

1 ALLEN B. GRODSKY (SBN 111064)
 GRODSKY & OLECKI LLP
 2 2001 Wilshire Blvd., Ste. 210
 Santa Monica, California 90403
 3 310.315.3009 (phone)
 310.315.1557 (fax)
 4 allen@grotsky-olecki.com (e-mail)

5 Attorneys for Defendants
 WILLIAM ADAMS, et al.

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 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

**PROPOSED STATEMENT OF
 DECISION SUBMITTED BY
 DEFENDANT WILLIAM ADAMS
 ET AL.**

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

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

1 Having considered Defendants’ Motion for Partial Summary Judgment, the
2 supporting papers and evidence, the opposition papers of Plaintiff, the record on file in
3 this action, and the arguments of counsel, the Court finds and adjudicates as follows:

4 1. Clinton produced the master sound recording (*Not Just*) *Knee Deep*
5 (“*Knee Deep*”), which was contained on Funkadelic’s 1979 album UNCLE SAM
6 WANTS YOU. (UF 3.)

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

10 3. In 2003, The Black Eyed Peas (“BEP”) released an album entitled
11 ELEPHUNK. *Shut Up* was one of the singles on ELEPHUNK. (UF 6.) At or about
12 the same time, BEP released a vinyl album containing several different versions of
13 *Shut Up*; one of those versions included a sample of *Knee Deep*. (UF 7.) That version
14 is referred to herein as the “2003 Shut Up Remix.”

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

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

24 6. In 2009, BEP, through Universal, released an album entitled “THE
25 E.N.D.” (UF 11.) At the same time, BEP sought to release a special double-disc
26 edition of the “THE E.N.D.” exclusively to be sold at Target stores. The second disc
27 of this Target release contained a few new songs as well as remixes of classic BEP
28 hits, including *Shut Up*. The planned *Shut Up* remix was again to use a sample of

1 *Knee Deep*. (UF 12.) This version is referred to herein as the “2009 Shut Up Remix.”
2 The 2003 Shut Up Remix and the 2009 Shut Up Remix are identical except one of the
3 remixes is a few seconds longer. (UF 36.)

4 7. On June 17, 2005, a federal court entered an order declaring Clinton to be
5 the sole owner of his master sound recordings, including *Knee Deep*. (UF 13.)

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

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

13 10. Mannis-Gardner faxed to Kelly a proposed license for use of *Knee Deep*
14 in the Shut Up Remix. Kelly faxed back an executed license agreement and an
15 executed W9, providing for payment to Clinton to be made to Clinton’s company, C.
16 Kunspyruhzy, LLC. (UF 18.) Both the license and the W9 appeared to have Clinton’s
17 signature. Mannis-Gardner had no reason to believe that they did not contain the
18 actual signature of Mr. Clinton. (UF 19.) Mannis-Gardner sent a \$15,000 advance
19 check to C. Kunspyruhzy, LLC. (UF 20.)

20 11. Neither defendant will.i.am music, inc. (“WMI”), nor defendant Tab
21 Magnetic, Inc. (“TMI”) owns, or ever owned, the masters for the 2003 Shut Up Remix
22 or the 2009 Shut Up Remix, licensed the right to exploit those masters, received any
23 income from the exploitation of those masters. (UF 23-25.)

24 12. Clinton has never computed his damages as required by Rule
25 26(A)(1)(a)(iii). Rather, Plaintiff’s section on damages in the Rule 26 disclosures
26 stated: “The amount of damages is not known at this time.” (UF 26.) Clinton never
27 supplemented his Rule 26 disclosures. (UF 27.)

28

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

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

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

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

20 17. On November 14, 2011, counsel for BEP submitted a draft protective
21 order to counsel for Clinton. Counsel for Clinton never responded with any comments
22 to the protective order, never proposed his own order, and never filed a motion to
23 compel further responses either as to Universal or BEP. (UF 33.) Discovery cut-off
24 and the last date to file motions to compel have now passed.

25 18. It is Plaintiff’s burden to prove the existence of damages caused by the
26 alleged infringement. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S.
27 539, 567 (1985). Defendants may carry their initial burden on this motion by showing
28

1 that Clinton lacks sufficient evidence to carry his ultimate burden of persuasion at
2 trial. FRCP, Rule 56(c)(1)(B); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

3 19. Plaintiff cannot carry its burden at trial of proving actual damages. He
4 has no damages expert. Moreover, he never disclosed a damage calculation or
5 produced damage documents under Rule 26 (a)(1)(A)(iii) which requires that a party
6 “without awaiting a discovery request,” provide to the other parties “a computation of
7 each category of damages claimed by the disclosing party – who must also make
8 available for inspection and copying as under Rule 34 the documents or other
9 evidentiary material . . . on which each computation is based.”

10 20. More importantly, “if a party fails to provide information required by
11 Rule 26(a), “the party is not allowed to use that information . . . to supply evidence on
12 a motion . . . unless the failure was substantially justified or is harmless.” Federal
13 Rules of Civil Procedure, Rule 37(c)(1). This exclusion sanction is “self-executing.”
14 Dayton Valley Investors, LLC v. Union Pacific Railroad Co., 2010 Westlaw 3829219
15 at *4 (D. Nev. 2010).

16 21. Here, Plaintiff has failed to provide any information and documents
17 regarding damages, as required by Rule 26(a), and, because he cannot use information
18 or documents he did not disclose, he has no information or documents to oppose this
19 motion. Plaintiff can therefore present no evidence of damages caused by the alleged
20 infringement and, Plaintiff cannot, as a matter of law, prove damages.

21 22. A prevailing plaintiff in a copyright infringement action may recover “an
22 infringer’s profits to the extent they are attributable to the infringement.” Frank Music
23 Corp., 772 F.2d at 514. It is Plaintiff’s burden to prove Defendants’ sales. Id.

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

27 24. Moreover, because Clinton failed to stipulate to a protective order and
28 failed to move to compel, he has no documents reflecting Defendants’ revenues. And

1 he cannot estimate those profits because he has no expert witnesses. Therefore,
2 Clinton will be unable to put on evidence of revenues generated from the alleged
3 infringement, and cannot, as a matter of law, prove Defendants' profits.

4 25. The Copyright Act permits a court to award statutory damages of \$200
5 per infringed work if "the infringer was not aware and had no reason to believe that
6 his or her acts constituted an infringement of copyright." 17 U.S.C. § 504(c)(2). To
7 prove "innocent" infringement, the defendant has the burden of showing that he or she
8 had a good faith belief that his or her infringing conduct did not amount to
9 infringement, and that the good faith belief was reasonable. 4 Nimmer on Copyright,
10 § 14.04[B][2][a], at 14-74.

11 26. Under the circumstances set forth above, BEP was clearly acting in
12 reasonable good faith and was, accordingly, an innocent infringer.

13 27. Because WMI and TMI were never owners of the allegedly infringing
14 master recordings and did not license them or receive income from them (UF 23-25),
15 Clinton cannot prove WMI's or TMI's liability for infringement.

16 Accordingly, IT IS HEREBY ADJUDICATED AND DECREED that:

- 17 (1) Plaintiff cannot, as a matter of law, prove the existence of actual damages
18 and may not recover actual damages on his copyright infringement claim;
19 (2) Plaintiff cannot, as a matter of law, prove profits attributable to the
20 alleged infringement and may not recover profits on his copyright
21 infringement claim;
22 (3) The Moving Defendants are "innocent infringers" within the meaning of
23 18 U.S.C. § 504(c)(2).
24 (4) Defendants will.i.am music, inc. and Tab Magnetic, Inc. are entitled to
25 judgment as a matter of law on all claims for relief in the Complaint.
26

27 Dated: _____, 2012

U.S. DISTRICT COURT JUDGE