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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

12 GEORGE CLINTON, an individual,

13 Plaintiff,

14 v.

15 WILL ADAMS, p/k/a will,I,am
 16 individually and d/b/a will.i.am music,
 17 inc., et al.,

18 Defendants.

Case No.CV 10-09476-ODW-PLA

The Honorable Otis D. Wright II

**PLAINTIFF’S RESPONSE TO
 DEFENDANTS’ MOTION FOR
 PARTIAL SUMMARY
 JUDGMENT**

Date: April 16, 2012

Time: 1:30 p.m.

Place: Courtroom 11

Action Filed: December 10, 2010

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1 **I. FACTUAL BACKGROUND**

2 The March 7, 2012, partial summary judgment motion was filed by
3 Moving Defendants recited at D/E 75 as follows: Will Adams, Jamie Gomez,
4 Allen Pineda, Stacey Ferguson, Will I Am Music, Inc., and Tab Magnetic, Inc.¹
5 despite the fact that at least Will I Am Music, Inc. remains a suspended California
6 corporation. See Thennisch Decl., Exhibit A.
7

8
9 The present action is neither procedurally or legally complex, and all
10 parties agree that: (1) Plaintiff, George Clinton (“Clinton”), produced a master
11 sound recording more commonly known as (*Not Just*) *Knee Deep* (“*Knee Deep*”),
12 which was contained on Clinton’s 1979 album UNCLE JAM WANTS YOU.
13 (Undisputed Fact (“UF” 3)); (2) Moving Defendants released their own album
14 ELEPHUNK in 2003. The musical work, *Shut Up*, was one of the singles on
15 Moving Defendants’ ELEPHUNK album (UF 6); (3) At about that same time in
16 2003, Moving Defendants released a vinyl album containing several different
17 versions of *Shut Up* wherein at least one of those versions included a sample of
18 Clinton’s *Knee Deep* work. (UF 7). For purposes of consistent nomenclature in
19 the present briefing, all parties refer to this work as the “2003 *Shut Up* Remix”.
20 All parties agree that, in 2009, Moving Defendants, through Defendant Universal,
21 released an album entitled “THE E.N.D” which included a remix of *Shut Up*
22 which again used the sample of *Knee Deep*. (UF 12). For purposes of consistent
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1 nomenclature in the present briefing, all parties refer to this work as the “2009
2 Shut Up Remix;” and (4) On June 17, 2005, the Honorable Manuel Real of this
3 same judicial district issued an Order in Case No. 03-08955 declaring Clinton to
4 be the sole owner of his master sound recordings, including *Knee Deep* (UF 13).
5

6 But Moving Defendants do not: (i) attach Judge Real’s June 17, 2005,
7 Order to any of their pleadings, (ii) discuss the scope or application of the Order
8 in any detail, or (iii) provide any declarations from the actual named Defendants
9 supporting any aspect of the requested relief under Fed. R. Civ. P. 56. Judge
10 Real’s June 17, 2005, Order at D/E 121 in Case 03-08955 is attached to the
11 Thennisch Decl., Exhibit B and as part of a separate request for judicial notice of
12 its contents, all of which demonstrate as a matter of law that Judge Real:
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16 ORDERED, adjudged and decreed that GEORGE CLINTON is
17 the sole owner of the master recordings of the albums “Hard Core
18 Jollies,” “One Nation Under A Groove”, “Uncle Jam Wants You²”, and
19 “Electric Spanking Of War Babies” (the “Masters”) and has been the
20 sole owner of Masters since 1993; and it is further

21 ORDERED, adjudged and decreed that the liens of the law firms
22 and any other grant of rights in the Masters since 1993 by anyone other
23 than GEORGE CLINTON are invalid and shall not be honored.
24 [emphasis added].

25 Contrary to this existing Order by an Article III Court, which has not been
26 vacated or sought to be limited by the named Defendants in any manner before
27 Judge Real, Moving Defendants essentially now ask this Court to grant summary
28

29 ¹ No other named Defendant has joined in this motion by “Moving Defendants” or otherwise
30 sought summary judgment in another motion.

1 judgment in their favor and “honor” the very type of grant or “license” to produce
2 the 2003 Shut Up Remix which Judge Real’s Order clearly forbade and
3 adjudicated to be invalid. With all professional deference to opposing counsel,
4 and despite the fact that Moving Defendants do refer to Judge Real’s June 17,
5 2005, Order as UF 13, the actual Order (containing the above language) was not
6 submitted to this Court, and the present summary judgment motion appears to be
7 nothing more than a blatant and contrived collateral attack on Judge Real’s Order.
8
9 Namely, even though the June 17, 2005 Order states that “any other grant of
10 rights in the Masters since 1993 by anyone other than GEORGE CLINTON are
11 invalid and shall not be honored,” Moving Defendants are now attempting to ask
12 this Court to both validate and “honor” the supposed August 16, 1993, license
13 attached to the Craig Marshall Declaration – even though nothing in the Marshall
14 Declaration suggests that any of the Moving Defendants received any type of
15 grant/ license from Clinton. Rather, Defendants just ignore Judge Real’s Order.
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20 Even more troubling is D/E 80 filed in this case which seeks judicial notice
21 of the December 3, 2007, McMullen Declaration filed in yet another action
22 assigned to Judge Real, Case 06-CV-08106. However, this document is
23 incomplete on its face in that it clearly refers to both an Exhibit A and Exhibit B,
24 which are absent. In any event, the McMullen Declaration is dated December 3,
25
26

27 ² Uncontested Material Fact 3 at D/E 77, Page 2 establishes that Clinton’s *Knee Deep* work
28 “was contained on Funkadelic’s 1979 album UNCLE SAM (sic) WANTS YOU.”

1 2007—over two (2) years after Judge Real’s June 17, 2005, Order³ and contains
2 the caveat at D/E 80, Page 3, ¶9 that there was “no participation in, or control
3 over, any party” in Case 03-09855 before Judge Real. In short, nothing in the
4 December 3, 2007, McMullen Declaration functions to ignore, limit, or restrict
5 the clear – and existing - Order issued by Judge Real on June 17, 2005.
6

7
8 Regrettably, this does not stop Moving Defendants from attempting to do
9 just that through the new February 29, 2012, Declaration of Craig Marshall, an
10 attorney, which advocates this same position before Judge Wright (i.e. the
11 existence of a license) that is completely contrary to the express wording of Judge
12 Real’s June 17, 2005, Order. To the extent that Craig Marshall is a licensed
13 attorney that actually signed the Marshall Declaration on February 29, 2012,
14 Clinton states that Attorney Marshall has completely abrogated his duty to be of
15 any service to this Court by “declaring” the existence of a putative license for the
16 same subject matter that is subject to Judge Real’s prior June 17, 2005 Order
17 without informing this Court of the existence of the same Order. Clinton states
18 that the Marshall Declaration is the very type of “bad faith” declaration which
19 mandates judicial intervention under Fed. R. Civ. P. 56(h). To the extent that
20 Attorney Marshall is/was simply not aware of the existence of Judge Real’s June
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25 _____
26 ³ If Moving Defendants truly believed that they possessed valid rights despite Judge Real’s
27 June 17, 2005, Order, they have had nearly seven (7) years to seek relief or clarification of that
28 Order before Judge Real, but have done nothing. Instead, Moving Defendants now ask this
Court to collaterally attack the 2005 Order – all without providing this Court with a copy. The
Court is asked to decline this request.

1 17, 2005, Order when he signed his declaration on February 29, 2012, then his
2 declaration is of utterly no value or use in aiding this Court to determine if there
3 are any questions of material fact. Either way, it is also highly relevant that
4 nothing in the Marshall Declaration mentions, even tangentially, how or why any
5 “license” would flow to these individual defendants by name.
6

7
8 Moving Defendants’ attempt to demonstrate the existence of a license for
9 the 2009 *Shut Up* Remix suffers from similar fundamental defects. First, based
10 upon the same June 17, 2005, Order issued by Judge Real, it is beyond dispute
11 that only George Clinton (i.e. the sole owner of musical works in question as
12 adjudicated by an Article III Court) has the authority to grant any licenses for
13 these musical works to any third party. Certainly, the June 17, 2005, Order
14 existed during the 2007-2009 events set forth in the Declaration of Deborah
15 Mannis-Gardner. Although Moving Defendants may believe that Mannis-
16 Gardner “has an excellent reputation in the music industry,” Clinton contests this
17 supposed fact. In response, both Clinton and Eban Kelly (the same individual
18 referred to in the Mannis-Gardner Declaration) provide sworn declarations that no
19 such negotiations or license was ever entered into by Clinton and that Eban Kelly
20 never had authority to bind or otherwise “license” the musical works that Clinton
21 clearly was the sole owner of since 1993—based upon Judge Real’s Order. See
22 Kelly Decl, ¶2-7 and Clinton Decl. , ¶3-7. To the extent that the Mannis-Gardner
23 and Rosoff Declarations discuss and set forth a supposed \$15,000 check issued to
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1 another entity, the Court can clearly recognize that no check was issued to George
2 Clinton, nor cashed or signed by him despite the fact that he is the same person
3 that Judge Real ruled is the sole owner of the applicable Master Recordings. The
4 filing of attorney arguments, as declarations, is not proper evidence to support
5 summary judgment—especially where the named Defendants say nothing.
6

7 **II. PROCEDURAL BACKGROUND AND EXPERT REPORTS**

8
9 Moving Defendants also support their Fed. R. Civ. P. 56 motion, and
10 appear to seek a Fed. R. Civ. P. 37 discovery sanctions against Clinton by virtue
11 of the fact that Clinton did not submit or designate any “expert” witnesses on the
12 issue of damages within the meaning of Fed. R. Civ. P. 26. Although the
13 Grodsky Declaration discusses these issues in great detail and appears to castigate
14 Clinton for not “over-lawyering” this case, the fact remains that no party has a
15 “duty” to present expert testimony. Plus, in the absence of any noticed discovery
16 motion, it is unclear how or why Defendants would be entitled to any type of a
17 discovery sanction under Fed. R. Civ. P. 37. The time for such motions is over.
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21 In fact, under the controlling *Daubert* trilogy of cases, expert testimony
22 must serve as a demonstrable aid to the Court. Here, Clinton’s monetary
23 remedies – and his statutory right under 17 U.S.C. §504(c) to “elect” such
24 remedies from either “actual damages” or “statutory damages” at any time prior
25 to final judgment: (i) are set forth in the U.S. Copyright Act itself, (ii) were
26 properly recited as such in the December 10, 2010, complaint, and (iii) all
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1 Defendants were clearly on notice of Clinton’s reliance upon such an election of
2 monetary remedies from the explicit wording of the complaint itself, thereby
3 negating any alleged prejudice involving the Rule 26(a) disclosures. Thus, as this
4 action has yet to reach the stage of “final judgment,” Clinton questions whether
5 this issue is even “ripe” and fully retains his statutory right to elect his method of
6 damages between “actual damages” or “statutory damages.” Granted, Moving
7 Defendants certainly retain the ability to contest any such election of damages—if
8 and when it is made—but Clinton does not need an “expert” to tell this Court what
9 17 U.S.C. §504(c) states on its face. Indeed, a recitation of the pertinent law is
10 the province of this Court and nothing in Rule 56 changes this clear fact.

14 **III. LEGAL BACKGROUND & ARGUMENT**

15 **A. General Standard for Summary Judgment Motions**

16 Summary judgment is appropriate only if there are no genuine issues of
17 material fact and if defendants demonstrate their entitlement to judgment as a
18 matter of law. Fed. R. Civ. P. 56(c); *T.W. Elec. Serv., Inc. v. P. Elec. Contractors*
19 *Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). The Court must view the evidence and
20 draw inferences in the light most favorable to plaintiff, the non-moving party. *T*
21 *W Elec.*, 809 F.2d at 630-31; *see also Matsushita Elec. Indus. Co. v. Zenith Radio*
22 *Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed. 538 (1986). The Court may
23 not make credibility determinations or weigh conflicting evidence on summary
24 judgment for such determinations “are within the province of the fact finder at
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1 trial.” *T. W. Elec.*, 809 F.2d at 630. On summary judgment, “the judge’s function
2 is not himself to weigh the evidence and determine the truth of the matter but to
3 determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby,*
4 *Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, L.Ed. 202 (1986). Such a “genuine issue
5 of material fact” need not be resolved conclusively in favor of the party asserting
6 its existence; rather, all that is required is that sufficient evidence supporting the
7 claimed factual dispute be shown to require a jury or judge to resolve the parties’
8 differing versions of the truth at trial. *Anderson*, 477 U.S. at 248-49. This Court
9 must construe the produced in the light most favorable to Clinton, as the non-
10 moving party, drawing all justifiable inferences in his favor. *Id.* at 255. Thus, “if
11 reasonable minds could differ as to the import of the evidence,” summary
12 judgment is not proper. *Id.* at 250.

17 **B. Asserted Grounds for Partial Summary Judgment**

18 Moving Defendants set forth four (4) separate grounds for partial summary
19 judgment against Clinton in D/E 75 as follows:
20

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

1 **C. Moving Defendants’ Theory 1 – “Actual Damages” Under 17 U.S.C.**
2 **§504(c) Should Be Denied As It Lacks Ripeness And Denies Plaintiff His**
3 **Statutory Right Of Damages Election under 504(c)(2).**

4 Theory 1 asks that Clinton should be precluded from seeking the specific
5 monetary remedy of “actual damages” despite the fact that 17 U.S.C. §504(c)(1)
6 explicitly states that “the copyright owner may elect, at any time prior to final
7 judgment is rendered, to recover, instead of actual damages and profits, an award
8 of statutory damages for all infringements in the action”

10 Rather than seeking the substantive dismissal of Clinton’s claim for
11 copyright infringement under 17 U.S.C. §501, the March 7, 2011, Notice of
12 Motion of Partial Summary Judgment first appears to seek partial summary
13 judgment to preclude Clinton from even seeking the specific monetary remedy of
14 “actual damages” despite the fact that Clinton’s Payer For Relief in the December
15 10, 2010, Complaint at D/E 1, Page 26-28, Section c, unmistakably outlines, and
16 provides ample notice of, the clear December 10, 2010, statement that Clinton
17 was alternatively seeking both actual damages or statutory damages, at his
18 election, in full accordance with 17 U.S.C. §504(c)(1). The Ninth Circuit itself
19 has previously held that “[u]nder the 1976 Act⁴, the plaintiff, may, prior to final
20 judgment, elect to recover either actual or statutory damages. 17 U.S.C. §
21 504(c)(1). Statutory damages may be elected whether or not there is adequate
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27 ⁴ By virtue of Undisputed Material Fact 3 in Defendants’ own D/E 77, Clinton submits that this
28 Court can take judicial notice that the 1979 album, Uncle Jam Wants You, which contained the *Knee Deep* work, is governed by the 1976 Copyright Act.

1 evidence of the actual damages suffered by plaintiff or of the profits reaped by
2 defendant. 3 M. Nimmer, [] §14.04[A].” *Harris v. Emus Records Corporation,*
3 *et al.*, 734 F.2d 1329, 1335 (9th Cir. 1984). As final judgment has yet to be
4 rendered and Clinton has yet to make any such statutory election, Theory 1 is
5 premature and lacks fundamental ripeness unless and until Clinton makes an
6 election for actual damages, which can be done any time before final judgment.
7
8 While Clinton recognizes that Moving Defendants reserve the right to challenge
9 the existence of “adequate evidence of the actual damages suffered by plaintiff,”
10 Moving Defendants cannot use Rule 56 to defeat, and render meaningless, the
11 statutory granted right to elect damages under Section 504(c)(2). *Id.*

14 **D. Moving Defendants’ Theory 2 – “Profits” Under 17 U.S.C. §504(c)**
15 **Should Be Denied Because It Lacks Ripeness and Denies Plaintiff His**
16 **Statutory Right Under 504(c)(2).**

17 Theory 2 asserts that Clinton should be precluded from seeking the specific
18 monetary remedy of “profits” in this action despite the fact that 17 U.S.C. §504(b)
19 explicitly states, “[i]n establishing the infringer’s profits, the copyright owner is
20 required to present proof only of the infringer’s gross revenue, and the infringer is
21 required to prove his or her deductible expenses and the elements of profit
22 attributable to factors other than the copyrighted work.” Thus, Clinton need only
23 present proof at trial of Defendants’ gross revenue. It is then Defendants (not
24 Clinton) who have the burden to place their “spin” on the actual profits. Very
25 logically, this is why Clinton (or any other copyright owner) has the statutory
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1 right to elect the form of damages under Section 504(c)(2) “at any time before
2 final judgment is rendered, instead of actual damages and profits, an award of
3 statutory damages for all infringements in the action” As final judgment has
4 yet to be rendered, and Clinton has yet to make any such statutory election,
5 Theory 2 should likewise be denied outright as an impermissible attempt to defeat
6 the statutory mandated right of election of damages between “actual damages”
7 and “statutory damages” in Section 504(c)(2).
8

9
10 In the theoretical event that Clinton does elect to seek actual damages
11 and/or Defendant’s profits in this action at some time before entry of a final
12 judgment, there is ample evidence to support a claim for both actual damages
13 and Defendants’ profits under 17 U.S.C. §504. Moving Defendants neither
14 provide the operative language of Section 504 nor discuss respective
15 evidentiary burdens of the parties. Contrary to Moving Defendants’s position
16 that Clinton has not provided “evidence” as to gross revenue, such “evidence”
17 is squarely within the knowledge of the Defendants. In this case, Moving
18 Defendants have already provided the necessary proof and evidence needed to
19 present the infringer’s gross revenue to Clinton’s counsel. On October 12,
20 2011, Moving Defendants presented Plaintiff with a print-out form from
21 Neilson Soundscan, a subscription-based service offering many packages to
22 prospective subscribers. See Thennisch Decl, Ex. C-E. This Neilson
23 Soundscan data is a publically available third party factual data compilation of
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1 the unit sales of Moving Defendants’ musical works, more commonly-known
2 in the music industry as a Soundscan Report. Id.. Therefore, based on the
3 language of 17 USC 504(b) the factual information contained in the
4 SoundScan report regarding the infringer’s sales data and units constitutes
5 evidence of their gross revenue which is the sole evidentiary requirement
6 under 17 U.S.C. §504, and any “proof only of the infringer’s gross revenue” is
7 thus clearly subject matter known to the Defendants which they can testify to
8 at trial. See Thennisch Decl. Exhibits C-E.

12 To the extent that Moving Defendants object to the Soundscan material
13 under the pretext that it was “only” provided to Clinton under Federal Rule of
14 Evidence 408, it should be seen that FRE 408 does not require exclusion of
15 any evidence otherwise discoverable simply because it may have been
16 presented in the course of compromise negotiations.⁵ Rather, FRE 408 does not
17 apply to exclude purely factual and publicly available factual information
18 (compiled and sold by a third party) such as SoundScan data compiled by
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22 ⁵ Rule 408 provides: “Evidence of (1) furnishing or offering or promising to furnish, or (2)
23 accepting or offering or promising to accept, a valuable consideration in compromising or
24 attempting to compromise a claim which was disputed as to either validity or amount., is not
25 admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or
26 statements made in compromise negotiations is likewise not admissible. **This rule does not
27 require the exclusion of any evidence otherwise discoverable merely because it is
28 presented in the course of compromise negotiations.** This rule also does not require
exclusion when the evidence is offered for another purpose, such as providing bias or prejudice
of a witness, negotiating a contention of undue delay, or proving an effort to obstruct
investigation or prosecution.” Fed. R. Evid. 408. (Emphasis added).

1 Neilson, which simply shows the factual sales data that is certainly otherwise
2 discoverable. Most notably, the Soundscan data set forth in the Thennisch
3 Decl. does not reflect any type of “offer” from Moving Defendants and is not
4 “offered” as such. Rather, factual data is not subject to any exclusions under
5 FRE 408 since such data involves empirical and ascertainable facts.
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8 Further, FRE 408 permits evidence that is otherwise discoverable or that
9 is offered for a purpose other than establishing liability. *Bankcard America,*
10 *Inc. v. Universal Bancard Systems, Inc.*, 203 F.3d 477 (2000). The purpose of
11 Rule 408 is to encourage settlements, not act as an absolute ban on all evidence
12 regarding settlement negotiations. *Deere & Comp. v. Int. Harvester Comp.*,
13 710 F.2d 1551 (1983). *See also ABM Industries, Inc. v. Zurich Amer.*
14 *Insurance Comp.* 237 F.R.D. 225 (N.D.Cal. 2006) (Rule 408 does not require
15 exclusion of any evidence otherwise discoverable because it is presented in the
16 course of compromise negotiations). Similarly, the sales data information
17 conveyed by Will Adams counsel on October 12, 2011 is/was an otherwise
18 discoverable factual report, and is not being offered into evidence to prove
19 liability of Defendants in this action. Therefore, Rule 408 does not prevent
20 Clinton from introducing the Soundscan data into evidence, which is
21 admissible under 17 USC 504(b). This evidence is still admissible even
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1 though it was attained during a supposed “negotiation” because the report is an
2 independent factual third party report otherwise discoverable.

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4 **E. Moving Defendants’ Theory 3 – The Non-Pled Innocent Infringer**
5 **Defense Should Be Deemed Waived Because Defendants Never Plead It**
6 **Before Their Current Motion Which Is Well After The Close of Discovery**

7 Clinton states that as part of the March 7, 2012, Notice of Motion for
8 Partial Summary Judgment, Moving Defendants have asserted the affirmative
9 defense of being an “innocent infringer” for the first time in this litigation and
10 well after the February 29, 2012, close of discovery. In addition to not being pled
11 as an affirmative defense within the meaning of Fed. R. Civ. P. 8(c) in any of the
12 answers submitted by Moving Defendants at D/E 21, 24, 25, and 27, this new
13 assertion of the “innocent infringer” affirmative defense truly does take Clinton
14 by surprise and creates real prejudice in that—in all of the pre-filing
15 correspondence and post-filing activity to date—Moving Defendants have
16 continuously claimed that they are not “infringers” at all and that they possessed
17 tangible license rights to use Clinton’s work. Now, for the first time, Moving
18 Defendants seem to be “admitting” to being infringers—albeit innocent ones—
19 which goes directly to the putative and subjective “state of mind” of each of the
20 named Defendants (inherently within their control) as opposed to the objective
21 determination of whether Clinton granted the named Defendants a license (which
22 Clinton can testify to). Although it is acknowledged that such alternative or
23 inconsistent claims can be made under Fed. R. Civ. P. 8(d)(3), they must first be
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1 properly pled and noticed under Fed. R. Civ. P. 8(c) as an affirmative defense to
2 avoid this very type of surprise and prejudice which is now created. Although
3 Moving Defendants have the burden of proof to establish both the existence of a
4 license and the innocent infringer defense, any valid license must have been
5 granted by Clinton whereas the “innocent infringer” defense is predicated upon
6 what the individual defendants “knew and when they knew it⁶.” This Court is
7 now asked to strike this belated affirmative defense under Fed. R. Civ. P. 12(f)(1)
8 for failure to comply with Fed. R. Civ. P. 8(c).
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12 It has always been well understood that the defense of innocent
13 infringement under Section 504(c)(2) of the Copyright Act is an affirmative
14 defense requiring the alleged infringer to prove that “such infringer was not
15 aware and had no reason to believe that [its] acts constituted an infringement of
16 copyright.” 17 U.S.C. § 504(c)(2). Since this action clearly arises under both a
17 federal statute and federal question jurisdiction via 28 U.S.C. §1331, the
18 characterization of defensive matters is a matter of federal law. See *Meachum v.*
19 *Knolls Atomic Power Lab.*, 554 U.S. 84, 128 S. Ct. 2395, 171 L.Ed.2d 283, 290-
20 94 (2008). Here, the answers submitted by Moving Defendants each contain
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24 ⁶ Despite their burden of proof, none of the named Defendants have submitted a declaration
25 attesting or professing any type of “innocent infringer” knowledge, so summary judgment is
26 improper on this defense. However, Clinton also seeks to strike the defense since it was not
27 plead at D/E 21, 24, 25, and 27, and he does not agree to amend the pleadings to include such a
28 “new” defense under Fed.R.Civ.P. 15(b).

1 affirmative defenses at D/E 21, 24, 25, and 27, but no Defendant, until now, has
2 asserted reliance upon the “innocent infringer” provisions of Section 504(c)(2).
3

4 Clinton now requests that Moving Defendants be precluded from asserting
5 the affirmative defense of innocent infringement since it was waived in their
6 respective initial answers under Fed. R. Civ. P. 8(c), and there has been no
7 attempt to amend any such pleading under Fed. R. Civ. P. 15. Further, even when
8 this affirmative defense is properly pled under Fed. R. Civ. P. 8(c), it may still fail
9 as a matter of law. *Marobie-Fl. Inc. v. National Ass’n of Fire Equipment*
10 *Distributors and Northwest Nexus, Inc.*, 983 F.Supp. 1167 (N.D. Ill. 1997)
11 (defendant’s innocent infringement defense was pled as an affirmative defense,
12 but was not enough to defeat summary judgment on infringement liability).
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16 Since the party seeking to maintain the innocent infringer defense has the
17 burden of proving that the elements of Section 504(c)(2) have been met, such a
18 defense must be properly pled and preserved in the pleadings. The purpose of
19 that requirement is to give notice to both the plaintiff and the Court that such a
20 defense could be an issue for trial. This was not done here. To the extent that
21 Moving Defendants provide a series of declarations from lawyers (that may or
22 may not represent all of Moving Defendants⁷), those attorney declarations do not
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26 ⁷ For example, Rosoff Decl., ¶2 states that she represents “certain individual members” of
27 Black Eyed Peas musical group, but does not identify any such individuals and says nothing
28 about the individual named defendants in this action. At the risk of being coy, one can claim to
represent The Three Stooges, but do they mean “Moe, Larry & Curly” or “Moe, Larry &
Shemp?” Summary judgment demands precision to be successful.

1 even suggest what any of Moving Defendants knew or “when they knew it” about
2 absolutely any subject⁸.

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4 Even if Moving Defendants had properly noticed this affirmative defense,
5 it is unavailable to them as a matter of law. On this point, it is axiomatic that to
6 satisfy Section 504(c)(2), the defendant must “prove that it was not aware and had
7 no reason to believe that his or her acts constituted infringement.” *Fitzgerald*
8 *Pub. Co., Inc. v. Baylor Pub. Co., Inc.*, 807 F.2d 1110, 1 I 15 (2d Cir. 1986);
9 *Eastern America Trio Prods., Inc. v. Tang Elec. Corp.*, 97 F. Supp. 2d 395, 419
10 (S.D.N.Y. 2000). “Indeed, a defendant’s burden of proving innocent
11 infringement has been described by one commentator as a ‘heavy one.’” *Natl.*
12 *Football League v. PrimeTime 24 Jt. Ventur*, 131 F. Supp. 2d 458, 476 (S.D.N.Y.
13 2001) (*quoting* 2 Patry, *Copyright Law & Practice* at 1175 (1994)). That heavy
14 burden is likely the reason why the innocent infringer defense “appears to have
15 been limited to cases where the defendant (often unsophisticated) proves that it
16 did not know about the plaintiffs copyright and immediately ceased its infringing
17 conduct upon being made aware of plaintiff’s copyright claim.” *Id.* at 477 (*citing*
18 *D.C. Comics Inc. v. Mini Gift Shop*, 912 F.2d 29, 35-36 (2d Cir. 1990) (“The
19 level of sophistication of the defendant in business is an entirely proper means of
20 determining whether or not his infringement was innocent.”); *Warner Bros., Inc.*
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27 ⁸ Indeed, it appears that Defendant Will Adams is not even aware that his own Will I Am
28 Music, Inc. is a suspended California corporation that is legally unable to defend this action
even though the December 10, 2010, Complaint, ¶20 provided notice of this fact.

1 *v. Dae Rim Trading, Inc.*, 677 F. Supp. 740 (S.D.N.Y. 1 988) (finding innocent
2 infringement where defendant bought dolls from wholesaler that, unknown to
3 defendant, were of characters from plaintiffs movie; when defendant learned this,
4 it immediately and unilaterally returned all unsold dolls), *aff'd in relevant part*,
5 877 F.2d 1120 (2d Cir. 1989)).
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8 Under this heavy burden, and in view of the fact that each of the Marshall,
9 Mannis-Gardner, and Rosoff Declarations solely exist for the proposition that
10 Moving Defendants had express knowledge of Clinton's copyright interests and
11 actively sought to license such rights from 2003-2009, there is no rational basis
12 for Moving Defendants, similarly-situated musical performers and copyright
13 owners in their own right, to be characterized as "innocent infringer(s)" under the
14 undisputed record in this case. Given the "Undisputed Facts" submitted by
15 Moving Defendants themselves, coupled with the obvious June 17, 2005, Order
16 issued by Judge Real, they cannot now claim to be unaware or taken by the
17 surprise that Clinton was the "sole owner" of the Masters at issue—at least as of
18 June 17, 2005, for purposes of damages.
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22 **F. Moving Defendants' Theory 4 Should Be Denied As Defendant Will I Am**
23 **Music, Inc. Is A Suspended California Corporation And Statements About**
24 **Tab Magnetic Are Not Supported By Evidence**

25 Although the Rosoff Decl. ¶2 and ¶7-9 does identify that Attorney Rosoff
26 represents Defendants Will I Am Music, Inc. and Tab Magnetic, Inc., it does not
27 appear that the scope of Attorney Rosoff's representation extends to basic
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1 corporate compliance. Namely, as first set forth in ¶20 of the December 20,
2 2010, Complaint, and re-confirmed at Exhibit A to the Thennisch Decl., Will I
3 Am Music, Inc. remains a suspended California corporation. “It is well-settled
4 that a delinquent corporation may not bring suit and may not defend a legal
5 action.” *U.S. v. 2.61 Acres of Land, More or Less, Situated in Mariposa County,*
6 *State of Cal.*, 791 F.2d 666, 668 (9th Cir. 1985). Since Defendant Will I Am
7 Music, Inc.: (i) lacks capacity under Fed. R. Civ. P. 17(a); (ii) cannot defend this
8 action under at least Cal. Rev. and Tax Code §23301; and (iii) has not moved this
9 Court for any additional time to “revive” itself (despite the fact that its admitted
10 counsel, Attorney Rosoff, and its present counsel clearly “know” about this case).
11 As such, the Court is respectfully requested to take action under Fed. R. Civ. P.
12 56(f) and enter summary judgment against Defendant Will I Am Music, Inc. since
13 that entity is legally incapable of defending this action or seeking any relief –
14 including the present request for partial summary judgment.

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20 With respect to Defendant Tab Magnetic, Inc., ¶8 of the Rosoff Declaration
21 states that this entity “is a company owned by Jamie Gomez.” Gomez is the same
22 individual named as a defendant, but has not submitted any type of declaration on
23 behalf of either the individual or Tab Magnetic, Inc. (TMI). Instead, the sole
24 asserted basis for summary judgment relating to Tab Magnetic, Inc. appears to be
25 the statement of Attorney Rosoff at ¶8, where Attorney Rosoff (not Jamie Gomez
26 or anyone else claiming to be an officer, director, or shareholder of TMI) states

1 the following: “To the best of my knowledge, TMI has received no income from
2 any exploitation of the master recordings of the 2003 *Shut Up* Remix or the 2009
3 *Shut Up* remix and has not entered into any license for the exploitation of those
4 master recordings.” See D/E 78-3, ¶8. See *Hamilton v. Keystone Tankship*
5 *Corp.*, 539 F.2d 684, 686 (9th Cir. 1976) (“where the movant’s papers on their
6 face are clearly insufficient to support a motion for summary judgment and
7 where, as here, those papers themselves suggest the existence of a genuine issue
8 of material fact,” summary judgment is wholly inappropriate). Again, and with
9 professional respect to Moving Defendants, the Rosoff Declaration is neither the
10 “best evidence” under the Federal Rules of Evidence or a good faith declaration
11 for purposes of Fed. R. Civ. P. 56(h). At best, Rosoff Decl, ¶2 states that the
12 Attorney Declarant has represented TMI since “approximately 2007 to the
13 present” but then Rosoff Decl. ¶8 attempts to present summary judgment
14 “evidence” relating to the 2003 *Shut Up* Remix – events which clearly predate
15 any conceivable personal or firsthand knowledge by the named declarant. Thus,
16 the Rosoff Declaration lacks any statement that she undertook any type of review
17 or investigation of the TMI documents to allow any statement “to the best of her
18 knowledge⁹.” Clearly, there is no declaration from Jamie Gomez or any other
19 individual involving TMI which even implicates the *Celotex* trilogy of cases.
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27 ⁹ For purposes of Fed. R. Civ. P. 56(h), neither the Mannis-Gardner or Rosoff Declarations
28 present any evidence that any payment was initiated, issued, or received by George Clinton
relating to any putative license, yet the declarants claim that a license exists.

1 **G. Defendant’s Motion Should Be Denied Because Moving Defendants Do**
2 **Not Have Any License Agreement With Plaintiff**

3 Moving Defendants have asserted the affirmative defense of having a
4 license from Clinton to utilize Clinton’s *Knee Deep* musical work in their various
5 works, including both the 2003 *Shut Up* Remix and the 2009 *Shut Up* Remix but
6 they have not produced a fully signed and executed license directly from Clinton
7 for the 2003 *Shut Up* Remix, the 2009 *Shut Up* Remix, or any other Clinton work.
8 Instead, the putative license(s) now alleged to have been granted by Clinton to
9 these Defendants are, at best, through a series of convoluted intermediaries or
10 separate business entities such as Capitol Records which Moving Defendants now
11 claim to receive their pedigree from—all despite the clear wording of Judge Real’s
12 June 17, 2005, Order which states: any other grant of rights in the Masters since
13 1993 by anyone other than GEORGE CLINTON are invalid and shall not be
14 honored. [emphasis added].
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19 At a minimum, these tenuous connections (which do not even purport to
20 show a direct relationship between Clinton and any of Moving Defendants by
21 individual name) fail to establish any type of license recognized by the Copyright
22 Act. At best, and even if Moving Defendants are excused for the “oversight” of
23 not providing a copy of Judge Real’s June 17, 2005, Order to this Court, the
24 materials presented by Defendants themselves are “extrinsic evidence” involving
25 mixed questions of law and fact which are inherently intertwined with contract
26 interpretation. *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851 (9th Cir.1988).
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1 More simply stated, Moving Defendants' own materials do not include any
2 declarations from the named Defendants¹⁰ and raise genuine issues of material
3 fact under Ninth Circuit law. See *Hamilton*, 539 F.2d at 686 (“where the
4 movant’s papers on their face are clearly insufficient to support a motion for
5 summary judgment and where, as here, those papers themselves suggest the
6 existence of a genuine issue of material fact”, summary judgment is wholly
7 inappropriate).
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10 In particular, in D/E 80, the Moving Defendants ask this Court to take
11 “judicial notice” of the December 3, 2007, Declaration Of Alasdair McMullen in
12 Case No. 06-CV-08106 in support of the request for summary judgment despite
13 the fact that ¶3 of the McMullen Declaration refers to an attached Exhibit A
14 which is not part of D/E 80 in any manner and ¶7 of the McMullen Declaration
15 refers to an Exhibit B which is also absent from D/E 80¹¹. To the extent that the
16 McMullen Declaration is relevant at all, Clinton states that Moving Defendants
17 impermissibly attempt to rely upon the 2007 McMullen Declaration to avoid the
18 import of Judge Real’s June 17, 2005, Order in Case 03-CV-08955 by suggesting
19 that the alleged August 16, 1993, license agreement from Tercer Mundo to
20 Priority Records attached to the Marshall Declaration somehow first “morphed”
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26 ¹⁰ Attorney argument is not summary judgment evidence. Likewise, dressing attorney
27 argument as a declaration is of no assistance to Rule 56 and only implicates Rule 56(h).

28 ¹¹ Although this Court has great latitude to take judicial notice of any matter, the Moving
Defendants have clearly not provided the “entire” December 3, 2007 McMullen Declaration
with all of its attendant exhibits at D/E 80. For this reason, Clinton asks that the request for
judicial notice at D/E 80 be denied.

1 to a license to Capitol Records and then “morphed” again into a license to
2 Moving Defendants through the unilateral proclamation of the Marshall
3 Declaration and no other documents. But even ¶9 of the McMullen Declaration
4 itself disavows both participation and involvement by Capitol Records and
5 Priority Records in Case No. 03-CV-08955, yet Moving Defendants continue to
6 claim that they somehow received what can only be described as a supposed
7 “license” from another licensee (i.e. Capitol Records/Priority Records)—all of
8 which continues to conveniently ignore the June 17, 2005, Order . To the extent
9 that the entire Marshall Declaration (dated February 29, 2012) is predicated upon
10 the supposed August 16, 1993, license from Tercer Mundo to Priority Records,
11 and ¶9 of the McMullen Declaration (dated December 3, 2007) (which effectively
12 disclaims any involvement in Case No. 03-CV-08955), Clinton states that Judge
13 Real’s June 17, 2005, Order is not only “law of the case” concerning that issue, it
14 cannot now be collaterally attacked in this action. If anything, this Court now has
15 ample authority to take action under Fed. R. Civ. P. 56(f) and issue summary
16 judgment in favor of Clinton based upon Judge Real’s June 17, 2005, Order.
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22 Further, neither Moving Defendants nor the Marshall Declaration explain
23 how or why any putative license to Priority Records could first “morph” to
24 Capitol Records and then somehow be assigned, transferred, or extended to any
25 Moving Defendants—all without a single document or explanation. In fact,
26 controlling copyright law precedent of the Ninth Circuit explicitly holds and
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1 embraces “the proposition that such licenses are not transferable as a matter of
2 law.” *Harris v. Emus Records Corporation, et al.* 734 F.2d 1329, 1333 (9th Cir.
3 1984). “It has been held that a copyright licensee is a “bare licensee . . . without
4 any right to assign its privilege.” *Id.* This legal position is further supported by
5 Judge Pregerson’s decision in *Michaels v. Internet Ent. Group, Inc.*, 5 F.Supp.2d
6 823, 834 (C.D. Cal. 1998) which cited *Harris* in a dispute involving copyright
7 license issues flowing from the use of a celebrity sex-tape by IEG featuring
8 musician Brett Michaels “holding that a copyright license itself does not include
9 the right to transfer the license, unless the copyright owner (here Clinton by virtue
10 of Judge Real’s June 17, 2005 Order) explicitly conveys this right in addition to
11 the license itself.” *Id.* The court reasoned that “[t]he default rule of non-
12 transferability [] makes IEG’s burden heavier in proving its license defense. It
13 must prove not only that Michaels granted a license to the unnamed client, but
14 also that Michaels’ agreement with the unnamed client included a term allowing
15 the license to be transferred to IEG without further consent from Michaels.” *Id.*
16 Given this default rule of non-transferability, the supposed “1993” license
17 flowing to the Moving Defendants in the Marshall Declaration is even more
18 suspect given not only Judge Real’s June 17, 2005, Order, but because the
19 Moving Defendants submit absolutely no evidence on behalf of themselves as
20 named parties. Indeed, no member of the BEP filed anything – why?
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1 Concerning the alleged second “license” supposedly obtained through an
2 individual named Eban Kelly to use the 2009 *Shut Up* Remix, Moving
3 Defendants submit and rely upon the Mannis-Gardner and Rosoff Declarations
4 neither of whom establish for purposes of summary judgment, that an agreement
5 was ever made with George Clinton to obtain the alleged license from 2007-2009
6 before they “cleared” the use of *Knee Deep* by Moving Defendants. Moving
7 Defendants’ evidence consists of a November 29, 2007, check in the amount of
8 \$15,000 made payable to C Kunspyrushzy LLC, but does not provide any type of
9 signed or negotiated version of the check showing that it was ever cashed by
10 anyone – including Clinton. Neither the Mannis-Gardner or Rosoff Declarations
11 suggest the existence of a license or a check made payable to the actual legal
12 owner of the work at issue, George Clinton, all of which is clearly refuted by the
13 opposing Kelly and Clinton Declarations attached hereto.

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18 **IV. CONCLUSION**

19 For the above stated reasons, Defendants’ Motion For Partial Summary
20 Judgment should be DENIED as set forth above in the accompanying Proposed
21 Order.
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24 Dated: March 19, 2012

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, hereby certify that on March 19, 2012, I electronically filed the foregoing:

PLAINTIFF’S RESPONSE TO DEFENDANTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT

with the Clerk of the Court using the ECF System which will send notification of such filing to all counsel of record.

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