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 9 GOULD LAW GROUP
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15 Attorneys for Plaintiff
 16 BRYAN PRINGLE

17 **UNITED STATES DISTRICT COURT**
 18 **CENTRAL DISTRICT OF CALIFORNIA**
 19 **SOUTHERN DIVISION**

20 BRYAN PRINGLE, an individual,
 21 Plaintiff,
 22 v.
 23 WILLIAM ADAMS, JR.; STACY
 24 FERGUSON; ALLAN PINEDA; and
 25 JAIME GOMEZ, all individually and
 collectively as the music group The Black
 Eyed Peas; DAVID GUETTA;
 26 FREDERICK RIESTERER; UMG
 27 RECORDINGS, INC.; INTERSCOPE
 28 RECORDS; EMI APRIL MUSIC, INC.;
 HEADPHONE JUNKIE PUBLISHING,
 LLC; WILL.I.AM. MUSIC, LLC;

) Case No. SACV10-1656 JST (RZx)

) **DECLARATION OF**
) **ALEXANDER STEWART IN**
) **SUPPORT OF PLAINTIFF'S EX**
) **PARTE APPLICATION FOR**
) **TEMPORARY RESTRAINING**
) **ORDER AND ORDER TO**
) **SHOW CAUSE RE**
) **PRELIMINARY INJUNCTION**

1 JEEPNEY MUSIC, INC.; TAB
2 MAGNETIC PUBLISHING; CHERRY
3 RIVER MUSIC COL.; SQUARE
4 RIVOLI PUBLISHING; RISTER
EDITIONS; and SHAPIRO,
BERNSTEIN & CO.,

5 Defendants.

6
7 **DECLARATION OF ALEXANDER STEWART**

8 I, Alexander Stewart, have personal knowledge of the facts contained within this
9 declaration, and if called as a witness, could and would testify regarding the following
10 facts:

11 1. I am Associate Professor of Music at the University of Vermont, where,
12 among other duties, I direct the Jazz Studies and Integrated Fine Arts Programs. I have
13 earned a Ph.D. in music with a concentration in Ethnomusicology and a Master of Music
14 in Jazz and Commercial Music from Manhattan School of Music. I have published books,
15 articles, and encyclopedia entries and have given numerous conference papers and guest
16 lectures. As an active musician, I have over thirty years of experience performing and
17 recording with jazz and pop artists; nearly twenty of these years as a free-lance musician
18 in New York City. As a jazz musician and ethnomusicologist, in addition to printed
19 scores, my primary musical documents have been recordings, and I have transcribed (put
20 into musical notation) and carefully analyzed thousands of commercial and "field"
21 recordings. I have received many awards and grants, including a Fulbright Fellowship to
22 Mexico during 2006-7. Further details are contained in my CV, a copy of which is
23 attached to this Declaration as Exhibit A.

24 2. I was retained by the Gould Law Group as a professional forensic
25 musicologist to analyze and compare the similarities between the derivative version of
26 Bryan Pringle's song, "Take a Dive," and the Black Eyed Peas' song, "I Gotta Feeling"
27 (all references to "Take a Dive" contained herein refer specifically to the derivative
28

1 version). In preparing my opinions that are communicated in this Declaration, I made a
2 preliminary transcription of each song (lyrics and music) and listened to each song a
3 number of times.

4 3. The Gould Law Group previously provided me with a legal standard for
5 establishing copyright infringement between two songs, which is that of “substantial
6 similarity.” It was represented to me that substantial similarity between two songs is
7 usually determined by the “total concept and feel” test, which is broken down into two
8 parts: (1) an objective extrinsic test, in which an expert is required to do an analytical
9 dissection of the songs and compare the protected elements of expression, as opposed to
10 mere ideas, in order to determine if the works are in fact sufficiently similar to support a
11 conclusion that one was actually copied from the other; and (2) a subjective intrinsic test,
12 or “whether the ordinary, reasonable observer would find the works, taken as a whole, to
13 be substantially similar.”

14 4. After listening to and analyzing each song closely, and given the applicable
15 legal standard above, it is my professional opinion that the instrumental track for “I Gotta
16 Feeling” and the derivative version of “Take a Dive” are more than substantially similar,
17 they are strikingly similar in every fundamental respect: melody or pitch sequence,
18 rhythm, and harmony. They are also strikingly similar in instrumentation, timbre (tone
19 color), tempo, key, accompaniment, style, and genre. The most important element of each
20 song, the eight-measure hook, is absolutely identical in every respect. Based on this
21 information and the sequence of events described in the complaint, I must conclude that
22 the creators of “I Gotta Feeling” listened to and copied significant and original material
23 from the derivative version of “Take a Dive.”

24 5. The following is a non-exhaustive list of similarities between Pringle’s
25 song, “Take a Dive,” and the Black Eyed Peas’ song, “I Gotta Feeling”:

26 (a) In terms of their overall sound, “I Gotta Feeling” and “Take a Dive” share
27 the following fundamental compositional elements:
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Summary of General Characteristics

	<u>"I Gotta Feeling"</u>	<u>"Take a Dive"</u>
Genre	Club/Dance	Club/Dance
Style	Techno/Pop	Techno/Pop
Key	G Major	G Major
Meter	4/4	4/4
Tempo	128	130
Structure	Repeating 8 bar cycle	Repeating 8 bar cycle
Instrumentation	Guitar sound, bass, synthesized string & other techno sounds	Guitar sound, bass, synthesized string & other techno sounds

(b) Both "I Gotta Feeling" and "Take a Dive" are nearly the same length: 4:49 and 4:39 respectively. Except for the first seventeen seconds of "Dive" they are constructed entirely from a repeating eight measure pattern.

(c) Both songs contain an identical "twangy" guitar figuration that is absolutely identical in pitches, rhythm, range, and sound (timbre or tone color, attack, decay, etc.). The metric placement is identical - one chord on each of the measure's beats (1-2-3-4), which yields a steady pulsing or throbbing effect. This figuration, which is a total of 64 notes, forms the core of each song, occurring seventeen times in "Take a Dive" and fifteen times in "I Gotta Feeling." Below is the transcription for the "Twangy" guitar passage in both songs:

The musical notation consists of two staves, each with a treble clef and a key signature of one sharp (F#). The time signature is 4/4. The first staff (lines 22-23) shows the first four measures of the repeating pattern. The second staff (lines 25-26) shows the next four measures. The notation is a rhythmic guitar figuration with chords on each beat. The notes are: G4 (quarter), A4 (quarter), B4 (quarter), G4 (quarter), F#4 (quarter), E4 (quarter), D4 (quarter), C4 (quarter), G4 (quarter), A4 (quarter), B4 (quarter), G4 (quarter), F#4 (quarter), E4 (quarter), D4 (quarter), C4 (quarter), G4 (quarter), A4 (quarter), B4 (quarter), G4 (quarter), F#4 (quarter), E4 (quarter), D4 (quarter), C4 (quarter).

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This theme forms the core of each song, occurring seventeen times in "Take a Dive" and fifteen times in "I Gotta Feeling." The passage is approximately fifteen seconds long in each song. In "Dive" the theme is heard 4:15 of 4:39 (255 of 279 seconds) or 92% of the time. In "Feeling" the theme is sounded during 3:45 of 4:49 (225 of 289 seconds) or 78% of the song.

(d) The bass line in both songs consists of four repeated notes that last for two measures each as follows:

<u>Measures</u>	1-2	3-4	5-6	7-8
"Feeling"	G	C	E	C
"Dive"	G	F	A	C

As can be seen, in four of the eight measures (measures 1, 2, 7, 8) the repeated bass note is the same. Later in the song in "Dive" Pringle introduces a somewhat different bass cycle at 2:30; 3:40; 3:58; and 4:13.

<u>Measures</u>	1-2	3-4	5-6	7-8
"Feeling"	G	C	E	C
"Dive"	E	C	E	C

These pitches are sustained using a low string sound much like the beginning of "Feeling." Here the pitches match in measures 3, 4, 5, 6, 7, and 8 (all except measures 1 and 2). Throughout much of the song, then, at least 50% of the pitches in the bass part match and during *part* of the song the congruence in the bass reaches 75%. Though the rhythms are somewhat different, the number of repeated notes in each measure of the bass part is almost the same (seven in "Dive" and eight in "Feeling"). But, most important, *all* of the bass pitches heard in the eight-measure cycle in "Feeling" can be found in the same position of the cycle somewhere in

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“Dive.”

(e) The harmony used in both songs is substantially similar due to the many common notes in the main theme and the bass part. One of the few differences is the F-natural that is played in the bass in measures 3 and 4 of the cycle in “Dive.” But this F-natural is also heard in “Feeling” during a significant portion of the song and is present in the melody and the accompaniment in the same location of the cycle (measures 3 and 4) at the following locations:


- 1:34
- 1:48
- 2:03

(f) In addition to the striking similarities both general and specific outlined above, these songs contain many of the same sounds, electronic effects, musical devices, and other details.

6. As far as the quality of material copied by the Black Eyed Peas, the “twangy” guitar passage heard in both “Feeling” and “Dive” is the central theme of both songs. In addition to being sounded almost continuously, it is one of the loudest and most prominent sounds in the mix. Moreover, the theme is especially exposed at the beginning and ending of each work, making both the first and the last impression on the listener. As the most recognizable element, it enables a listener to instantly identify the song. In record producers’ parlance, this passage can be considered the “hook.” Producers and recording artists consider the “hook” to be the most valuable part of a song and it is thought that in order to be successful, a popular song must contain at least one such catchy passage. The eight-measure passage serves this function in both songs and is unquestionably the most memorable and valuable part of the instrumental tracks.

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I declare under penalty of perjury under the state law of California that the statements contained in this Declaration are true and correct to the best of my knowledge.

Executed this 18 day of November, 2010 By: 
Alexander Stewart, PhD.

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Curriculum Vitae
Alexander Stewart
2010

Department of Music
University of Vermont
Burlington, VT 05405
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astewart@uvm.edu

TEACHING POSITIONS

UNIVERSITY OF VERMONT 1999-present
Associate Professor
Jazz Studies Coordinator
Director, Integrated Fine Arts Program
Co-Director, Latin American Studies Program (Spring 2006)
Fulbright Fellow, Mexico (2006-7)

LONG ISLAND UNIVERSITY C.W. Post Campus 1988-1999
Director of Jazz Studies

Adjunct courses:

The New School (Jazz and American Culture) 1995-1997
John Jay College of CUNY (History of Jazz and Rock) 1995

EDUCATION

GRADUATE CENTER: THE CITY UNIVERSITY OF NEW YORK
Ph.D. in Music (Ethnomusicology Concentration), 2000
Dissertation: *Composition and Performance in Contemporary New York City
Big Bands* (1989-1999) Advisor: Stephen Blum

MANHATTAN SCHOOL OF MUSIC
Master of Music, 1991

LONG ISLAND UNIVERSITY, C.W. POST
B.F.A., *summa cum laude*, in Music Education, 1988

SELECTED PROFESSIONAL ACTIVITIES

MUSIC COPYRIGHT

Trial testimony in Federal District Court, Nashville TN, Case No. 3:01-780, Bridgeport Music v.

Universal Music. February 2007. "Atomic Dog" and "D.O.G. in Me." Affirmed by US Sixth Circuit Court of Appeals, No. 07-5596, November 4 2009.

Trial testimony in Federal District Court, Nashville, TN Case No. 3:01-0155 involving rap artist, the Notorious B.I.G and the Ohio Players. (March 2006).

Expert report in *Bridgeport Music, Inc. v. Di-mension Films*, 383 F.3d 390 (6th Cir. 2004) establishing new "bright line" standard for sampling and sound recording copyrights.

Expert reports in forensic musicology for King and Ballow, Nashville, TN; Schwartz Cooper, Chicago, IL; Microhits, Los Angeles, CA; Rawson, Merrigan & Litner, Greenfield and Boston, MA; JPMC Burlington, VT; Kile, Goekjian, McManus, Washington, DC; and many others.

Testimony by deposition. Case information available on request.

Classes and seminars in Music Business and Copyright.

"Musicology CSI: Sampling, Interpolation, and Copyright." Invited lecture, State University of New York (SUNY) Albany, April 28, 2010.

"Copyrights and Copywrongs: Interpolation, Sampling, and Forensic Musicology." Invited Lecture at State University of New York, (SUNY) Plattsburgh, March 2010.

Symposium on Music Copyright, flautist James Newton discusses his lawsuit against the Beastie Boys. University of Vermont, January 2003.

PUBLICATIONS – books

Making the Scene: Contemporary New York City Big Band Jazz, Berkeley: University of California Press, 2007.

Spanish translation from the French and German: Hans Bodenmann, *El ABC de la Flauta Dulce*. Zurich: Anton Peterer Music & Books, 2003.

PUBLICATIONS – refereed journals

Review of Ben Ratliff, *Coltrane: The Story of a Sound* in *Jazz Perspectives* 2(1):103-109 (2008).

"Contemporary New York City Big Bands: Composition, Arranging, and Individuality in Orchestral Jazz," *Ethnomusicology* 48(2) (Spring/Summer 2004): 169-202.

Review of The New Grove Dictionary of Jazz. *Ethnomusicology* 47(3) (Fall 2003):

376-80.

Essay review of Lewis Porter, John Coltrane: His Life and Music. *Annual Review of Jazz Studies* 11, 2000-1 [2002]: 237-52.

“‘Funky Drummer’: New Orleans, James Brown and the Rhythmic Transformation of American Popular Music,” *Popular Music* 19(3) (Winter 2000): 293-318.

Review of Scott DeVaux, The Birth of Bebop, *Yearbook of Traditional Music* 30 (1998): 135-7.

PUBLICATIONS – other

“Second Line,” *Encyclopedia of Popular Music of the World*. London: Cassell 2003.

LECTURES AND CONFERENCE PAPERS

Numerous presentations at national and international conferences of Society for Ethnomusicology, Society for Music Theory, American Musicological Society, Latin American Studies Association, Society for American Music, and more.

PERFORMANCES

Jazz and Latin

The Lionel Hampton Orchestra; featured artists: Dizzy Gillespie, Dee Dee Bridgewater, and others. Extensive tours of Europe and North America and appearances at major jazz festivals including: North Sea, Nice, Montreal, Newport (NY and Saratoga), Biarritz (1989-1991).

Burlington Discover Jazz Festival Big Band, Musical Director and Performer.

Duke Ellington Sacred Concert, with David Berger, Priscilla Baskerville, Paul Broadnax, and 100-voice Choir, 2003 Burlington Discover Jazz Festival, Flynn Center

The Grand Wazoo: Music of Frank Zappa, with Ernie Watts, Napoleon Murphy Brock, Ike Willis, and Ed Palermo 2004 Burlington Discover Jazz Festival, Flynn Center.

Sketches of Spain: Celebrating the Miles Davis/Gil Evans Collaboration with trumpeter Randy Brecker and guest conductor, Joe Muccioli 2005 Burlington Discover Jazz Festival, Flynn Center.

Music of Jim McNeely with special guest Jim McNeely, piano 2006 Burlington Discover Jazz Festival, Flynn Center.

Mary Lou Williams Resurgence with Cecilia Smith, vibraphone and Amina Claudine, piano, 2007 Burlington Discover Jazz Festival, Flynn Center.

Paquito D'Rivera Funk Tango. Produced, co-directed, and played saxophone in concert on Flynn MainStage with 17-piece orchestra with guests: Paquito D'Rivera, alto saxophone; Diego Urcola, trumpet; Alex Brown, piano; Massimo Biocalti, bass; Mark Walker, drums; and special guest Ray Vega, trumpet. Burlington Discover Jazz Festival (1 June 2008). Reviews in Free Press, AllAboutJazz, and other media.

James Harvey and Garuda – opening act for Randy Weston in Discover Jazz Festival (2004)

Jazzismo with Rick Davies – performances of Latin Jazz at SUNY Plattsburgh Jazz Festival (with Harvie S., 2002; with Chocolate Armenteros 2003); Flynn Mainstage (Discover Jazz Festival 2003); FlynnSpace with guest artist Ray Vega (July 2003, 2004, 2005, 2006, 2007, 2008); Red Square and other venues; Oaxaca, Mexico spring 2007.

Grupo Sabor (Salsa and Merengue) – Higher Ground, Burlington; Red Square; Eclipse Theater, Waitsfield; Onteora Club, New York; Burlington Latino Festival (2001-present).

The Bill Warfield Band, The Dorsey Brothers Orchestra, Dave Berger, Paquito D'Rivera, Clem DeRosa, Bobby Shew, David Liebman, Stan Rubin, Lew Anderson, Billy Mitchell, Roland Hanna, Lew Soloff, Randy Brecker and many more (1985-1999).

The Lehigh Valley Repertory Jazz Orchestra: Sketches of Spain featuring Randy Brecker, An Evening with David Liebman, A Tribute to Benny Goodman featuring Buddy DeFranco, and Celebrating Louis Armstrong featuring Jon Faddis (1997-2000).

Pop

Frankie Valli, Ray Charles (Sweden 1999), Mary Wells, Frankie Avalon (Atlantic City), The Drifters, Funk Filharmonik, Nick Apollo Forte, Little Wilson, Sandra Wright Band, Jimmy Branca and the Red Hot Instant Combo, Dave Grippo Funk Band, and others (1985-present).

SELECTED RECORDINGS

Rick Davies and Jazzismo, Siempre Salsa, feat. Wayne Gorbea. Emlyn Music. Tenor sax (2006).

Anne Hampton Callaway, To Ella with Love, feat. Wynton Marsalis, Christian McBride, Lewis Nash, Cyrus Chestnut. Touchwood Records - Tenor sax and clarinet (1998).

Dave Stryker, Nomad, feat. Randy Brecker and Steve Slagle. Steeplechase Records - Baritone sax and bass clarinet (1997).

The Bill Warfield Band, The City Never Sleeps. Seabreeze Records - Baritone sax and bass

clarinet (1996).

Frankie Lane: Wheels of a Dream. Touchwood Records - Tenor sax, flute and alto flute (1997).

Peter Herborn, Large, feat. Gene Jackson, Greg Osby, Robin Eubanks – Baritone sax and bass clarinet (1998).

Billy Stritch, Waters of March: The Brazilian Album - Tenor sax and flute (1998).

GRANTS AND AWARDS

Lattie F. Coor Award for International Travel to present paper and chair panel at the Society for Ethnomusicology conference (SEM) Mexico City. November 2009.

Joan Smith Faculty Research Support Award Performing Race: Afro-Mexicans, Multiculturalism, and the “Black Pacific.”

Lattie F. Coor Award for International Travel to present paper at the Latin American Studies Association (LASA) Congress in Rio de Janeiro, Brazil. June 2009.

Fulbright Research Fellowship to Mexico, Afro-Mexican music, 2006-7.

UVM Arts and Sciences Dean’s Fund for Faculty Development, Fall 2005.

UVM Humanities Center Research Grant, Spring 2004.

UVM Global Outreach Committee Grant, March 2003.

UVM Arts and Sciences Faculty Development Grant for study in Cuba, May 2002.

2001 Barry S. Brook Award for best dissertation in music CUNY.

CUNY Dissertation Year Fellowship 1998-1999.

BOARD MEMBERSHIPS

Friends of Indian Music and Dance (FIMD), Burlington VT

Burlington Discover Jazz Festival

University of Vermont Latin American Studies (LAS) Program

PROFESSIONAL SOCIETIES

Society for Ethnomusicology (SEM)

Society for American Music (Sonneck)

American Musicological Society (AMS)

Latin American Studies Association (LASA)

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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 2101 East Coast Highway, Suite 260, Corona del Mar, California 92625. On November 22, 2010, I served the within document(s) described as:

DECLARATION OF ALEXANDER STEWART IN SUPPORT OF PLAINTIFF'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

on the interested parties in this action as stated below:

Kara Cenar
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Los Angeles, CA 90017-2463

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(BY ELECTRONIC MAIL) I electronically mailed a true copy of the foregoing document to the email address as noted above; AND.


(BY OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in a sealed envelope or package designated by the express service carrier, addressed as set forth above, with fees for overnight delivery paid or provided for.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on November 22, 2010, at Corona del Mar, California.

Colin C. Holley

(Type or print name)



(Signature)