Def. Br. at 10, Judge Orrick awarded \$2.5 million to a successful  
26 corporate *defendant* based on the fee provision in a merger agreement challenged by  
two plaintiff shareholders.

27 <sup>15</sup> Generally, courts in this Circuit compensate travel time at the same hourly rate  
28 billed for other tasks, so long as the travel time is considered reasonable. *Defenbaugh*  
(continued...)

1 In *In re Energy Futures Corp.*, No. 14-10797 (CSS) (D. Del. Bankr.),  
2 Defendants’ counsel here, Munger, Tolles & Olson – itself – requested (and  
3 received) compensation for “non-working travel” time. Munger Tolles billed 62.8  
4 hours for “[n]on-[w]orking [t]ravel,” for which it billed \$64,330.50, which equals an  
5 average hourly rate of \$1,024.37 for “[n]on-[w]orking [t]ravel” time. *In re Energy*  
6 *Futures Corp.*, No. 14-10797 (CSS), Dkt. 6477-2 at 31 (D. Del. Bankr. Oct. 15,  
7 2015).

8 Plaintiffs’ Counsel have billed for travel time: (1) to and from Los Angeles for  
9 appearances in Court or for meetings that Defendants’ counsel insisted take place in  
10 Los Angeles; (2) to Louisville, Kentucky – the Hill Sisters’ birthplace – where they  
11 conducted extensive factual investigations of the Song, including time spent at the  
12 Filson Historical Society, where the Hill Sisters’ papers are stored;<sup>16</sup> (3) to the New  
13 York Public Library where Mr. Newman conducted important research on  
14 newspapers and periodicals in the library’s extensive periodicals collection; and (4)  
15 within New York City for meetings at Wolf Haldenstein (while Mr. Newman was a  
16

17 \_\_\_\_\_  
18 (...continued)

19 *v. JBC & Assocs.*, No. C-03-0651 JCS, 2004 U.S. Dist. LEXIS 16256, at \*33 (N.D.  
20 Cal. Aug. 10, 2004); *Ilick v. Miller*, 68 F. Supp. 2d 1169, 1178 (D. Nev. 1999)  
21 (compensating travel time at the full professional rate because attorneys are entitled  
22 to bill for lost productivity during travel, but limiting billable travel time to six hours  
23 within any 24-hour period, for “in the court’s experience, most attorneys would be  
24 satisfied with six hours of billable time at the end of any working day”); *Allen v. City*  
25 *of L.A.*, No. CV 91-2497 JGD (Tx), 1995 U.S. Dist. LEXIS 13929, at \*27 (C.D. Cal.  
26 Jan. 13, 1995) (“The Court does not believe an arbitrary percentage reduction on all  
27 hours claimed for travel is appropriate. Rather, the Court has either allowed or  
28 disallowed travel time depending upon the purpose for the travel.”) (emphasis  
added).

<sup>16</sup> Defendants cannot complain that Plaintiffs’ Counsel needlessly visited the  
Filson Historical Society. Defendants also visited the Filson Historical Society to  
conduct similar research there.

1 solo practitioner at his own office in New York City).<sup>17</sup> With one exception, there is  
2 no dispute that any of this travel was reasonable and necessary.<sup>18</sup> Nor is there any  
3 dispute that Plaintiffs’ Counsel billed accurately for their travel time.

4 Defendants do criticize Mr. Rifkin’s travel to Los Angeles on November 8,  
5 2015, to discuss the Action at a meeting of the Los Angeles Copyright Society. He  
6 accepted an invitation to do so primarily because, despite the Court’s ruling that  
7 Defendants do not own a copyright to the Song’s lyrics, *Defendants continued to*  
8 *demand payments for use of the Song*. The most appropriate response to  
9 Defendants’ unfounded demand was to disseminate information about the Court’s  
10 ruling, and the meeting of the Los Angeles Copyright Society – to be attended by  
11 attorneys who represent many class members – was a particularly appropriate venue  
12 in which to do so. Plaintiffs’ Counsel firmly believe that Mr. Rifkin’s travel for that  
13 purpose was necessary and appropriate.

## 14 2. Media Time

15 Defendants oppose the time Plaintiffs’ Counsel spent responding to media  
16 inquiries not on the basis that their time records were inadequate or deficient in any  
17 respect, but rather on Defendants’ assessment that such time is “‘*generally* not  
18 compensable.”” Def. Br. at 19 (quoting *Lehr v. City of Sacramento*, No. 2:07-cv-  
19 01565-MCE-GGH, 2013 U.S. Dist. LEXIS 42014, at \*36 (E.D. Cal. Mar. 22, 2013)  
20 (emphasis added). That case concerned a lodestar-based fee request under the Civil  
21 Rights Attorney’s Fees Awards Act of 1976. The holding implicitly recognized that  
22 media time may be appropriate. Other courts have compensated media time. *See*  
23 *David C. v. Leavitt*, 900 F. Supp. 1547, 1557-58 (D. Utah 1995) (awarding fees for

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24 <sup>17</sup> Mr. Newman’s travel time to the library and to Mr. Rifkin’s office – short  
25 subway commutes of no more than 20 minutes each way – was trivial.

26 <sup>18</sup> Defendants withdrew their objection to Plaintiffs’ Counsel’s request for  
27 reimbursement for the costs associated with all that travel. Tr. June 27, 2016 at  
28 11:16-12:13.

1 communications directed to class members via the media); *Keyes v. Sch. Dist. No. 1*,  
2 439 F. Supp. 393, 408 (D. Colo. 1977) (awarding fees where news media provided  
3 valuable conduit for information between counsel and class members). Defendants  
4 admit that media time is compensable when, as here, it is “‘directly and intimately  
5 related to the successful representation of a client’ and when they ‘contribute,  
6 directly and substantially, to the attainment of [the] litigation goals.’” Def. Br. at 19  
7 (quoting *L.H. v. Schwarzenegger*, 645 F. Supp. 2d 888, 900 (E.D. Cal. 2009).

8 This Action has drawn extensive worldwide media attention since its  
9 inception. The media inquiries reflected the public’s intense interest in the scope or  
10 validity of the *Happy Birthday* copyright. Media interest in the Action peaked after  
11 the Court granted partial summary judgment for Plaintiffs on September 22, 2015. As  
12 previously explained in the Declaration of Mark C. Rifkin in Support of Final  
13 Approval of Class Action Settlement and Request for Attorneys’ Fees and Expenses  
14 (Dkt. 324), ¶ 32, Plaintiffs’ Counsel, principally Mr. Rifkin, responded to those  
15 media inquiries not to draw publicity to themselves or their firms, but rather to  
16 provide important information to the public (many of whom were class members) on  
17 the status of the litigation and Defendants’ claimed copyright.

18 The obligation to communicate the status of the litigation to the public was  
19 never greater than after the Court’s summary judgment decision, not only because of  
20 the historic nature of the ruling, but also ***because Defendants insisted upon charging***  
21 ***for the Song even after the Court ruled that they never owned the copyright.***  
22 Indeed, Defendants continue to insist on that right to this very day (and presumably  
23 will do so until the Order and Final Judgment becomes final on July 29, 2016).  
24 However, through Plaintiffs’ Counsel’s efforts to publicize the summary judgment  
25 decision and the settlement by responding to media inquiries, the number of people  
26 forced to pay for the Song declined dramatically after September 22, 2015.

27 The few hours that Plaintiffs’ Counsel actually spent responding to media  
28 inquiries – only a handful of hours out of more than 10,000 hours they devoted to the

1 litigation<sup>19</sup> – are fully compensable because they were directly related to the  
2 successful representation of their clients’ goals and contributed directly and  
3 substantially to the attainment of one of the principal goals of the Action: ending  
4 Defendants’ baseless and unlawful demand for payment for *Happy Birthday*.

5 **III. CONCLUSION**

6 For all these additional reasons, the Court should grant Plaintiffs’ Counsel’s  
7 request for \$4.62 million in attorneys’ fees in full.

8 Respectfully submitted,

9 Dated: July 12, 2016

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18 <sup>19</sup> Defendants identified five time entries that they have characterized as “media  
19 time.” Only two of those time entries, for a total of just two hours, were, in fact,  
20 “media contacts.” On July 9, 2013, Mr. Rifkin spent approximately one hour (out of  
21 2.6 hours he billed to the matter that day) being interviewed by a Russian television  
22 reporter about the copyright dispute. (Dkt. 337 at 13). Ms. Landes also attended the  
23 interview. (Dkt. 337 at 158). The other time entries were not “media time.” One time  
24 entry (0.3 hours) was for an email Mr. Rifkin received from his client on March 7,  
25 2014, about an episode of *The Colbert Report* on the Action (neither Mr. Rifkin nor  
26 his client appeared on the show) (Dkt. 337 at 22). Another time entry (0.5 hours)  
27 included time spent by Daniel W. Krasner, a senior partner of Wolf Haldenstein,  
28 reading a *Hollywood Reporter* article on July 28, 2015. (Dkt. 337 at 5). Mr. Krasner  
was not interviewed for the article. The final time entry (8.5 hours billed on various  
tasks) included less than an hour on June 14, 2013 that Ms. Landes spent being  
interviewed for a documentary being made by the firm’s client. (Dkt. 337 at 157-58).  
Ms. Landes was not responding to a media or press inquiry about the Action.

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