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15 Attorneys for Plaintiff  
 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  
 JAIME GOMEZ, all individually and  
 25 collectively as the music group The Black  
 Eyed Peas; DAVID GUETTA;  
 26 FREDERICK RIESTERER; UMG  
 RECORDINGS, INC.; INTERSCOPE  
 27 RECORDS; EMI APRIL MUSIC, INC.;  
 HEADPHONE JUNKIE PUBLISHING,  
 28 LLC; WILL.I.AM. MUSIC, LLC;

) Case No. SACV10-1656 JST (RZx)

) **DECLARATION OF**  
 ) **KEVIN BYRNES 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 KEVIN BYRNES**

8 I, Kevin Byrnes, 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 a forensic musicologist by training, and a member of the American  
12 Musicological Society. I studied music history at the University of Notre Dame, where I  
13 earned my BA in music history in 1976. I studied musicology at the University of Chicago  
14 in the late 1970's and early 1980's, earning an MA in musicology in 1988. I have a  
15 thorough knowledge of music theory and history, and have continued my studies since  
16 leaving the University of Chicago. In addition to my studies, I have played both piano  
17 and guitar since my early teens, and have performed in various groups and given lessons  
18 ranging from students in high school to graduate school. From 1978 through 1990 I was  
19 the music director for Calvert House, the Catholic Student Center at the University of  
20 Chicago. In that position I reviewed a substantial quantity of music, rehearsed singers and  
21 instrumentalists, arranged parts, wrote original music, and accompanied the musicians on  
22 guitar, piano, and organ. A copy of my CV is attached to this Declaration as Exhibit A.

23 2. I was retained by the Gould Law Group as a professional forensic  
24 musicologist to analyze and compare the similarities between the derivative version of  
25 Bryan Pringle's song, "Take a Dive," and the Black Eyed Peas' song, "I Gotta Feeling"  
26 (all references to "Take a Dive" contained herein refer specifically to the derivative  
27 version). In preparing my opinions that are communicated in this Declaration, I made a  
28

1 preliminary transcription of each song (lyrics and music) and listened to each song a  
2 number of times.

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

13         4. After analyzing each song closely, and given the applicable legal standard  
14 above, it is my professional opinion that “I Gotta Feeling” is substantially similar to “Take  
15 a Dive.” In particular, I find that “I Gotta Feeling” is substantially similar to “Take a  
16 Dive” in tempo, meter, key, song structure, orchestration, harmonic pattern, and in the  
17 characteristic guitar chord accompaniment, which is identical in the two songs in its  
18 voicing, rhythmic pattern, and attack pattern.

19         5. Given this substantial similarity between the two songs, and giving  
20 consideration to the factual sequence of events outlined in the Complaint filed in the case,  
21 it is also my professional opinion that the Black Eyed Peas could not have written “I Gotta  
22 Feeling” unless they had first listened to and copied substantial elements of “Take a  
23 Dive.”

24         6. 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) The tempo, meter, and key of “I Gotta Feeling” are substantially similar  
27                 (identical or virtually identical) to the tempo, meter, and key of “Take a  
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1 Dive” – The tempo of “Take A Dive” is approximately 130 quarter note  
2 beats per minute (MM =130). The meter is 4/4. The key is G Major. The  
3 tempo of “I Gotta Feeling” is approximately 128 quarter note beats per  
4 minute (MM =128). The meter is 4/4. The key is G major.

5 (b) The song structure of “I Gotta Feeling” is substantially similar (virtually  
6 identical) to the song structure of “Take a Dive” – Each song uses a  
7 repeating 8-measure module that repeats 16 (“Take A Dive”) or 17 (“I Gotta  
8 Feeling”) times from the beginning to each song’s conclusion. Each module  
9 has the same pattern of chord changes in the same key of G major, the same  
10 tempo, the same meter, and they share a characteristic guitar-chord pattern  
11 with identical voicing (discussed below). The only minor difference in this  
12 structure is that “Take a Dive” has a brief introduction before starting the 8-  
13 measure pattern. Each song elaborates the structure by gradually adding a  
14 stronger bass and drum presence, as well as higher pitched synthesized  
15 string sounds, as each song progresses. Each song ends by fading out. In  
16 both “Take a Dive” and “I Gotta Feeling,” the same 8-measure repeating  
17 pattern provides a constant harmonic and metrical template for the  
18 underlying dance beat.

19 (c) The harmonic pattern and– The 8-measure repeating pattern in “Take A  
20 Dive” and in “I Gotta Feeling” has this identical basic pattern of chord  
21 changes:

Measure	1	2	3	4	5	6	7	8
Harmony	G	G	C	C	Em	Em	C	C

23 (d) The guitar chord accompaniment in “I Gotta Feeling” is identical to the  
24 guitar chord accompaniment to “Take a Dive” – “Take a Dive” and “I Gotta  
25 Feeling” each have a highly characteristic guitar chord accompaniment  
26 which is identical in the two songs in its voicing, rhythmic pattern, and  
27 attack pattern. In each song, the top note of each chord follows this pattern  
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(please note that the superscripts refer to the pitch level, based on Middle C = c4):

Measure	1	2	3	4	5	6	7	8
Top note	d <sup>4</sup> d <sup>4</sup> d <sup>4</sup> d <sup>4</sup>	c <sup>4</sup> c <sup>4</sup> b <sup>3</sup> b <sup>3</sup>	c <sup>4</sup> c <sup>4</sup> c <sup>4</sup> c <sup>4</sup>	c <sup>4</sup> c <sup>4</sup> c <sup>4</sup> c <sup>4</sup>	b <sup>3</sup> b <sup>3</sup> b <sup>3</sup> b <sup>3</sup>	b <sup>3</sup> b <sup>3</sup> b <sup>3</sup> b <sup>3</sup>	c <sup>4</sup> c <sup>4</sup> c <sup>4</sup> c <sup>4</sup>	c <sup>4</sup> c <sup>4</sup> c <sup>4</sup> c <sup>4</sup>

(e) The orchestration in “I Gotta Feeling” is substantially similar to the orchestration in “Take a Dive” – For their respective instrumental portions, each song has essentially three layers, not all of which are active throughout the song. The lowest layer is the bass, which in each song includes a synthesized string bass and bass drum sound, with the bass drum playing on each quarter note beat, and the string sound appearing variously as a legato expression or a faster alternation of eighth notes up and down an octave. The middle layer includes synthesized drum sounds with back beats (beats two and four) covered mostly by a snare sound, with some admixture of cymbals (open, closed, and half-open), along with the guitar chord accompaniment described above. The high layer includes synthesized string sounds with delays and other synthesized artifacts.

(f) The hook in “I Gotta Feeling” is substantially similar (identical) to the hook in “Take a Dive” – For both “Take A Dive” and “I Gotta Feeling,” the most prominent “hook” element is the guitar chord accompaniment, which is the same in each song—the same chords, in the same key, at almost exactly the same speed, played the same way. This is the element that, if played alone, would allow a listener who was otherwise familiar with either song to say, upon hearing it, “That is ‘Take a Dive’/‘I Gotta Feeling’.” Of course, because it is identical to each song, a listener hearing only that guitar chord accompaniment would not know which song it was from.

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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: Kevin Byrnes  
Kevin Byrnes

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11/18/10 1:20 PM

Forensic Musicology Qualifications  
of  
KEVIN A. BYRNES

I am a musicologist by training, a member of the American Musicological Society. I have worked with many attorneys in the Chicago area over the years and can supply references if needed. A brief summary of my musical background follows.

Musical Education

I studied music history at the University of Notre Dame, where I earned my BA in music history in 1976. I studied musicology at the University of Chicago in the late 1970's and early 1980's, earning an MA in musicology in 1988.

At Notre Dame my studies included the appropriate levels of music history and theory along with practical courses such as orchestration. At the University of Chicago my studies concentrated on Renaissance musicology, but included studies (for which I prepared extensive research and analysis papers) on musical subjects from the middle ages through the 20th century. My teachers at Chicago included Howard Mayer Brown, Robert Marshall, Robert Morgan, Edward Lowinsky, Charles Rosen, Rose Subotnik, Phillip Gossett, Easley Blackwood, and James H. Moore, among others.

I have a thorough knowledge of music theory and history, and have continued my studies since leaving the University of Chicago.

Musical Experience

I began playing the guitar at age 10 and the piano at age 12. My early guitar experience focused on folk and pop music of the 1960s; I began studying classical guitar in 1968 at the age of 13. At Notre Dame I studied guitar and piano, for which I prepared juried examination pieces each year. I also sang in the chapel choir and performed musically in various productions of the Notre Dame / St. Mary's Theater Department, the Notre Dame Orchestra, and the Notre Dame Jazz Band.

At the University of Chicago I performed with the Collegium Musicum (directed by Howard Brown) and with the Contemporary Chamber Players (directed by Ralph Shapey), as a singer, player of plucked instruments (electric/acoustic guitar, lute, mandolin), and director of concert programs. During those years I also performed with the Oriana Singers (directed by Bill Chin), the Newberry Consort (directed by Mary Springfels), and the Outcast Jazz Band (a big band directed by Gilbert Robinson) as a singer, a player of plucked instruments (guitar, lute, theorbo, and chitarrone), and as a keyboardist.

In Hyde Park I gave solo guitar recitals and taught guitar to students from high school through graduate school. For some local musicians who could not read or write notes, I transcribed song tapes to lead sheets (lead melody and chord changes).

From 1978 through 1990 I was the music director for Calvert House, the Catholic Student Center at the University of Chicago. In that position I reviewed a substantial quantity of music, rehearsed singers and instrumentalists, arranged parts, wrote original music, and accompanied the musicians on guitar, piano, and organ. Besides weekly campus masses, we performed for several masses at Rockefeller Chapel celebrated by Joseph Cardinal Bernardin, who was then the Archbishop of Chicago.

In the years since my time as a graduate student and then as music director at Calvert House, my musical activities have included performing with the Outcast Jazz Band, accompanying singers at auditions, and copyediting musical literature. Most recently I was involved with a book of essays in honor of the pianist Charles Rosen, *Variations on the Canon*, published in 2008 by the University of Rochester Press. I indexed the entire volume, copyedited several of the essays, and prepared all of the translations of the French passages in the essay by Charles Rosen.

In addition to this professional work, I have maintained an active acquaintance with all kinds of music—all of the varied American styles of pop music, contemporary classical music, and world music—as well as a wide-based consumption of secondary sources of music criticism, from the *AMS Journal* and the *Journal of Music Theory* to the *New York Times*, *Crawdaddy*, *Rolling Stone*, *Spin*, *Decibel*, *Opera News*, and *NPR Music*, among others.



## Summary

I have a combined background that few musicologists share:

- A thorough grounding in musical theory, history, and analysis;
- broad familiarity and professional musical performance experience in folk, pop, jazz, and classical styles;
- knowledge of many instruments, either as a performer or as a composer/arranger;
- years of work as an expert witness;
- familiarity with the evidentiary requirements of litigation;
- the ability to work easily with attorneys; and
- the temperament to comfortably sustain depositions and cross-examinations.

I can offer litigants, or potential litigants, in musical matters: a thorough, informed analysis of the music at issue; close communication with the client and the client's legal counsel; and concise, persuasive reporting of my conclusions, providing the client with a well-grounded basis for deciding how to pursue action—and when justified, with solid evidence needed to support their position at trial.

### Contact information

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1 **PROOF OF SERVICE**

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

6 **DECLARATION OF KEVIN BYRNES IN SUPPORT OF PLAINTIFF'S EX PARTE**  
7 **APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW**  
8 **CAUSE RE PRELIMINARY INJUNCTION**

9 on the interested parties in this action as stated below:

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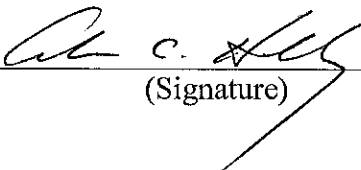
19  (BY ELECTRONIC MAIL) I electronically mailed a true copy of the foregoing document  
20 to the email address as noted above; AND.

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

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

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

Colin C. Holley  
(Type or print name)

  
(Signature)