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 WILLIAM ADAMS, et al.

8 UNITED STATES DISTRICT COURT
 9 CENTRAL DISTRICT OF CALIFORNIA

11 GEORGE CLINTON, an individual,
 12 Plaintiff,
 13 v.
 14 WILL ADAMS, p/k/a will.i.am,
 individually and d/b/a WILL.I.AM MUSIC
 15 PUBLISHING, an individual; ALLAN
 PINEDA, p/k/a apl.de.ap, individually and
 16 d/b/a JEEPNEY MUSIC PUBLISHING,
 an individual; JAIME GÓMEZ, p/k/a
 17 Taboo, individually and d/b/a NAWASHA
 NETWORKS PUBLISHING, an
 18 individual; STACY FERGUSON, p/k/a
 Fergie, an individual; GEORGE PAJON,
 19 JR., an individual; JOHN CURTIS, an
 individual; UNIVERSAL MUSIC
 20 GROUP, INC., a Delaware corporation;
 UMG RECORDINGS, INC., a Delaware
 21 corporation; WILL I AM MUSIC, INC., a
 California corporation; CHERRY LANE
 22 MUSIC PUBLISHING COMPANY, INC.,
 a New York corporation; EL CUBANO
 23 MUSIC, INC., a California corporation;
 EMI BLACKWOOD MUSIC INC., a
 24 Connecticut corporation; TAB
 MAGNETIC, INC., a California
 25 corporation; and DOES 1 through 10,
 26 Defendants.

Case No. CV 10-9476 ODW (PLAx)
 Honorable Otis D. Wright II, Ctrm 11

**MEMORANDUM OF POINTS
 AND AUTHORITIES IN
 SUPPORT OF DEFENDANTS'
 MOTION FOR PARTIAL
 SUMMARY JUDGMENT**

Date: April 9, 2012
 Time: 1:30 p.m.
 Place: Courtroom 11

Pre-Trial Conf.: May 7, 2012
 Trial Date: June 5, 2012

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1 **1. INTRODUCTION.**

2 Plaintiff George Clinton sued multiple defendants for copyright infringement
3 based on the use of a sample of one of his songs in a limited edition re-mix of one of
4 The Black Eyed Peas' hit songs. Defendants contend that there was no infringement
5 because they obtained valid licenses authorizing the use of Clinton's sound recording
6 in this limited release. While the issue of whether Defendants obtained a valid license
7 may be subject of factual disputes, there are three issues relating to damages and the
8 liability of two peripheral defendants that are ripe for summary judgment.

9 First, Clinton cannot prove actual damages or profits attributable to the alleged
10 infringement. Clinton failed to disclose any documents reflecting damages, or to
11 provide a computation of damages, as required by Rule 26; nor can he do so now
12 because the discovery period is over. Given the exclusion sanction of Federal Rule 37
13 and his failure to designate any damages expert, Clinton can submit no evidence
14 showing actual damages or profits of the Defendants attributable to the alleged
15 infringement.

16 Second, while there may be factual disputes as to whether the licenses are valid,
17 there is no dispute of fact that Defendants reasonably and justifiably relied on those
18 licenses. Accordingly, even if Plaintiff could prove infringement, Defendants, as a
19 matter of law, are "innocent infringers" for purposes of statutory damages.

20 Third, since filing his complaint, Clinton has dismissed several defendants who
21 never should have been sued in the first place. There are two others left who have no
22 conceivable relationship to the alleged infringement: Defendants will.i.am music, inc.
23 and Tab Magnetic, Inc. These Defendants have never owned the alleged infringing
24 sound recording, have never licensed that sound recording, and have never received
25 profits from use of that sound recording. As a matter of law, then they cannot be
26 liable for copyright infringement.

27 Therefore, Defendants respectfully request that the Court grant this motion.
28

1 **2. STATEMENT OF UNDISPUTED FACTS.**

2 **A. Creation, And Initial Ownership, of The Master “*Knee Deep*.”**

3 Clinton^{1/} was a member of the funk musical group known as Funkadelic.
4 (Uncontroverted Fact (“UF”) 1.) Clinton produced the master sound recording (*Not*
5 *Just*) *Knee Deep* (“*Knee Deep*”), which was contained on Funkadelic’s 1979 album
6 UNCLE SAM WANTS YOU. (UF 3.)

7 Warner Bros. Records, as Clinton’s employer for hire, registered the copyright
8 for the sound recording for the album UNCLE SAM WANTS YOU on or about
9 October 5, 1979. (UF 4.)

10 **B. BEP and Universal Licensed The Right To Use A Sample of *Knee***
11 ***Deep* From Capitol Records, Who Represented That It Owned The**
12 **Copyright In and To the *Knee Deep* Master.**

13 The Black Eyed Peas (“BEP”) is a music group composed, at all relevant times,
14 of defendants William Adams, Allan Pineda, Jamie Gomez, and Stacy Ferguson.
15 (UF 5.)

16 In 2003, BEP released an album entitled ELEPHUNK. *Shut Up* was one of the
17 singles on ELEPHUNK. (UF 6.) At or about the same time, BEP released a vinyl
18 album containing several different versions of *Shut Up*; one of those versions included
19 a sample of *Knee Deep*. (UF 7.) That version is referred to herein as the “2003 Shut
20 Up Remix.”

21 In order to obtain a license for use of *Knee Deep*, BEP contacted Capitol
22 Records, which, through its wholly owned subsidiary Priority Records, had been
23 releasing albums featuring Clinton’s masters. (UF 8.) Priority had entered into a
24 license agreement with Tercer Mundo, Inc., a company that represented that it had the
25 rights to Clinton’s masters. That license agreement gave Priority the right to issue
26 “sampling” licenses for Clinton masters, such as *Knee Deep*. (UF 9.)

27
28 ^{1/} Plaintiff Clinton is known both by the names “George Clinton” and “George Clinton, Jr.” (UF 2.)

1 Capitol and BEP negotiated a license for use of the *Knee Deep* sample in the
2 2003 Shut Up Remix. A check in the amount of \$12,000 was then sent to Capital as
3 payment of the advance on the license. (UF 10.)

4 **C. BEP Obtains A License Before Releasing the 2009 Shut Up Remix.**

5 In 2009, BEP, through Universal, released an album entitled “THE E.N.D.”
6 (UF 11.) At the same time, BEP sought to release a special double-disc edition of the
7 “THE E.N.D.” exclusively to be sold at Target stores. The second disc of this Target
8 release contained a few new songs as well as remixes of classic BEP hits, including
9 *Shut Up*. The planned *Shut Up* remix was again to use a sample of *Knee Deep*.
10 (UF 12.) This version is referred to herein as the “2009 Shut Up Remix.” The 2003
11 Shut Up Remix and the 2009 Shut Up Remix are identical except one of the remixes is
12 a few seconds longer. (UF 36.)

13 Obtaining a license for this sample was different in 2009 than it was in 2003
14 because the ownership of Clinton’s master had changed. Specifically, on June 17,
15 2005, a federal court entered an order declaring Clinton to be the sole owner of his
16 master sound recordings, including *Knee Deep*. (UF 13.)^{2/}

17 Deborah Mannis-Gardner of DMG Clearances, Inc., a sample clearance
18 company, was retained to obtain a license from Clinton for the use of a sample of
19 *Knee Deep* in the 2009 Shut Up Remix. (UF 14.) Mannis-Gardner has been used
20 before by BEP and has an excellent reputation in the music industry. (UF 15.)

21 Initially, Mannis-Gardner had difficulty getting in touch with Clinton. (UF 16.)
22 Eventually, she was referred to Eban Kelly who she understood had been working
23 with Clinton for over 20 years. (UF 17.)

24 Mannis-Gardner faxed to Kelly a proposed license for use of *Knee Deep* in the
25 *Shut Up* Remix. Kelly faxed back an executed license agreement and an executed W9,
26 providing for payment to Clinton to be made to C. Kunspyruhzy, LLC, a company of

27
28 ^{2/} Though entered in 2005, the Order was not recorded with the Copyright Office
until May 15, 2006. (UF 13.)

1 which Clinton is a member. (UF 18.) Both the license and the W9 appeared to have
2 Clinton's signature. At the time she received the documents, Mannis-Gardner had no
3 reason to believe that they did not contain the actual signature of Mr. Clinton.

4 (UF 19.)^{3/} Mannis-Gardner sent a \$15,000 advance check to C. Kunspyruhzy, LLC.

5 (UF 20.)

6 **D. Defendants will.i.am music, inc. and Tab Magnetic, Inc. Do Not Own,**
7 **Did Not License, And Received No Income From Exploitation Of,**
8 **The Masters Of The 2003 And 2009 Shut Up Remixes.**

9 Defendant will.i.am music, inc. ("WMI") is a company owned by Defendant
10 Adams. (UF 21.) Defendant Tab Magnetic, Inc. ("TMI") is a company owned by
11 Defendant Jaime Gomez. (UF 22.)

12 Neither WMI nor TMI:

- 13 • owns, or ever owned, the masters for the 2003 Shut Up Remix or the
- 14 2009 Shut Up Remix;
- 15 • licensed the right to exploit those masters;
- 16 • received any income from the exploitation of those masters.

17 (UF 23-25.)

18 **E. Clinton Has Provided No Evidence Of Actual Damages Or Profits.**

19 **(1) Clinton Had Not Produced Any Evidence of Actual Damages.**

20 Clinton has never computed his damages as required by Rule 26(A)(1)(a)(iii).
21 Rather, Plaintiff's section on damages in the Rule 26 disclosures reads as follows:

22 Plaintiff asks for damages, declaratory relief, permanent injunctive relief,
23 and equitable relief pursuant to the Copyright Act, as amended. . . . **The**
24 **amount of damages is not known at this time.**

25 (UF 26.) Clinton never supplemented his Rule 26 disclosures. (UF 27.)

27
28 ^{3/} BEP believes that the signatures are, in fact, those of Mr. Clinton or were
authorized by him. But for purposes of this motion, that dispute need not be resolved.

1 Nor has Clinton made “available for inspection and copying . . . the documents
2 or other evidentiary material . . . on which each computation is based, including
3 materials bearing on the nature and extent of injuries suffered,” as required by Rule
4 26(a)(1)(A)(iii). (UF 28.) Clinton has never produced any documents in this case as
5 part of Rule 26 disclosures. (UF 29.) While his written Rule 26 disclosures do
6 describe certain categories of documents, none relate to damages. (UF 30.)

7 Nor did Clinton produce any documents in response to requests for production
8 seeking documents evidencing his alleged damages. Defendants served such requests
9 for production in October 2011, and agreed to extend Clinton’s time to respond to
10 January 4, 2012. (UF 34.) Clinton did not serve written responses until February 29,
11 2012 – the last day of discovery – and those responses consisted solely of boilerplate
12 objections. No responsive documents were produced. (UF 35.)

13 Clinton cannot rely on expert testimony. He submitted no expert report on the
14 day expert reports were to be served, nor did he submit a rebuttal expert report on the
15 day rebuttal reports were due. (UF 31.)

16 **(2) Clinton Will Be Unable to Produce Any Evidence of**
17 **Defendants’ Revenues.**

18 Clinton served discovery requests early on in the case. Written responses from
19 both Universal and members of BEP stated that documents relating to sales of digital
20 singles of, or albums containing, the two remixes would be produced only if Clinton’s
21 counsel stipulated to a protective order which was then entered by the Court. (UF 32.)

22 On November 14, 2011, counsel for BEP submitted a draft protective order to
23 counsel for Clinton. Counsel for Clinton never responded with any comments to the
24 draft protective order, never proposed his own order, and never filed a motion to
25 compel further responses either as to Universal or the BEP parties. (UF 33.)
26 Discovery cut-off and the last date to file motions to compel have now passed.
27 (12/1/11 order setting February 27, 2012 discovery cut-off date; Scheduling and Case
28 Management Order, ¶ 5.)

1 Again, Clinton cannot establish profits through expert testimony; he failed to
2 submit any expert reports and the deadline for submitting those reports has now
3 passed. (UF 31.)
4

5 **3. CLINTON CANNOT CARRY HIS BURDEN OF PROVING ACTUAL**
6 **DAMAGES CAUSED BY THE ALLEGED INFRINGEMENT.**

7 Under Section 504(b) of the Copyright Act, a plaintiff who proves infringement
8 may recover “the actual damages suffered by him or her as a result of the
9 infringement.” 17 U.S.C. § 504(b).

10 “Actual damages are the extent to which the market value of a copyrighted work
11 has been injured or destroyed by an infringement.” Frank Music Corp. v. MGM, Inc.,
12 772 F.2d 505, 512 (9th Cir. 1985). In the Ninth Circuit, the test of market value is
13 “what a willing buyer would have been reasonably required to pay to a willing seller
14 for plaintiff’s work.” Id., quoting Sid & Marty Krofft Television Productions, Inc. v.
15 McDonalds Corp., 562 F.2d 1157, 1174 (9th Cir. 1997).

16 It is Plaintiff’s burden to prove the existence of damages caused by the alleged
17 infringement. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539,
18 567 (1985) (a copyright plaintiff has the burden of proving “the existence of a causal
19 connection between the infringement and a loss of revenue”). Defendants may carry
20 their initial burden on this summary judgment motion by showing that Clinton lacks
21 sufficient evidence to carry his ultimate burden of persuasion at trial. FRCP, Rule
22 56(c)(1)(B); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

23 Plaintiff cannot carry its burden at trial of proving actual damages. He has no
24 damages expert. Moreover, he never disclosed a damage calculation or produced
25 damage documents under Rule 26 (a)(1)(A)(iii) which requires that a party “without
26 awaiting a discovery request,” provide to the other parties “a computation of each
27 category of damages claimed by the disclosing party – who must also make available
28

1 for inspection and copying as under Rule 34 the documents or other evidentiary
2 material . . . on which each computation is based.”^{4/}

3 More importantly, “if a party fails to provide information required by Rule
4 26(a), “the party is not allowed to use that information . . . to supply evidence on a
5 motion . . . unless the failure was substantially justified or is harmless.” Federal Rules
6 of Civil Procedure, Rule 37(c)(1). This exclusion sanction is “self-executing.”
7 Dayton Valley Investors, LLC v. Union Pacific Railroad Co., 2010 Westlaw 3829219
8 at *4 (D. Nev. 2010). Evidence preclusion under Rule 37 is not dependent on finding
9 willfulness or bad faith.

10 Here, Plaintiff has failed to provide any information and documents regarding
11 damages, as required by Rule 26(a), and, because he cannot use information or
12 documents he did not disclose, he has no information or documents to oppose this
13 motion. Plaintiff can therefore present no evidence of damages caused by the alleged
14 infringement and, the Court should order that Plaintiff, as a matter of law, cannot
15 prove damages.

16
17 **4. CLINTON CANNOT PROVE DEFENDANTS’ PROFITS.**

18 A prevailing plaintiff in a copyright infringement action may recover “an
19 infringer’s profits to the extent they are attributable to the infringement.” Frank Music
20 Corp., 772 F.2d at 514. It is Plaintiff’s burden to prove Defendants’ sales. Id.
21 Furthermore, to the extent Plaintiff seeks indirect profits, it must also “proffer
22 sufficient non-speculative evidence to support a causal relationship between the
23 infringement and the profits generated indirectly from such an infringement.” Mackie
24 v. Rieser, 296 F.3d 909, 915-16 (9th Cir. 2002).

25 _____
26 ^{4/} Rule 26(a)(1)(A)(iii) is “the functional equivalent of a standing Request for
27 Production under Rule 34.” Dayton Valley Investors, LLC v. Union Pac. R. Co., 2010
28 Westlaw 3829219 at *2 (D. Nev. 2010), citing, Advisory Committee Notes to 1993
Amendments.

1 Again, Clinton failed to provide any computation of these profit damages under
2 Rule 26(a)(1)(A)(iii). Indeed, his Rule 26 disclosures do not state that he is seeking to
3 recover profits at all. (UF 26.)

4 Moreover, as set forth in Section 2.E, supra, because Clinton failed to stipulate
5 to a protective order and failed to move to compel, he has no documents reflecting
6 Defendants' revenues. And he cannot estimate those profits because he has no expert
7 witnesses. Therefore, Clinton will be unable to put on evidence of revenues generated
8 from the alleged infringement, and the Court should order that Clinton cannot, as a
9 matter of law, prove Defendants' profits.

10
11 **5. BEP IS AN "INNOCENT INFRINGER" FOR PURPOSES OF**
12 **STATUTORY DAMAGES.**

13 The Copyright Act permits a court to award statutory damages of \$200 per
14 infringed work if "the infringer was not aware and had no reason to believe that his or
15 her acts constituted an infringement of copyright." 17 U.S.C. § 504(c)(2).

16 To prove "innocent" infringement, the defendant has the burden of showing that
17 he or she had a good faith belief that his or her infringing conduct did not amount to
18 infringement, and that the good faith belief was reasonable. 4 Nimmer on Copyright,
19 § 14.04[B][2][a], at 14-74. See Bryant v. Media Right Productions, Inc., 603 F.3d 135
20 (2d Cir.) cert. denied, 131 S.Ct. 656 (2010) (music wholesaler was an innocent
21 infringer in making digital copies of individual songs from album where wholesaler
22 relied on provisions of distribution agreement, which provided that wholesaler was
23 permitted to distribute albums "by any and all means and media").

24 The evidence here sets forth the paradigmatic case of innocent infringement.
25 BEP, here, actually obtained licenses for both uses:

- 26 • For the 2003 Shut Up Remix, a license was negotiated with Capitol
27 Records who was distributing albums with Clinton's masters and
28

1 believed it had the right to do so through an agreement with Tercer
2 Mundo. (UF 8-10.)

- 3 • For the 2009 Shut Up Remix, a reputable sample clearance agent
4 obtained a signed license agreement with a signature she believed to be
5 Clinton's. The advance was paid to a company owned by Clinton. (UF
6 14-19.)

7 Under these circumstances, BEP was clearly acting in reasonable good faith and
8 was, accordingly, an innocent infringer.

9
10 **6. THERE IS NO EVIDENCE THAT WMI OR TMI IS LIABLE FOR**
11 **COPYRIGHT INFRINGEMENT.**

12 To prove copyright infringement, Plaintiff must show ownership of the
13 allegedly infringing material and that “the alleged infringers violate at least one
14 exclusive right granted to copyright holder under 17 U.S.C. § 106.” A&M Records,
15 Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001). Contributory infringement
16 occurs “when one, with knowledge of the infringement activity induces, causes, or
17 materially contributes to the infringing conduct of another.” Fonovisa, Inc. v. Cherry
18 Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996), quoting, Gershwin Publishing Corp. v.
19 Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d. Cir. 1971). Vicarious
20 infringement is shown when defendant “has the right and ability to supervise the
21 infringing activity and also has a direct financial interest in such activities.” Fonovisa,
22 76 F. 3d at 262, quoting, Gershwin, 443 F.2d at 1162.

23 Plaintiff will be unable to establish that WMI and TMI played any role in
24 creating the sound recording of the 2003 or 2009 Shut Up Remixes, or produced,
25 manufactured, distributed and sold those sound recordings. The facts are undisputed
26 that WMI and TMI were never owners of the allegedly infringing master recordings,
27 did not license them, and did not receive income from them. (UF 23-25.)
28

1 As such, Clinton cannot prove WMI's or TMI's liability for direct, vicarious, or
2 contributory infringement.

3
4 **7. CONCLUSION**

5 For the foregoing reasons, this Motion for Partial Summary Judgment should be
6 granted in its entirety.

7
8 Dated: March 7, 2012

GRODSKY & OLECKI LLP

9
10
11 By / Allen B. Grodsky /
Allen B. Grodsky

12 Attorneys for Defendants William Adams,
13 Allan Pineda, Jamie Gomez, Stacy
14 Ferguson, will.i.am music, inc., and Tab
Magnetic, Inc.

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