

CAUSE NO. \_\_\_\_\_

ELIZA GILKYSON, TONY GILKYSON,  
and NANCY GILKYSON,

Plaintiffs,

v.

THE WALT DISNEY COMPANY, and  
XYZ ENTITIES #1-10,

Defendants.

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IN THE DISTRICT COURT  
  
\_\_\_\_\_ JUDICIAL DISTRICT  
  
OF TRAVIS COUNTY, TEXAS

**PLAINTIFFS’ ORIGINAL PETITION**

**COME NOW** Eliza Gilkyson, Tony Gilkyson, and Nancy Gilkyson, the Plaintiffs in the above-styled action, by and through their counsel, Alan C. Milstein and Michael Dube of Sherman, Silverstein, Kohl, Rose & Podolsky, P.A., Craig Barker of Barker Lee PLLC, and Price Ainsworth of Law Office of Price Ainsworth, P.C., by way of this Original Petition against Defendants The Walt Disney Company (“Disney”) and XYZ Entities #1-10 (collectively, “Defendants”), and hereby say, state, and aver as follows:

**I. DISCOVERY CONTROL PLAN**

1. Discovery in this case is intended to be conducted under Level 3 pursuant to Texas Rules of Civil Procedure 190 and 190.3.

**II. THE BARE NECESSITIES (PARTIES, JURISDICTION, AND VENUE)**

2. The parties are as follows:

a. Plaintiffs Eliza Gilkyson (“Eliza”), Tony Gilkyson (“Tony”), and Nancy Gilkyson (“Nancy”) are adult individuals who are the heirs of Terry Gilkyson (“Terry”).

b. Eliza and Nancy are citizens of the State of Texas; Tony is a citizen of the State of California.

c. Defendant The Walt Disney Company is a multinational mass media company headquartered in Burbank, California.

d. Disney is incorporated in the State of Delaware, and has its principal place of business in California. As such, Disney is a citizen of the States of Delaware and California.

e. Disney may be served with process care of its registered agent Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808.

f. XYZ Entities #1-10 are entities, whose identities are currently unknown or not fully known to the Plaintiffs, that bear or may bear legal responsibility as set forth herein.

3. The District Courts of Travis County, Texas have subject matter jurisdiction over this case, as the amount in controversy exceeds the minimum jurisdictional limits of this Court, and the exercise of this Court's jurisdiction over the Defendants is otherwise proper.

4. The District Courts of Travis County, Texas have personal jurisdiction over Disney as Disney has minimum contacts with the State of Texas and systematically and continuously transacts business in the State of Texas such that the maintenance of this action in Texas would be fair, and the long-arm statute authorizes the exercise of jurisdiction over Disney.

5. Venue is appropriate in the District Courts of Travis County, Texas pursuant to Texas Civil Practices & Remedies Code § 15.002(a) and such other provisions as are applicable.

### **III. FACTS COMMON TO ALL COUNTS**

#### **A.**

6. Terry Gilkyson was a successful singer, performer, and songwriter who was primarily active during the 1950's and 1960's.

7. As part of The Easy Riders, Terry co-wrote and performed on the hit single “Marianne,” which sold in excess of 1,000,000 copies.

8. Terry also wrote, co-wrote, and performed on numerous other hit records.

9. In the early 1960’s, Terry began writing songs for “The Wonderful World of Disney” television series.<sup>1</sup>

10. In or around 1963, Terry and Disney entered into a series of separate contracts whereby Terry agreed to write songs for a contemplated project called “The Jungle Book.”

11. Specifically, Terry agreed to write songs including the following: “Brothers All,” “The Song of the Seeonee,” “The Bare Necessities,” “Monkey See, Monkey Do,” “I Knew I Belonged To Her,” “In A Day’s Work,” and “The Mighty Hunters” (collectively, “Jungle Book Songs”). A true and correct copy of the contract for “Monkey See, Monkey Do” is attached to this Petition as **Exhibit “A.”**

12. On information and belief, the contract for “Monkey See, Monkey Do” is typical of the contracts for all of the Jungle Book Songs.

13. In ¶ 5, the parties agree that Terry will be paid \$1,000 in exchange for writing the song. See Exhibit A, ¶ 5.

14. In ¶ 6(a), the parties agree that Terry will get a five cent royalty for each piece of sheet music sold in the United States and Canada. See Exhibit A, ¶ 6(a).

15. In ¶ 6(b), the parties agree that Terry will receive as a royalty fifty percent “of all net sums” received by the publisher (which appears to be Wonderland Music) in connection with sheet music sales in all foreign countries except for Canada. See Exhibit A, ¶ 6(b).

16. In ¶ 6(c), the parties agree that Terry will receive “[a]n amount of money equal to Fifty Percent (50%) of the net amount received by our music publisher on account of licensing or

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<sup>1</sup> “Disney,” as used herein, also refers to The Walt Disney Company’s predecessors in interest, if any.

other disposition of the mechanical reproduction rights in and to material so written by you.”

See Exhibit A, ¶ 6(c) (emphasis added).

17. Finally, ¶ 7 provides as follows: “You shall be entitled to receive as royalties only the moneys and/or royalties stipulated in and in accordance with Paragraph 6 above; specifically excepting, excluding and reserving to us all revenue, emoluments and/or receipts received by and paid to us by virtue of the exercise of the grand rights, dramatic rights, television rights and other performance rights, including the use of the material in motion pictures, photoplays, books, merchandising, television, radio and endeavors of the same or similar nature.”

18. Ultimately, Disney decided not to use all of the Jungle Book Songs in the movie “The Jungle Book”; instead, it simply used the song “The Bare Necessities.” The remaining songs in the movie were written by the songwriting team of Richard M. Sherman and Robert B. Sherman (collectively, “Sherman Brothers”).

19. “The Jungle Book” tells the story of Bagheera the Panther and Baloo the Bear’s journey with a young boy who must leave the jungle for human civilization.

20. “The Bare Necessities” is the centerpiece of the movie and is featured three times in the film, first in the middle, then again in a reprise, and then again during the final minute.

21. “The Jungle Book” was a smash hit, and ultimately grossed over \$140,000,000 at the box office. It was the last Disney movie to be produced by Walt Disney himself.

22. In 1968, Terry was nominated for an Academy Award for Best Original Song for “The Bare Necessities.”

23. That same year, Terry and the Sherman Brothers were nominated for a Grammy award in the category of “Best Album for Children.”

24. “The Bare Necessities,” famous in its own right, includes the well-known lyrics:

**Look for the bare necessities, the simple bare necessities  
Forget about your worries and your strife  
I mean the bare necessities  
Old Mother Nature’s recipes  
That bring the bare necessities of life**

**B.**

25. Terry died in Austin, Texas in October 1999, at the age of eighty-three, survived by his widow Joan and three children, Eliza, Tony, and Nancy.

26. Joan passed away in November 2002. After Joan’s passing, in accordance with Terry’s will and other estate planning documents, Eliza, Tony, and Nancy became entitled to receive Terry’s royalties in equal measure.

27. In or around 2007, Disney re-released “The Jungle Book” on DVD and has since that time continuously sold the DVD and received substantial profits from the release.

28. On information and belief, in connection with the release, Disney prominently advertised the “special features” available on the DVD, including a demonstration recording of “The Bare Necessities,” deleted material, and unused songs written for the movie by Terry.

29. When an individual puts the DVD into his or her DVD player, and calls up the “main menu,” the song “The Bare Necessities” begins to play, and continues to play for an extended period of time.

30. When an individual calls up the “scene selection” feature, twenty-seven chapters appear. One is called “*The Bare Necessities*” (italics in original) and, if a user selects that chapter, he or she is able to jump to the very beginning of the song. If he or she wishes to play the song ten times in order to entertain a child, he or she can easily do so by simply pressing the “back” button on a remote.

31. Finally, when an individual selects “special features,” a screen with the title “Deleted Songs / Songs by Terry Gilkyson” appears.

32. When this screen is selected, seven songs written by Terry are listed: “Brothers All,” “The Song of the Seeonee,” “The Bare Necessities’ (Demo Version),” “Monkey See, Monkey Do,” “I Knew I Belonged To Her,” “In A Day’s Work,” and “The Mighty Hunters.”

33. When one of these songs is selected, the complete audio of the song plays. This audio is unaccompanied by any moving images.

34. Even before a user selects one of the songs, an instrumental version of “The Bare Necessities” plays. This audio is unaccompanied by any moving images.

35. Finally, when an individual inserts the accompanying second DVD, which contains bonus features, a second instrumental version of the song “The Bare Necessities” plays. This audio is unaccompanied by any moving images.

### C.

36. The intention of Terry and Disney, as reflected in the plain language of the contracts, was that Disney would make modest up-front payments of \$1,000 per song in order for Terry to write the Jungle Book Songs and to compensate him for the comparatively brief period of theatrical and television broadcast uses, but Disney would pay Terry the agreed-upon mechanical royalty set forth in ¶ 6(c) in connection with per-unit sales to consumers. The contracts do not limit per-unit consumer to audio-only sales.

37. Indeed, Disney has paid, and continues to pay, mechanical royalties on the sales of compact discs containing, and digital downloads of, the song “The Bare Necessities.”

38. On information and belief, Disney has sold approximately 4,000,000 DVD’s of “The Jungle Book” since the most recent release.

39. Despite the fact that “The Jungle Book” DVD (a) contains all or substantially all of the Jungle Book Songs in audio-only form; (b) contains two instrumental versions of “The Bare Necessities” in audio-only form; and (c) contains “The Bare Necessities,” which can be played and re-played by purchasers and their children to their hearts’ delight, Disney has wrongfully failed to pay Terry (or his heirs) any mechanical or other per-unit royalties from the sale of the DVD’s.

40. Disney has also wrongfully failed to pay Terry (or his heirs) any mechanical or other per-unit royalties where “The Bare Necessities” was sold as part of prior VHS and DVD releases, DVD compilations of the just the songs of the film, and other Disney films (including “The Jungle Book 2”).

41. Disney has announced that it will be releasing “The Jungle Book” in Blu-Ray format in early 2014.

42. On information and belief, Disney does not plan to pay Terry (or his heirs) any royalties from the sale of the film on Blu-Ray.

#### **IV. COUNTS AND CAUSES OF ACTION**

##### **COUNT ONE – BREACH OF CONTRACT**

43. The foregoing paragraphs are repeated as if fully set forth at length.

44. The Plaintiffs hereby plead a cause of action for breach of contract.

45. Terry and Disney entered into the above-described valid and binding contracts.

46. Disney and the Defendants breached the contracts in the manner described above.

47. As a direct and proximate result of that breach, the Plaintiffs have been damaged.

48. As a further direct and proximate result of that breach, the Plaintiffs have been forced to retain attorneys and, as such, are entitled to the recovery of attorney’s fees under Chapter 38 of the Texas Civil Practice & Remedies Code.

## **COUNT TWO – UNJUST ENRICHMENT**

49. The foregoing paragraphs are repeated as if fully set forth at length.

50. The Plaintiffs hereby plead a cause of action for unjust enrichment, and/or seek a remedy on a theory of unjust enrichment.

51. Terry conferred benefits upon Disney, including but in no way limited to intellectual property in the form of the Jungle Book Songs.

52. Disney and the Defendants received and appreciated the foregoing benefits.

53. Under the circumstances, it would be inequitable for the Defendants to retain all monies received in connection with the sale of “The Jungle Book” on DVD and Blu-Ray.

54. Thus, under the doctrine of unjust enrichment, the Defendants are obligated to compensate the Plaintiffs in an amount to be determined at trial.

## **COUNT THREE – DECLARATORY JUDGMENT**

55. The foregoing paragraphs are repeated as if fully set forth at length.

56. The Plaintiffs hereby plead a cause of action for declaratory judgment.

57. Chapter 37 of the Texas Civil Practice & Remedies Code provides in pertinent part as follows: “A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder. ... A contract may be construed either before or after there has been a breach.”

58. Pursuant to the foregoing, and such other provisions as are applicable, the Plaintiffs respectfully request a declaratory judgment that the Plaintiffs are entitled to royalties in

connection with sales of “The Jungle Book” on DVD, Blu-Ray, and any similar medium, nationally and internationally, now and in the future.

#### **COUNT FOUR – BREACH OF FIDUCIARY DUTY**

59. The foregoing paragraphs are repeated as if fully set forth at length.

60. The Plaintiffs hereby plead a cause of action for breach of fiduciary duty.

61. In the cases of royalty accounting to recording artists (and songwriters), the party handling the money has a fiduciary duty to the artists/writers.

62. The Defendants’ actions, including but not limited to their failure to appropriately account for, and pay, the appropriate royalty amounts to the Plaintiffs, constitutes a breach of the aforesaid fiduciary duty.

63. As a direct and proximate result of that breach, the Plaintiffs have been damaged.

#### **V. PRAYER FOR RELIEF**

64. For the foregoing reasons, Plaintiffs Eliza Gilkyson, Tony Gilkyson, and Nancy Gilkyson request that upon final trial or other disposition of this lawsuit, the Plaintiffs have and recover judgment against the Defendants, jointly and severally, for the following:

- a. All damages requested in this Petition, including all monies owed in connection with the sale of the Jungle Book Songs as described above;
- b. Reasonable and necessary attorney’s fees;
- c. Pre-judgment and post-judgment interest;
- d. Court costs;
- e. Punitive/exemplary damages; and
- f. Such other relief as is necessary and appropriate in the circumstances presented.

g. Pleading further, and in the alternative if necessary, the Defendants' actions were knowing, malicious, intentional, wanton, and in reckless and callous disregard of the legitimate rights of the Plaintiffs so far as to justify the imposition of exemplary damages. The Plaintiffs seek the recovery of such exemplary damages from Defendants.

**VI. DEMAND FOR JURY TRIAL**

65. The Plaintiffs respectfully request a trial by jury as to all counts and causes of action that are so triable.

**VII. DEMAND FOR DISCOVERY**

66. Pursuant to Texas Rule of Civil Procedure 194, the Defendants are hereby requested to disclose, within fifty days after the date of service of this request, the information and the material described in Rule 194.2(a) through (i).

Dated: July 15, 2013

Respectfully submitted,

BARKER LEE PLLC

By:



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