Paul H. Duvall (SBN 73699)
E-Mail: pduvall@kingballow.com
KING & BALLOW
6540 Lusk Blvd., Suite 250
San Diego, CA 92121
(858) 597-6000
Fax: (858) 597-6008
Attorneys for Defendants and Counter-Claimants Frankie Christian Gaye and Nona Marvisa Gaye

Richard S. Busch (TN BPR 014594)
(*pro hac vice)*
E-Mail: rbusch@kingballow.com
Sara R. Ellis (TN BRP 030760) (*pro hac vice)*
Email: sellis@kingballow.com
KING & BALLOW
315 Union Street, Suite 1100
Nashville, TN 37201
(615) 259-3456 Fax: (615) 726-5417
Attorneys for Defendants and Counter-Claimants Frankie Christian Gaye and Nona Marvisa Gaye

Mark L. Block (SBN 115457)
E-Mail: mblock@wargofrench.com
WARGO & FRENCH LLP
1888 Century Park East; Suite 1520
Los Angeles, CA 90067
(310) 853-6355 Fax: (310) 853-6333
Attorneys for Defendants and Counter-Claimants Frankie Christian Gaye and Nona Marvisa Gaye

Paul N. Philips (SBN 18792)
E-Mail: pnp@pnplegal.com
The Law Offices of Paul N. Philips, APLC
9255 West Sunset Boulevard
West Hollywood, CA 90069
(323)813-1126 Fax: (323) 854-6902
Attorney for Defendant and Counter-Claimant Marvin Gaye III

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

PHARRELL WILLIAMS, an individual; ROBIN THICKE, an individual; and CLIFFORD HARRIS, JR., an individual,

Plaintiffs,

vs.

BRIDGEPORT MUSIC, INC., a Michigan corporation; FRANKIE CHRISTIAN GAYE, an individual; MARVIN GAYE III, an individual; NONA MARVISA GAYE, an individual; and DOES 1 through 10, inclusive,

Defendants.

AND RELATED COUNTERCLAIMS

Case No. CV13-06004-JAK (AGRx)

Hon. John A. Kronstadt

COUNTER-CLAIMANTS' JOINT MOTION FOR PREJUDGMENT INTEREST

Motion Hearing:
Date: June 29, 2015
Time: 8:30 am
Ctrm: 750

Action Commenced: August 15, 2013
Trial Date: February 24, 2015

Counter-Claimants Nona Marvisa Gaye, Frankie Christian Gaye and Marvin Gaye III (hereinafter "the Gayes") respectfully move this Court, pursuant to 17 U.S.C. § 504(b) of the Copyright Act and operative caselaw, for an award of prejudgment interest on the actual damages and profits awarded to the Gayes in the jury's Special Verdict (Dkt. No. 320).

I. INTRODUCTION

The jury found that the song "Blurred Lines" infringes upon the musical composition copyright in "Got to Give it Up" owned by the Gayes, and imposed liability on Plaintiff Robin Thicke ("Thicke"), and Plaintiff Pharrell Williams and Williams' publishing entity, Counter-Defendant More Water From Nazareth Publishing, Inc. (collectively, the "Williams Parties"). (Dkt. No. 320). As compensatory damages for the infringement, the jury awarded the Gayes $4,000,000.00 in actual damages against Thicke and the Williams Parties, $1,768,191.88 in profits against Thicke, and $1,610,455.31 in profits against the Williams Parties, for a total compensatory damages award of $7,378,647.19. (*Id.*). The jury also awarded the Gayes $9,375.00 in statutory damages against Thicke and the Williams Parties. Pursuant to 17 U.S.C. § 504(b) of the Copyright Act and operative caselaw in this Circuit, this Court should also award the Gayes prejudgment interest on the total compensatory damages award against Thicke and the Williams Parties.

II. ARGUMENT

A. The Gayes are Entitled to an Award of Prejudgment Interest

The United States Court of Appeals for the Ninth Circuit has specifically found "that prejudgment interest is available under the Copyright Act." *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 716 (9th Cir. 2004); see also *Frank Music Corp. v. Metro Goldwyn–Mayer, Inc.,* 886 F.2d 1545, 1551 (9th Cir.1989) (holding prejudgment interest as an available remedy under the 1909 Copyright Act). In particular, the Ninth Circuit found that prejudgment interest is appropriate pursuant to 17 U.S.C. § 504(b) of the Copyright Act "to compensate fully a copyright owner for the misappropriated value of its property and 'to avoid unjust enrichment by defendants, who would otherwise benefit from this component of profit through their unlawful use of another's work."

Polar Bear Prods., 384 F.3d at 718 (quoting *TVT Records v. Island Def Jam Music Group,* 279 F.Supp.2d 366, 410 (S.D.N.Y.2003)).

As the Ninth Circuit further explained:

> [P]rejudgment interest may be necessary to discourage needless delay and compensate the copyright holder for the time it is deprived of lost profits or license fees. . . . Simply put, prejudgment

Id. at 718. The Ninth Circuit then went on to say that "prejudgment interest is a different remedy for a different harm" and "may be necessary at times to effectuate the legislative purpose of making copyright holders whole and removing incentives for copyright infringement." *Id*. Therefore, prejudgment interest is routinely awarded to prevailing copyright owners in infringement cases. See, e.g., *Excelsior Coll. v. Frye*, Case No. 04-CV-0535-WQH, 2007 WL 672517, at *4 (S.D. Cal. Feb. 21, 2007) ("[A]n award of prejudgment interest [on actual damages and profits] furthers the legislative purpose of removing incentives for copyright infringement"); *Precision Craft Log Structures, Inc. v. Cabin Kit Co., Inc.*, Case No. 05-CV-0199-EJL, 2007 WL 1412502, at *2 (D. Idaho Jan. 17, 2007) (awarding prejudgment interest in copyright case); *see also* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.02[C][1] ("the trend may currently be towards awards of prejudgment interest generally in federal courts") (internal citations omitted).

Here, while the jury awarded the Gayes compensatory damages in the form of actual damages and the profits realized by Thicke and the Williams Parties, those damages do not fully compensate the Gayes for the infringement of "Got to Give it Up." Regarding actual damages, the infringement deprived the Gayes of the use of money they would have received as a licensing fee had Thicke and the Williams Parties properly obtained a license. The jurors heard from Nancie Stern, who explained that the use of "Got to Give it Up" in "Blurred Lines" would have resulted in a 50% ownership/licensing fee being granted to the Gayes if a license had been negotiated before release of "Blurred Lines," and a much higher percentage after release. (*See* Trial

Tr., March 3, 2015 at 27:18-22, 28:16-22, attached to Busch Decl. as Exhibit A). This testimony regarding a 50% licensing fee supports the jury's actual damages award of $4 million, as the Gayes' financial expert, Gary Cohen, testified that the publishing revenue for "Blurred Lines" was over $8 million. (*See id.* at 48:4-21). Thus, by failing to obtain a license for the use of "Got to Give it Up" and account to the Gayes, Thicke and the Williams Parties have deprived the Gayes of the use of such publishing revenues.

Similarly, Thicke and the Williams Parties have been unjustly enriched through their infringement by retaining such publishing revenues and through realizing the $3.38 million in profits that the jury also awarded to the Gayes. As the Ninth Circuit stated in *Polar Bear Prods.*, prejudgment interest will serve to avoid such unjust enrichment by Thicke and the Williams Parties, "who would otherwise benefit from this component of profit through their unlawful use of another's work." 384 F.3d at 718. Thus, an award of prejudgment interest is necessary as a further disincentive for Thicke and the Williams Parties' infringement and to make the Gayes whole pursuant to 17 U.S.C. § 504(b) and the Ninth Circuit's decision in *Polar Bear Prods.*

B. Amount of Prejudgment Interest

As to the proper amount of prejudgment interest, the Ninth Circuit has held that such pre-judgment interest should be calculated in the same manner as post-judgment interest under 28 U.S.C. § 1961(b), i.e. "at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 836 (9th Cir. 2012); *Frank Music Corp.*, 886 F.2d at 1552 (applying this rate in a copyright infringement case); *Western Pacific Fisheries, Inc. v. SS President Grant,* 730 F.2d 1280, 1288 (9th Cir.1984).

As for the starting date for calculating prejudgment interest, in the only copyright infringement case in the Ninth Circuit addressing the issue, *Frank Music Corp.*, the court accepted the plaintiffs' request for prejudgment interest from the date of the last infringing performance, and therefore declined to decide "whether an award of

prejudgment interest from some earlier point in time, such as the first infringement or date of notice, would be appropriate." *Frank Music Corp.*, 886 F.2d at 1552. Here, the Gayes submit that an earlier starting date for calculating prejudgment interest – the "accrual date" – is appropriate. (*See* Decl. of Gary Cohen at ¶ 3).

Gary Cohen, the Gayes' financial expert, determined the accrual date for prejudgment interest by calculating the average payout date of the royalties that formed the basis of the jury's award of actual damages and profits based on the "Blurred Lines" single release date of March 23, 2013. (*See id.* at ¶¶ 4-6). Based on his experience in the music industry, Mr. Cohen assumed royalties began to be paid forty-five (45) days after the end of the quarter in which the release occurred, or May 15, 2013. (*See id.* at ¶ 6). Assuming royalties were paid evenly between that date and the present, the average payout date would have been May 8, 2014. (*See id.*). Though in reality the weighted average date would likely be earlier because more royalties were earned during the first year following release than the second, May 8, 2014, is a conservative accrual date for calculation of prejudgment interest. (*See id.*).

Using the accrual date of May 8, 2014, and the federal post-judgment interest rate on the date of the jury verdict of 0.25% pursuant to 28 U.S.C. § 1961(b),[1] the total prejudgment interest accrued on the actual damages and profits award as of today's date of May 1, 2015, is $18,093.00. (*See id.* at ¶¶ 7-8). Additional interest after May 1, 2015 through the date of judgment will accrue at a rate of $50.54 per day. (*See id.* at ¶ 8).

The Gayes submit that the foregoing calculation of prejudgment interest is reasonable and appropriate, and request that the Court calculate prejudgment interest accordingly, from the accrual date of May 8, 2014, through the date the judgment is entered by the Court.

[1] Mr. Cohen submits that this rate is a very low interest rate when compared to rates in jurisdictions, such as the California state court prejudgment interest rate of 10%, which is forty (40) times higher. (See id. at ¶ 7).

III. CONCLUSION

Based on the foregoing, the Gayes respectfully request this Court award the Gayes prejudgment interest.

Dated: May 1, 2015

Respectfully submitted,

KING & BALLOW

By: /s/ Richard S. Busch
RICHARD S. BUSCH
PAUL H. DUVALL
SARA R. ELLIS

WARGO & FRENCH, LLP

By: /s/ Mark L. Block
MARK L. BLOCK

ARNOLD & PORTER LLP

BY: /S/ DANIEL B. ASIMOW
MARTIN R. GLICK
DANIEL B. ASIMOW

Attorneys for Defendants and Counter-Claimants Nona and Frankie Gaye

THE LAW OFFICES OF PAUL N. PHILIPS, APLC

By: /s/ Paul N. Philips
PAUL N. PHILIPS

Attorney for Defendant and Counter-Claimant Marvin Gaye III