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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
**REPLY IN SUPPORT OF
 DEFENDANTS' MOTION FOR
 PARTIAL SUMMARY
 JUDGMENT; REPLY
 DECLARATION OF ALLEN B.
 GRODSKY & EXHIBIT 15**
*[Filed concurrently with Objections
 to Evidence Offered by Plaintiff]*
 Date: April 16, 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 The opposition papers submitted by Plaintiff George Clinton plainly establish
3 that he has no competent evidence on three issues for which he will bear the burden of
4 proof at trial:

- 5 • Plaintiff has no evidence of actual damages. While it is true that Plaintiff
6 may elect between actual or statutory damages if he prevails at trial, that
7 is no reason to deny the Moving Defendants summary judgment on a
8 damages theory for which Plaintiff has no evidence.
- 9 • Plaintiff has no evidence of profits, either. Plaintiff bears the burden of
10 showing Moving Defendants' revenues received from the 2003 and 2009
11 Shut Up Remixes. The sole exhibit he cites contains no information
12 whatsoever regarding revenues to any of the Moving Defendants. It is
13 also inadmissible for a number of reasons, not the least of which being
14 that it was provided to Plaintiff's counsel solely for use in settlement
15 discussions and that it is hearsay and unauthenticated.
- 16 • Plaintiff has no evidence against Defendants WMI and TMI. Plaintiff
17 essentially concedes this by agreeing to two undisputed facts, and failing
18 to put forth evidence raising a genuine dispute as to a third fact. And
19 WMI's suspended corporate status is no basis for allowing Plaintiff to
20 proceed to trial against a defendant against whom he has no evidence.

21 Plaintiff's opposition papers and convoluted declarations also establish that he
22 has no evidence regarding a fourth issue for which the Moving Defendants will bear
23 the burden of proof at trial: that the Moving Defendants had a reasonable, good faith
24 belief that they had a valid license. Plaintiff is free to dispute the validity of those
25 licenses with as much evidence as he wants – but that dispute is for trial, and that
26 evidence has no bearing on the reasonableness of the Moving Defendants' belief that
27 they had obtained a valid license through reputable channels. If the Moving
28

1 Defendants are found to have infringed, they are entitled as a matter of law to have
2 that infringement be deemed innocent.

3 For all of these reasons, the Moving Defendants are entitled to partial summary
4 judgment on each of these four issues.

5
6 **2. CLINTON IDENTIFIED NO EVIDENCE OF HIS ACTUAL DAMAGES.**

7 Plaintiff's opposition papers basically concede that he has no evidence of actual
8 damages under Section 504(b) of the Copyright Act. Plaintiff produced no
9 documentary evidence of actual damages; Plaintiff failed to disclose a damage
10 calculation under Federal Rule of Civil Procedure 26(a)(1)(A)(iii); and Plaintiff failed
11 to designate an expert witness that could testify to actual damages. (See Plaintiff's
12 Statement of Genuine Disputes of Material Fact ["Pl.'s Stmt."], Dkt. 89, pp. 9-11,
13 responses to UFs 26-31.)

14 Faced with this insurmountable problem, Plaintiff only responds by attempting
15 to confuse the issues. Plaintiff argues – without offering any authority – that because
16 he is entitled to elect statutory damages in lieu of actual damages at any time before
17 final judgment, the Court somehow lacks jurisdiction to rule on the issue of whether
18 he can prove actual damages until after the election.

19 This is wrong. A motion for partial summary judgment is a proper vehicle for
20 foreclosing a party from proceeding on any issue or theory for which the party has no
21 evidence from which a reasonable jury could find for the party on that issue or theory.
22 See Fed. R. Civ. P. 56(a) (party may seek summary judgment on part of a claim). By
23 seeking summary judgment on Plaintiff's actual damages theory, Defendants may
24 properly foreclose Plaintiff from being able to elect actual damages (and profits, for
25 that matter). The issue is "ripe" for adjudication so long as Plaintiff continues to take
26 the position that he is entitled to actual damages.

27 Defendants have carried their burden of showing that Plaintiff cannot produce
28 admissible evidence of actual damages, and Plaintiff has failed to carry his burden of

1 identifying any evidence of actual damages. Defendants are thus entitled to judgment
2 as a matter of law on Plaintiff’s theory of actual damages. See Celotex Corp. v.
3 Catrett, 477 U.S. 317, 322 (1986) (summary judgment proper where plaintiff “fails to
4 make a showing sufficient to establish the existence of an element essential to that
5 party’s case, and on which that party will bear the burden of proof at trial”).

6
7 **3. CLINTON IDENTIFIED NO COMPETENT EVIDENCE OF THE**
8 **MOVING DEFENDANTS’ PROFITS OR REVENUES.**

9 To the extent Plaintiff seeks profits as monetary recovery under Section 504(b),
10 Plaintiff bears the burden of proving gross revenues received by each of the Moving
11 Defendants. 17 U.S.C. § 504(b); Frank Music Corp. v. MGM, Inc., 772 F.2d 505, 514
12 (9th Cir. 1985). Yet Plaintiff cites only one exhibit as purported evidence of the
13 Moving Defendants’ revenues: Exhibit E to the Declaration of Jeffrey P. Thennisch.
14 (Dkt. 88-5.) There is no dispute that Exhibit E was provided to Plaintiff’s counsel in
15 the course of settlement negotiations. Indeed, Plaintiff’s counsel received this
16 document at a time when discovery was stayed voluntarily. (Grotsky Reply Decl.,
17 Ex. 15.)

18 Plaintiff loosely refers to Exhibit E as publicly available “Soundscan data,” but
19 this is wrong. Exhibit E is actually three documents: (1) an e-mail chain between
20 counsel for Plaintiff and counsel for the Moving Defendants (pages 2-4); (2) a
21 financial analysis that the Moving Defendants’ counsel received from Universal’s
22 counsel (pages 5-7, the “Financial Analysis”); and (3) a report generated from a third-
23 party subscription service, again received by the Moving Defendants’ counsel from
24 Universal’s counsel (pages 8-9, the “SoundScan Report”). (Grotsky Reply Decl. ¶¶
25 3-5.) Page 10 appears to be a duplicate of page 8.

26 Neither the Financial Analysis nor the SoundScan Report contains evidence of
27 revenues received by any of the Moving Defendants. Neither the Financial Analysis
28 nor the SoundScan Report is properly authenticated as a business record – or given

1 any foundation at all, for that matter. And both the Financial Analysis and the
2 SoundScan Report are inadmissible under Federal Rule of Evidence 408. For all three
3 of these reasons, Plaintiff again fails to carry his burden of coming forward with
4 competent evidence of revenues received by each of the Moving Defendants. See
5 Celotex, 477 U.S. at 322.

6 **A. The Financial Analysis Does Not Reflect The Moving Defendants’**
7 **Revenues, And The SoundScan Report Only Shows Unit Sales With**
8 **No Dollar Amounts.**

9 The Financial Analysis contained on pages 5-7 of Exhibit E does not reflect
10 revenues received by the Moving Defendants. Nothing on the face of the Financial
11 Analysis indicates that the Moving Defendants received the revenues listed. Indeed,
12 the Financial Analysis was first obtained from counsel for Universal, and the revenues
13 listed are not the Moving Defendants’ revenues. (Grotsky Reply Decl. ¶¶ 4, 8.)

14 Moving Defendants’ counsel made this fact clear to Plaintiff’s counsel before
15 transmitting the Financial Analysis. In e-mail correspondence, Moving Defendants’
16 counsel stated “I want to explain the documents to you when I send them, because
17 they are not necessarily self-explanatory.” (Thennisch Ex. E [Dkt. 88-5], p. 3 of 10,
18 10/11/2011 5:53 p.m. email.) During their subsequent phone call, Moving
19 Defendants’ counsel explained to Plaintiff’s counsel that the numbers on pages 5-7 of
20 Exhibit E did not show revenues to Moving Defendants, and that revenues to Moving
21 Defendants, if any, would be far less than the numbers indicated on pages 5-7.
22 (Grotsky Reply Decl. ¶ 8.)

23 Similarly, the SoundScan Report contained on pages 8-9 of Exhibit E does not
24 reflect revenues received by Moving Defendants. It does not reflect revenues at all!
25 The only information reflected in the SoundScan Report is unit sales of all 28 tracks
26 on the album containing the 2009 Shut Up Remix, including unit sales of the 2009
27 Shut Up Remix itself. The SoundScan Report contains no dollar figures related to the
28 2009 Shut Up Remix, let alone the 2003 Shut Up Remix.

1 Plaintiff thus has no evidence of revenues received by Moving Defendants from
2 which a jury reasonably could determine and award profits to Plaintiff.

3 **B. The Financial Analysis and The SoundScan Report Are Hearsay and**
4 **Lack Foundation.**

5 A party opposing a motion for summary judgment or partial summary judgment
6 must come forward with properly authenticated and admissible evidence showing a
7 genuine dispute of material fact. See Fed. R. Civ. P. 56(c)(4); Orr v. Bank of Am.,
8 NT & SA, 285 F.3d 764, 773-74 (9th Cir. 2002). The Financial Analysis and the
9 SoundScan Report cited by Plaintiff cannot create a genuine issue of material fact for
10 the additional reason that they are not authenticated properly and they are hearsay.
11 These documents could not be admitted at trial.

12 Plaintiff's counsel sponsors the Financial Analysis and the SoundScan Report
13 through his Exhibit E, but he does not even bother to authenticate these documents.
14 (Thennisch Decl. [Dkt. 88] ¶ 8.) Even if he had, the most to which Plaintiff's counsel
15 could testify on personal knowledge is that the Financial Analysis and SoundScan
16 Report contained in Exhibit E are true and correct copies of documents he received
17 from the Moving Defendants' counsel as part of settlement negotiations. (Cf. Grodsky
18 Reply Decl. ¶ 6.) This would not be enough to authenticate or lay a proper foundation
19 for the admission of the Financial Analysis or the SoundScan Report. Fed. R. Evid.
20 602 & 901.

21 The Financial Analysis and the SoundScan Report are also hearsay. Plaintiff is
22 using these documents to prove the truth of the documents' assertions as to
23 Defendants' revenues – although it is far from clear precisely what assertions these
24 documents these make. That is classic hearsay under Rule 801, and Plaintiff does not
25 establish the five elements for the business records exception under Rule 803(6).

26 Plaintiff has thus failed to carry his burden of identifying competent,
27 authenticated, and admissible evidence. Plaintiff cannot use these documents to create
28 a genuine dispute of material fact. Cf. Orr, 285 F.3d at 777-78.

1 **C. The Financial Analysis and The SoundScan Report Are Inadmissible**
2 **Because They Were Communicated To Plaintiff Solely For The**
3 **Purpose of Settlement Discussions.**

4 Plaintiff cannot use the Financial Analysis and the SoundScan Report to create
5 a genuine issue of material fact as to Moving Defendants’ revenues for the additional
6 reason that Plaintiff obtained these documents only through settlement discussions
7 with Defendants, and only under the agreement that the documents would be used
8 “FOR SETTLEMENT PURPOSES ONLY,” as they are branded. Plaintiff did not
9 discover these documents independent of the settlement discussions, and Plaintiff fails
10 to show that he could have discovered them independent of settlement discussions.
11 Not only did Plaintiff breach his agreement by using the documents for purposes other
12 than settlement; he filed them in the public record despite being warned that they
13 contain highly confidential and competitively sensitive financial information.

14 Federal Rule of Evidence 408(a)(2) provides that evidence of “conduct or a
15 statement made during compromise negotiations” is not admissible to prove the
16 “amount of a disputed claim.” The Financial Analysis and the SoundScan Report fall
17 squarely within subsection (a)(2) because they were provided in the course of
18 settlement discussions and under the agreement that they would be used for settlement
19 purposes only. (Grotsky Reply Decl. ¶ 6.)

20 Rather than citing the current version of Rule 408, Plaintiff cites a version of
21 Rule 408 that predates the Rule’s 2006 Amendment. (Opposition, p. 12 n.5.) Plaintiff
22 cites this now-superseded version of Rule 408 to support the proposition that
23 documents provided during settlement discussions are admissible if they are
24 “otherwise discoverable.” But even if this were true, Plaintiff fails to lay any
25 foundation showing that the Financial Analysis and the SoundScan Report are indeed
26 otherwise discoverable. The only facts Plaintiff offers regarding the origins of the
27 Financial Analysis and the SoundScan Report is that they were provided to him by
28 Moving Defendants’ counsel. (Thennisch Decl. [Dkt. 88] ¶ 8.) As discussed above,

1 Plaintiff's counsel has no personal knowledge as to the origins of the Financial
2 Analysis and the SoundScan Report. There is no question that Plaintiff failed to
3 obtained these documents through the normal discovery process.

4 While Plaintiff's counsel purports to acknowledge "the importance and need for
5 Federal Rule of Evidence 408" (*id.*), that Rule's important policy goals of encouraging
6 free flow of communication and information in settlement discussions is undermined
7 when a party breaks his promise not to use information outside of settlement
8 discussions, and then files those documents in the public record. In light of the strong
9 policy interest in encouraging settlements, courts wisely err on the side of excluding
10 evidence in "doubtful" situations. See Bradbury v. Phillips Petroleum Co., 815 F.2d
11 1356, 1364 (10th Cir. 1987) ("when the issue is doubtful, the better practice is to
12 exclude evidence of compromises or compromise offers").

13 * * *

14 Exhibit E does not in any way show the Moving Defendants' revenues and,
15 even if it did, the Exhibit is inadmissible. Plaintiff, therefore, cannot prove revenues
16 received by the Moving Defendants from the alleged infringement. Accordingly,
17 Plaintiff cannot recover damages.

18
19 **4. INNOCENT INFRINGEMENT IS NOT AN AFFIRMATIVE DEFENSE,**
20 **AND PLAINTIFF CITES NO EVIDENCE THAT CREATES A GENUINE**
21 **DISPUTE REGARDING MOVING DEFENDANTS' REASONABLE,**
22 **GOOD FAITH BELIEFS.**

23 Defendants are entitled to summary judgment that if they infringed Plaintiff's
24 copyright, they did so innocently. While Defendants bear the burden of proving their
25 innocent infringement defense, they have carried that burden by setting forth evidence
26 establishing that they reasonably believed they obtained valid licenses to *Knee Deep*
27 for use in the 2003 and 2009 Shut Up Remixes. (See Dfts' UFs 8-20 and supporting
28 evidence [Dkt. 77, pp. 3-6].)

1 If Plaintiff can dispute the validity of those licenses, then that may well be an
2 issue for trial. But there is no genuine dispute that Defendants reasonably and
3 justifiably relied upon those licenses, even if Plaintiff is able to prove at trial that the
4 licenses were invalid.

5 Plaintiff's opposition tries to confuse both the law and the facts. As to the law,
6 Plaintiff repeats at least nine times that innocent infringement is an "affirmative"
7 defense that must be pleaded with Defendants' answers. This is wrong. Innocent
8 infringement is not an affirmative defense, and Plaintiff cites no authority for this
9 proposition. Innocent infringement is not enumerated in Rule 8(c); nor does it fall
10 within that Rule's "residuary" clause. This is so because a copyright defendant's
11 establishing innocent infringement does not result in a complete bar to recovery – it
12 merely mitigates the monetary award awarded against the defendant. See Wolf v.
13 Reliance Standard Life Ins. Co., 71 F.3d 444, 449 (1st Cir. 1995) (test for whether a
14 defense is "affirmative" is "whether the defense shares the common characteristic of a
15 bar to the right of recovery even if the general complaint were more or less admitted
16 to"). Defendants may properly establish on summary judgment that they if they
17 infringed, they are innocent infringers.

18 As to the facts, Plaintiff says very little in his opposition brief. (See Opposition,
19 p. 18:8-21.) Instead, Plaintiff presents the bulk of his argument in his Statement of
20 Genuine Disputes of Material Fact, where he essentially argues he is the sole owner of
21 the master recording of *Knee Deep* as a result of the 2005 Court Order, and that the
22 licenses to use *Knee Deep* in the 2003 and 2009 Shut Up Remixes were invalid.

23 Again, this misses the mark. The validity of these licenses is not at issue in this
24 motion. What is at issue is whether there is any genuine dispute as to whether the
25 Defendants had a reasonable, good faith belief that they had obtained valid licenses to
26 sample *Knee Deep*.

27
28

1 Plaintiff does not put forward any evidence creating a genuine issue as to
2 Defendants' reasonable, good faith belief. This is shown from Plaintiff's responses to
3 Defendants' Undisputed Facts:

4 a. In response to UFs 8-10 regarding the license for the 2003 Shut Up Remix,
5 Plaintiff only disputes the validity of this license by citing the subsequent 2005 Court
6 Order. (Pl.'s Stmt., pp. 4-5.) Plaintiff offers no evidence that the Moving Defendants
7 knew of the existence of the 2005 Court Order and it thus has no bearing on
8 Defendants' good faith, reasonable belief as to whether they obtained a valid license
9 in 2003.

10 b. In response to UF 15 regarding Deborah Mannis-Gardner's reputation in the
11 music industry for obtaining clearances, Plaintiff only argues that "credibility
12 determinations are inherently factual." (Id. p. 6.) But this confuses reputation with
13 credibility, and reputation is proved through evidence and testimony, not through
14 observing the witness's demeanor at trial. See, e.g., Fed. R. Evid. 803(21).

15 c. In response to UFs 18-20 regarding Deborah Mannis-Gardner's
16 communications and interactions with George Clinton's associate, Eban Kelly,
17 Plaintiff submits his own declaration and a declaration from Kelly that contend
18 Clinton's signatures on the 2009 license agreement (Ex. 4) and the W-4 form (Ex. 5)
19 are "forgeries." Even if these signatures were "forgeries" – a claim which Defendants
20 look forward to exploring at trial through cross-examination of Mr. Kelly – that would
21 not create a genuine dispute over whether Defendants had a reasonable, good faith
22 belief that they obtained genuine signatures from George Clinton.^{1/}

23
24
25 ^{1/} Curiously, Mr. Kelly never denies Mannis-Gardner's assertion that "Mr. Kelly
26 faxed back . . . a license agreement containing a signature for Mr. Clinton and a W-9
27 also containing a signature for Mr. Clinton." (Mannis-Gardner Decl. ¶ 5 [Dkt. 78-2].)
28 Nor does Mr. Kelly deny that he received Mannis-Gardner's July 29, 2009 letter. (Ex.
3.) At best, Mr. Kelly only denies that he had legal authority from Mr. Clinton to
agree to a license on Mr. Clinton's behalf. This testimony does not create a genuine
issue of material fact as to Defendants' beliefs.

1 Thus, Defendants have carried their burden of showing there is no genuine issue
2 of material fact as to their good faith and reasonable beliefs in having obtained valid
3 licenses. In the event that Defendants are found to have infringed, they are entitled as
4 a matter of law to be deemed innocent infringers.

5
6 **5. PLAINTIFF HAS NO EVIDENCE OF WMI’S OR TMI’S LIABILITY.**

7 Plaintiff has the burden of proving that each named defendant “violate[d] at
8 least one exclusive right granted to the copyright holder under 17 U.S.C. § 106.”
9 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001). Plaintiff
10 does not dispute that it has no evidence to create a genuine issue of material fact as to
11 WMI’s or TMI’s liability under contributory or vicarious liability theories. Plaintiff
12 has no evidence that WMI or TMI played any role in creating the sound recording of
13 the 2003 or 2009 Shut Up Remixes, or produced, manufactured, distributed, and sold
14 those sound recordings.

15 Indeed, Plaintiff concedes that two of Defendants’ three undisputed facts
16 regarding WMI and TMI are indeed undisputed. (See Pl.’s Stmt., pp. 8-9 [UFs 23 &
17 24 undisputed].)

18 Plaintiff attempts to salvage his case against WMI and TMI with two
19 arguments. First, Plaintiff argues that UF 25 – that neither WMI nor TMI received
20 any income from the exploitation of the masters of the 2003 and 2009 Shut Up
21 Remixes – is a disputed fact. But Plaintiff fails to put forth any evidence of a dispute.
22 Plaintiff only puts forth an objection to the evidence Defendants cite,^{2/} but this is not
23 enough. Plaintiff bears the burden of persuasion at trial, and it is enough for
24 Defendants to show that there is an absence of essential evidence to support Plaintiff’s
25 case against WMI and TMI. See Fed. R. Civ. P. 56(c)(1)(B); Celotex, 477 U.S. at
26 325. Summary judgment for WMI and TMI is appropriate because Plaintiff “fail[ed]

27
28 ^{2/} Plaintiff’s objection is not properly set out in a separate document as required
under § 6(d)(iii) of the Court’s Scheduling & Case Management Order (Dkt. 38).

1 to make a showing sufficient to establish the existence of an element essential to that
2 party's case, and on which that party will bear the burden of proof at trial." Celotex,
3 477 US at 322.

4 Second, Plaintiff argues he should be allowed to proceed to trial against WMI –
5 despite his lack of evidence against WMI – because WMI is a suspended corporation
6 and cannot defend itself. Plaintiff even goes so far as to argue he is entitled to
7 summary judgment against WMI pursuant to Rule 56(f). (Opposition, p. 19.) Both of
8 these arguments should be rejected. Plaintiff bears the burden of proving WMI's
9 liability at trial, and he has no evidence and fails to identify any evidence of WMI's
10 liability. WMI's suspended status should not permit Plaintiff to proceed to trial
11 against a Defendant against whom he has no evidence.

12 Because Plaintiff failed to identify any evidence of their liability, WMI and
13 TMI are entitled to judgment as a matter of law.

14
15 **6. CONCLUSION**

16 For the foregoing reasons and the reasons stated in Moving Defendants'
17 opening brief, this Motion for Partial Summary Judgment should be granted in its
18 entirety.

19
20 Dated: March 26, 2012

GRODSKY & OLECKI LLP

21
22
23 By / Allen B. Grodsky /
Allen B. Grodsky

24 Attorneys for Defendants William Adams,
25 Allan Pineda, Jamie Gomez, Stacy
26 Ferguson, will.i.am music, inc., and Tab
27 Magnetic, Inc.
28