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 10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12 SOUTHERN DIVISION

13 BRYAN PRINGLE, an individual,
 14 Plaintiff,
 15 v.
 16 WILLIAM ADAMS, JR.; STACY
 17 FERGUSON; ALLAN PINEDA; and
 18 JAIME GOMEZ, all individually and
 collectively as the music group The
 Black Eyed Peas, et al.,
 19 Defendants.

Case No. SACV 10-1656 JST(RZx)
 Hon. Josephine Staton Tucker
 Courtroom 10A

**STATEMENT OF
 UNCONTROVERTED FACTS AND
 CONCLUSIONS OF LAW IN
 SUPPORT OF MOTION FOR
 SUMMARY JUDGMENT BY
 DEFENDANTS SHAPIRO,
 BERNSTEIN & CO, INC.,
 FREDERIC RIESTERER AND
 DAVID GUETTA**

Complaint Filed: October 28, 2010
 Trial Date: February 28, 2012
 Hearing Date: December 19, 2011
 10:00 AM

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Central District of California Local Rule 56-1, and the Court’s Initial Standing Order at 11(c)(i), Defendants Shapiro, Bernstein & Co, Inc. (“Shapiro Bernstein”), Frederic Riesterer and David Guetta (collectively, “Defendants”) respectfully submit this Statement of Uncontroverted Facts and Conclusions of Law in Support of their Motion for Summary Judgment.

I. Pringle Cannot Establish Infringement of “Take a Dive” (Dance Version)

A. Pringle Cannot Show That He Owns a Valid Copyright In “Take a Dive” (Dance Version)

1. Pringle Cannot Prove That The Guitar Twang Sequence Was His Original Work of Authorship

(a) There is No Evidence that the Guitar Twang Sequence Was Pringle’s Original Work of Authorship

Authority: *Benay v. Warner Bros Entertainment, Inc.*, 607 F.3d 620 (9th Cir. 2010) (citation omitted); *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003); 17 U.S.C. § 410(c).

	UNCONTROVERTED MATERIAL FACT	SUPPORTING EVIDENCE
Background Facts and Pringle’s Allegations		
1.	Bryan Pringle is a real-estate developer from San Antonio, Texas.	Compl. (Doc. 1) at ¶ 9.
2.	In October 2010, seventeen months after “I Gotta Feeling” was released, Pringle filed suit against each of The Black Eyed Peas, Guetta, Riesterer and eleven (11) record labels and music publishing companies, claiming that “I Gotta Feeling” infringed the musical composition copyright in “Take a Dive” and the composition and sound recording copyright in “Take a Dive (Dance Version).	Compl. (Doc. 1)

1	3.	Pringle alleges that he created “Take a Dive” in 1998, and created “Take a Dive” (Dance Version) in 1999 by removing the vocals from “Take a Dive” and adding a repeating “guitar twang sequence.”	Dickstein Decl., Ex. A (First Amended Complaint (“FAC”) ¶¶ 29, 40-41)
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4	4.	Pringle alleges that “Take a Dive” is substantially similar to “I Gotta Feeling” and that the recorded guitar twang sequence in “I Gotta Feeling” was “directly sampled” from “Take a Dive” (Dance Version).	Dickstein Decl., Ex. A (FAC ¶¶ 29, 40-41)
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8	5.	Pringle states that the guitar twang sequence consists of four notes (D4, C4, B3 and G3), and also presents a transcription of the sequence that contains only three notes (D4, C4 and B3) and is in the key of G3.	Dickstein Decl., Ex. A (FAC ¶ 29)
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11	6.	Pringle asserts that, aside from removing the vocals and adding the guitar twang sequence, “Take a Dive” and “Take a Dive” (Dance Version) are exactly the same.	Pringle’s Memo of Law for PI Motion (Doc. 73-1) at 4 n.3
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14	Pringle’s Alleged Creation of “Take a Dive” (Dance Version)		
15	7.	Pringle does not recall how, specifically, he created “Take a Dive” (Dance Version).	Dickstein Decl., Ex. E (Pringle Dep. Tr. at 219:14-24)
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17	8.	Pringle is unable to explain how he allegedly created “Take a Dive” (Dance Version) and the guitar twang sequence, including: (i) the month, season or even the year in which he allegedly created the song (ii) how he recorded the guitar twang sound or the chords that comprise the guitar twang sequence, or (iii) how he allegedly added the guitar twang sequence into the original version of “Take a Dive.”	Dickstein Decl., Ex. E (Pringle Dep. Tr. at 100:24-101:8, 204:17-206:20; 239:10-240:8, 242:3-17; 216:20-217:21, 244:6-245:6, 249:15-250:12)
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23	9.	Pringle identifies no one who can corroborate his story about how he allegedly created “Take a Dive” (Dance Version).	Dickstein Decl., Ex. E (Pringle Dep. Tr. 201:4-202:18)
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25	10.	Pringle testified that the guitar twang sequence was “just a sample” of a Fender Stratocaster guitar sound that Pringle obtained from a music sample disc named “Best Service.”	Dickstein Decl., Ex. E (Pringle Dep. Tr. 230:7-231:2)
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1	11.	Pringle has never played a Stratocaster guitar.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 235:20-236:20)
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3	12.	Pringle testified that the guitar twang sequence was “possibly from [a music sample disk named] Best Service or it’s from the other sample artists.”	Dickstein Decl., Ex. E (Pringle Dep. Tr. 235:20-236:20)
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6	13.	The details Pringle has provided indicate that the guitar twang sequence was not his original work, but something he copied from another source.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 230:7-231:2, 235:20-236:20)
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Guetta and Riesterer’s Independent Creation of “I Gotta Feeling”			
9	14.	In 2008, William Adams, a member of The Black Eyed Peas, asked David Guetta to create the music for a song for The Black Eyed Peas’ new album.	Dickstein Decl., Ex. B (Adams Dep. Tr. 236:17-239:20, 258:6-18)
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12	15.	To create the music, Guetta collaborated with Frederic Riesterer.	Riesterer Decl. at ¶¶ 4-7; Dickstein Decl., Ex. C (Riesterer Dep. Tr. 165:19-166:21, 179:10-181:8)
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15	16.	Riesterer created a sequence of guitar sounds using an electronic guitar sound (or “pre-set”) he selected from “PlugSound: Fretted Instruments,” a French sound library.	Riesterer Decl. at ¶¶ 4-7; Dickstein Decl., Ex. C (Riesterer Dep. Tr. 165:19-166:21, 179:10-181:8)
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18	17.	Riesterer then used sound processing software to modify the PlugSound guitar pre-set. The result was a “twangy” sound that was different from both the PlugSound guitar pre-set and the sound that he used in the song “Love is Gone.”	Riesterer Decl. at ¶¶ 4-7; Dickstein Decl., Ex. C (Riesterer Dep. Tr. 165:19-166:21, 179:10-181:8)
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21	18.	Using this “twangy” sound, Riesterer composed a progression of guitar chords for use in the new song for the Black Eyed Peas.	Riesterer Decl. at ¶¶ 4-7; Dickstein Decl., Ex. C (Riesterer Dep. Tr. 165:19-166:21, 179:10-181:8)
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24	19.	The result of Riesterer’s modification of the PlugSound pre-set and his chord progression composition was an original guitar “twang” sequence.	Riesterer Decl. at ¶¶ 4-7; Dickstein Decl., Ex. C (Riesterer Dep. Tr. 165:19-166:21, 179:10-181:8)
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26	20.	On December 20, 2008, Guetta sent Adams the music that he and Riesterer created, which they tentatively named “David Pop Guitar.”	Dickstein Decl., Ex. B (Adams Dep. Tr. 75:22-78:23, 304:9-305:6)
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1	21.	Adams wrote lyrics to accompany “David Pop Guitar” but did not change any of the music.	Dickstein Decl., Ex. B (Adams Dep. Tr. at 35:3-38:23, 38:25-39:3, 74:21-75:2, 217:7-10, 258:22-259:13)
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4	22.	The combination of Guetta and Riesterer’s music with Adams’ lyrics became the song “I Gotta Feeling,” which The Black Eyed Peas released in 2009.	Dickstein Decl., Ex. B (Adams Dep. Tr. at 35:3-38:23, 38:25-39:3, 74:16-75:2, 217:7-10, 258:22-259:13)
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8	“Remix” Contest for “I Gotta Feeling”		
9	23.	In August and September 2009, The Black Eyed Peas and Guetta held a contest to see which DJ could create the best re-mix of “I Gotta Feeling.”	Warner Decl. ¶ 3 and Audio Exhibits thereto
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11	24.	Each of the separate instrumental tracks (known as music “stems”) of “I Gotta Feeling,” were made available for download on Beatport.com.	Warner Decl. ¶ 3 and Audio Exhibits thereto
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13	25.	The music stems made available on Beatport.com included the guitar twang sequence that Riesterer and Guetta had created, as well as The Black Eyed Peas’ lead and background vocal tracks for “I Gotta Feeling.”	Dickstein Decl., Ex. D; Warner Decl. ¶ 3 and Audio Exhibits thereto
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17	26.	During the DJ contest, over 1,200 re-mixes of “I Gotta Feeling” were submitted and circulated on the Internet.	Warner Decl. ¶¶ 3-4
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19	27.	Many of these re-mixes contained the guitar twang sequence “soloed out” – <i>i.e.</i> , without any other sounds layered on top.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 185:3-16)
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21	28.	These re-mix versions of “I Gotta Feeling” with the guitar twang sequence soloed out continue to be available on various Internet websites.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 185:3-16)
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(b) Expert Analysis Confirms that Defendants Independently Created the Guitar Twang Sequence and That Pringle Sampled That Sequence From Another Source

Authority: *Art Attacks Ink, LLC v. MGA Entm't, Inc.*, 581 F.3d 1138 (9th Cir. 2009); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129 (C.D. Cal. 2001).

	UNCONTROVERTED MATERIAL FACT	SUPPORTING EVIDENCE
29.	Riesterer's and Guetta's creation files of the music for "I Gotta Feeling" confirm their independent creation of both the sounds and underlying musical composition embodied in this work.	Geluso Decl. ¶¶ 15-21, 25-28
30.	It would have been physically impossible for the Defendants to have copied from Pringle.	Geluso Decl. ¶¶ 22-24
31.	The notes within each chord of Pringle's guitar twang sequence in his NRG disk are "fused" together, indicating that he sampled them from some other source.	Geluso Decl. ¶¶ 24-28; Geluso Decl. on PI (Doc. 81-1)
32.	The notes within each chord of the guitar twang sequence in Riesterer's creation files are separate, indicating that he composed those chords on a keyboard, rather than copying them from some other source.	Geluso Decl. ¶¶ 15-21
33.	Riesterer's creation files contain the unprocessed version of the guitar twang sequence, whereas Pringle's NRG disc contains only a final, pre-processed version of the guitar twang sequence.	Geluso Decl. ¶¶ 15-21, 25-28
34.	It would have been technologically impossible for Defendants to have sampled from the mixed version of Pringle's song that he claims to have distributed.	Geluso Decl. ¶¶ 22-24; Geluso Decl. on PI (Doc. 81-1)

2. The Guitar Twang Sequence is Not Copyrightable as a Musical Composition

Authority: *Newton v. Diamond*, 204 F. Supp. 2d 1244 (C.D. Cal. 2002) (quoting *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988)); *McDonald v. Multimedia Entertainment, Inc.*, 1991 WL 311921 (S.D.N.Y. July 19, 1991); *Batjac Productions Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223 (9th Cir. 1998); *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276 (3d Cir. 2004)

1		UNCONTROVERTED MATERIAL FACT	SUPPORTING EVIDENCE
2	35.	Pringle’s November 15, 2010 copyright registration application for “Take a Dive” (Dance Version) sought registration for both the sound recording and the musical composition embodied in the guitar twang sequence (the only new material allegedly added to “Take a Dive” (Dance Version)).	Dickstein Decl., Ex. H at 7
3	36.	The United States Copyright Office denied Pringle’s application to register a copyright in the musical composition of the guitar twang sequence “[b]ecause this work does not contain enough original musical authorship to be copyrightable.”	Dickstein Decl., Ex. H at 33-36
4	37.	Pringle’s copyright registration for “Take a Dive” (Dance Version) is limited to the sound recording of the guitar twang sequence, and does not include the underlying musical composition.	Dickstein Decl., Ex. H at 37-38
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13 **B. Pringle Cannot Show That Any Defendant Copied “Take a Dive”**
14 **(Dance Version)**

15 **1. There is No Evidence the Creators of “I Gotta Feeling” Had**
16 **Access to “Take a Dive” (Dance Version)**

17 **Authority:** *Art Attacks Ink, LLC v. MGA Entertainment Inc.*, 581 F.3d 1138
18 (9th Cir. 2009); *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129 (C.D. Cal.
19 2001).

20		UNCONTROVERTED MATERIAL FACT	SUPPORTING EVIDENCE
21	38.	Pringle claims that he “regularly” distributed his songs to virtually every entity in the music business, including Defendants UMG Recordings, Inc., Interscope Records (together the “UMG Defendants”) and EMI April Music, Inc. (“EMI”), and that he would send people in the music business multiple copies of his demos.	Dickstein Decl., Ex. E (Pringle Tr. 66:11-16), Ex. A (FAC ¶¶ 31, 32)
22	39.	Pringle alleged that he received “numerous letters in response to his music submissions,” including responses from “multiple A&R representatives at Interscope, UMG and EMI.”	Dickstein Decl., Ex. A (FAC ¶ 33)
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1	40.	There is no evidence that Pringle sent “Take a Dive” (Dance Version) to any of the Defendants prior to the release of “I Gotta Feeling.”	Dickstein Decl., Ex. E (Pringle Dep. Tr. 17:1-19:7, 124:2-20)
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3	41.	There is no evidence that Pringle sent “Take a Dive” (Dance Version) to anyone prior to the release of “I Gotta Feeling.”	Dickstein Decl., Ex. E (Pringle Dep. Tr. 17:1-19:7, 124:2-20)
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5	42.	Pringle admits that he has never had any direct contact with Guetta or Riesterer.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 17:1-19:7, 124:2-20)
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7	43.	Both Pringle’s October 28, 2010 Complaint and his November 18, 2010 First Amended Complaint alleged that Guetta and Riesterer were residents of Los Angeles, California.	Complaint ¶¶ 14-15; Dickstein Decl., Ex. A (FAC ¶ 14-15)
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10	44.	After Riesterer submitted a declaration on November 23, 2010 (Doc. 22-3) setting forth the circumstances of his and Guetta’s creation of the music for “I Gotta Feeling” in France, Pringle asserted that he had distributed his music in France.	Pringle Decl. for PI (Doc. 73-4) at ¶¶ 7-8
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13	45.	Although Pringle claims that he sent a demo CD to Adams c/o of Interscope, Pringle does not have a copy of the demo CD or any letter to Adams.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 69:5-71:6, 72:20-73:13)
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15	46.	William Adams does not accept submissions of unsolicited music.	Dickstein Decl., Ex. B (Adams Dep. Tr. 213:15-17)
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17	47.	Pringle did not mention Joachim Garraud in his Complaint, First Amended Complaint, application for Temporary Restraining Order, or Motion for Preliminary Injunction.	Complaint (Doc 1); Dickstein Decl., Ex. A (FAC); Pl.’s Mot. For TRO (Doc. 15); Pl.’s Mot. for PI (Doc. 73), Dickstein Decl., Ex. C (Riesterer Dep. Tr. 74:13-75:3)
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23	48.	Pringle testified that sometime between 2001 and 2004 Guetta’s former co-producer, Joachim Garraud, wrote to Pringle asking Pringle for specific songs, and that Pringle later sent “Take a Dive” (Dance Version) to Garraud in France.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 90:5-23)
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26	49.	Pringle does not have a copy of either the alleged letter from Garraud or of the alleged letter and demo that Pringle allegedly sent to Garraud.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 90:5-23)
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1	50.	Pringle does not recall (i) what the alleged letter from Garraud said, (ii) whether it included a specific request for music, (iii) who signed the letter, (iv) whether the letter was typed or handwritten, or (v) what language the letter was written in.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 90:5-23, 93:9-94:9, 113:1-11)
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4	51.	Pringle has no evidence of the alleged written correspondence with Garraud.	Dickstein Decl., Ex. E (Pringle Dep. Tr. at 90:5-23, 93:9-94:9, 113:1-11)
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7	52.	Pringle has never met Joachim Garraud.	Dickstein Decl., Ex. E (Pringle Dep. Tr. at 128:3-22.)
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9	53.	Garraud never had access to Pringle's songs; never received music from Pringle; never heard of either "Take a Dive" or "Take a Dive" (Dance Version); and never gave any of Pringle's music to Guetta or Riesterer.	Garraud Decl. at ¶¶ 2-3; Riesterer Decl. at ¶ 3-4, 8-9; Guetta Decl. at ¶¶ 2-7; Carre Decl. ¶¶ 5-8
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12	54.	Pringle claims to have sent "thousands of demo CDs for over a decade" to various persons and entities in the music industry, but has no copies of any of these demo CDs or of any cover letters that he claims to have sent with those demo CDs.	Dickstein Decl., Ex. E (Pringle Dep. Tr. at 76:3-6, 375:22-377:22)
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15	55.	Pringle has no evidence that "Take a Dive" or "Take a Dive" (Dance Version) was ever received by anyone after the release of "I Gotta Feeling."	Dickstein Decl., Ex. E (Pringle Dep. Tr. at 76:3-6)
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18	56.	Pringle testified that he would routinely send out CDs that did not contain all of the songs listed on the liner notes, and that he would send out CDs that contained no songs at all.	Dickstein Decl., Ex. E (Pringle Dep. Tr. at 349:23-353:7)
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21	57.	Pringle subpoenaed documents from TAXI Music, the music promotion company Pringle worked with, and TAXI produced documents that make no mention whatsoever of "Take a Dive" or "Take a Dive" (Dance Version).	Dickstein Decl., Ex. G
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2. There is No Evidence That "Take a Dive" (Dance Version) Received Widespread Distribution

Authority: *Mestre v. Vivendi Universal U.S. Holding Co.*, No. CV 04-442, 2005 WL 1959295, at *4 (D. Or. Aug. 15, 2005); *Art Attacks Ink, LLC v. MGA Entertainment Inc.*, 581 F.3d 1138, 1144 (9th Cir. 2009).

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	UNCONTROVERTED MATERIAL FACT	SUPPORTING EVIDENCE
58.	There is no evidence supporting Pringle’s claims that his music was played on radio stations in the U.S. or in France.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 291:1-292:1).
59.	Pringle claims that “Take a Dive” (Dance Version) was played on Armed Forces Radio in France.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 291:1-18)
60.	The last time an Armed Forces Radio station operated in France was 1967.	http://www.afneurope.net/AboutUs/tabid/85/Default.aspx (last visited November 9, 2011)
61.	There is no evidence that “Take a Dive” was ever publicly performed in the United States, France or in any European territory in which SACEM operates.	Fouet Decl.; Roth Decl.
62.	Pringle claims that “Take a Dive” and/or “Take a Dive” (Dance Version) was released on an album by a now-defunct record company, but Pringle does not know how many copies of that album were allegedly sold, and has no evidence that might corroborate his assertion that either version of “Take a Dive” was actually released to the public.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 130:3-131:10, 140:7-18)
63.	Pringle claims that “Take a Dive” (Dance Version) was sold on various Internet websites, but does not recall which websites or how many copies they sold, nor does he have any records reflecting any of those alleged sales.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 132:21-133:24)
64.	There is no evidence that any of the Defendants ever purchased or listened to Pringle’s song on CD or the Internet.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 142:23-143:16)
65.	Pringle testified to having earned only “[b]eer money” from the sale of his music.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 338:21-339:4)

3. Pringle Cannot Prove that Any Defendant Sampled from the “Take a Dive” (Dance Version) Sound Recording

1 **Authority:** *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Art*
 2 *Attacks Ink, LLC v. MGA Entm't, Inc.*, 581 F.3d 1138 (9th Cir. 2009); 17
 3 U.S.C. § 114(b).

	UNCONTROVERTED MATERIAL FACT	SUPPORTING EVIDENCE
4 5 6	66. Pringle has no evidence supporting his alleged creation of “Take a Dive” (Dance Version) or the guitar twang sequence.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 151:5-152:4, 155:9-156:2)
7 8 9	67. Pringle claims that the music equipment he used to create “Take a Dive” (Dance Version), including an ASR10 sampling keyboard, and his computer hard drives, were stolen in late 2000.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 151:5-152:4, 155:9-156:2)
10 11 12	68. Pringle offers an “NRG” disc image file, which contains a series of separate sound files for each of the individual instruments that appear in “Take a Dive” (Dance Version).	Geluso Decl. ¶¶ 25-28
13	69. Pringle’s NRG file is not a mixed sound recording of “Take a Dive” (Dance Version).	Geluso Decl. ¶ 27
14	70. Pringle’s NRG file cannot be played on a CD player or a computer.	Geluso Decl. ¶¶ 27
15 16 17 18	71. Pringle’s NRG file does not qualify as a “best copy” to be deposited in the Copyright Office.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 254:21-256:18, 262:10-14, 267:14-268:9); Geluso Decl. ¶¶ 25-28
19 20	72. Pringle’s NRG file is not a sound recording of “Take a Dive (Dance Version)” or of the eight-bar guitar twang sequence.	Geluso Decl. ¶¶ 25-28
21 22	73. Pringle’s NRG file contains separate files of each of the three individual chords that make up the guitar twang sequence.	Geluso Decl. ¶ 25
23 24 25 26	74. The only way to re-create the complete “Take a Dive” (Dance Version) sound recording from Pringle’s NRG file is to manually load each instrument file into an ASR10 sampling keyboard, and instruct the ASR10 to play the individual tracks together in a particular rhythmic way.	Geluso Decl. ¶¶ 25-28; Dickstein Decl., Ex. I (Pl.’s Resp. to Pineda’s RFA No. 40.)

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1	75.	In order to re-create the complete “Take a Dive” (Dance Version) sound recording from the NRG file, it is necessary to manipulate the various instrument files to create a completed musical work.	Geluso Decl. ¶¶ 25-28
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4	76.	There is no evidence that Pringle created “Take a Dive” (Dance Version) and the guitar twang sequence prior to release of “I Gotta Feeling.”	Laykin Decl. ¶¶ 21-36
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6	77.	The creation and last modified dates on an NRG file (including the NRG file referenced above) can be backdated by simply changing the clock on the computer and then re-saving the file and burning it to a CD.	Laykin Decl. ¶¶ 21-29
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9	78.	Evidence either supporting or refuting Pringle’s contentions regarding “Take a Dive” and “Take a Dive” (Dance Version) would likely have been found on the computer that Pringle used to create the NRG file.	Laykin Decl. ¶¶ 30-33
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13	79.	During this litigation, Pringle disposed of the computer hard drives that he used from 2009 to 2011.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 31:6-33:24, 34:2-37:23, 151:5-152:4, 155:9-156:2, 190:6-191:23, 340:20-342:20)
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17	80.	Pringle has identified two separate NRG files as containing “Take a Dive” (Dance Version). In his November 2010 TRO application, Pringle swore that he saved the NRG file from his ASR10 sampling keyboard to his computer on June 14, 1999 and that he then burned it to a CD in May 2001.	Pringle Decl. for TRO (Doc. 15-8) at ¶ 5); Gallant Decl. for TRO (Doc. 15-5) at ¶¶ 5-6
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21	81.	In his TRO declaration, Pringle quoted that CD’s serial number and submitted a purported expert report attesting to creation and modification dates of that file.	Pringle Decl. for TRO (Doc. 15-8) at ¶ 5); Gallant Decl. for TRO (Doc. 15-5) at ¶¶ 5-6
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24	82.	In his January 2011 preliminary injunction application, Pringle stated that the NRG file which he had cited in connection with his TRO application and given to his expert was the wrong file and did not contain the song at issue.	Pl.’s Mem. of Law for PI (Doc. 73-1) at 18 n.4
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1	83.	In a conference of counsel on November 1, 2011, Pringle’s counsel clearly, expressly, and unequivocally stated that Pringle would withdraw his claim of infringement of his sound recording copyright.	Dickstein Decl. ¶¶ 16-17.
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4	84.	When Defendants’ counsel proposed a stipulation dismissing Pringle’s sound recording claim, Pringle’s counsel refused to sign the stipulation.	Dickstein Decl., Exs. O, P
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6	85.	In an interrogatory response dated November 7, 2011, Pringle stated that he “is not seeking to recover for a physical appropriation of Take a Dive (Dance Version) at this time [but] Plaintiff reserves the right to seek recovery for physical appropriation of Take a Dive should Defendants produce evidence of said appropriation; investigation continues.”	Dickstein Decl., Ex. Q (Pl.’s Am. Resps. to Ferguson’s Interrogatory No. 18).
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11	II. Pringle’s Claim that Defendants Infringed “Take a Dive” (Dance Version) is Barred by His Failure to Submit a <i>Bona Fide</i> Deposit Copy		
12	Authority: <i>Kodadek v. MTV Networks, Inc.</i> , 152 F.3d 1209 (9th Cir. 1998); 17 U.S.C. §§ 408(b)(1),(2), 411(a).		
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15		UNCONTROVERTED MATERIAL FACT	SUPPORTING EVIDENCE
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17	86.	Pringle submitted to the Copyright Office an MP3 sound file as a deposit copy with his November 2010 copyright registration application.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 262:10-14, 267:14-268:9); Ex. I (Pl.’s Resps to Pineda’s RFAs No. 40, 41, 44)
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21	87.	The MP3 sound file that Plaintiff submitted to the Copyright Office did not exist in 1999, but was re-created using the various instrument sounds contained in Pringle’s NRG file.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 262:10-14, 267:14-268:9); Ex. I (Pl.’s Resps to Pineda’s RFAs No. 40, 41, 44)
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1	88.	Pringle testified that the MP3 file that he submitted to the Copyright Office was either created from his NRG file or copied from his original hard drive.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 262:10-14, 267:14-268:9); Ex. I (Pl.’s Resps to Pineda’s RFAs No. 40, 41, 44)
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5	89.	Pringle later acknowledged that he did not have the original hard drive in his possession when he created the MP3 file, so it could only have come from his NRG file.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 262:10-14, 267:14-268:9); Ex. I (Pl.’s Resps to Pineda’s RFAs No. 40, 41, 44)
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9	90.	Pringle created the MP3 file by “manually” “load[ing] each individual instrument in the proper place, load[ing] up the sequence . . . [and l]oad[ing] the effect that’s corresponding to that[.]”	Dickstein Decl., Ex. E (Pringle Dep. Tr. 254:21-255:13); Ex. I (Pl.’s Resps to Pineda’s RFAs No. 40)
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13	91.	Re-creating “Take a Dive” (Dance Version) from Pringle’s NRG disk involved a process of “trial and error” and “switch[ing] things around until it finally played properly” based on Pringle’s recollection of “what the song sounded like” when he allegedly created it in 1999.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 254:21-256:18)
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18 **III. Pringle Cannot Establish Infringement of “Take a Dive”**

19 **A. There is No Evidence That Any Defendant Had Access to “Take a Dive”**

20 Section I.B is incorporated by reference herein.

21 **B. “Take a Dive” and “I Gotta Feeling” are Not Substantially Similar**

22 **Authority:** *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1044 (9th Cir. 1994).

23		UNCONTROVERTED MATERIAL FACT	SUPPORTING EVIDENCE
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25	92.	Dr. Lawrence Ferrara has analyzed the musical composition embodied in the original version of “Take a Dive” and “I Gotta Feeling,” and has determined that there are absolutely no similarities that would suggest copying.	Ferrara Decl. ¶¶ 4, 91-97
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1	93.	There are significant differences between “I Gotta Feeling” and “Take a Dive” in every element of the respective compositions – structure, harmony, rhythm, melody, and lyrics.	Ferrara Decl. ¶¶ 4, 91-97
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4	94.	There are numerous major structural differences between “I Gotta Feeling” and “Take a Dive.”	Ferrara Decl. ¶¶ 9-11
5	95.	The basic chord progressions in “I Gotta Feeling” and “Take a Dive” are not substantially similar.	Ferrara Decl. ¶¶ 14, 15
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7	96.	There are no similarities at all in melody or lyrics of “I Gotta Feeling” and “Take a Dive.”	Ferrara Decl. ¶¶ 62-64
8	97.	“I Gotta Feeling” and “Take a Dive” have different “overall rhythmic feel and flow.”	Ferrara Decl. ¶ 60
9	98.	The similarities that do exist between “I Gotta Feeling” and “Take a Dive”—such as the fact that both songs happen to utilize 4/4 time, a “dance” tempo, a chorus with 8 bars, and a “I-IV” chord progression—are “musical building blocks and commonplace expression and practices.”	Ferrara Decl. ¶ 65

14 **IV. Defendants are Entitled to Judgment Based on Plaintiff’s Spoliation of Evidence**
 15 **Authority:** *Vieste, LLC v. Hill Redwood Development*, 2011 WL 2198257 (N.D. Cal. June 6, 2011); *Leon v. IDX Systems Corp.*, 464 F.3d 951 (9th Cir. 2006) (citing *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337 (9th Cir. 1995)).

19		UNCONTROVERTED MATERIAL FACT	SUPPORTING EVIDENCE
20	99.	As early as July 24, 2010, The Black Eyed Peas’ counsel wrote to Pringle’s counsel “question[ing] ... the authenticity of Mr. Pringle’s representations regarding the dates of his computer files” and demanding that all of Pringle’s electronically stored information be preserved.	Dickstein Decl., Ex. J
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24	100.	By email dated July 29, 2010, counsel for Pringle agreed to preserve Pringle’s computer equipment and electronically stored information.	Dickstein Decl., Ex. K
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1	101.	Pringle’s computer hard drives used in 2009 and 2010 likely contained evidence of Pringle’s copying of the guitar twang sequence from “I Gotta Feeling” and manipulation of the dates of his NRG file.	Dickstein Decl., Ex. J; Laykin Decl. ¶¶ 30-36; Geluso Decl. at ¶ 15 n.8
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4	102.	The Black Eyed Peas’ counsel further advised that Pringle’s computer equipment would be “something we will necessarily request in discovery should this case ever reach a filed action.”	Dickstein Decl., Ex. J
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7	103.	In the February 18, 2011 Joint Rule 26 Report, Defendants advised that “Mr. Pringle’s ESI will likely play a crucial role in discovery in this action, as it goes directly to the threshold issues of Plaintiff’s ownership of a valid copyright, including the dates and manner of Plaintiff’s alleged creation of ‘Take a Dive’ and ‘Take a Dive’ Derivative, and the validity of Plaintiff’s asserted copyright registrations of those works.”	Joint Rule 26 Report (Doc. 110) at 7:21-25
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13	104.	After Pringle filed suit, Defendants requested, and Pringle agreed to, a forensic inspection of all of Pringle’s computer hardware and music equipment from 2009 to the present.	Dickstein Decl., Exs. L, M, N
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16	105.	Shortly before a scheduled inspection of Pringle’s computer equipment, Pringle’s counsel informed Defendants that just a few weeks earlier Pringle had returned the computer hard drive that he had been using since January 2011 to its manufacturer, and that he had previously disposed of the hard drive that he used in 2009 and 2010.	Dickstein Decl., Ex. F
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21	106.	Pringle claimed to be following a practice of “replac[ing] his hard drive every 6 to 12 months” and “discard[ing] the prior drive” – even after he retained litigation counsel in February 2010 and filed suit in October 2010.	Dickstein Decl., Exs. F, E (Pringle Dep. Tr. 30:16-38:13)
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24	107.	The computer hard drive that Pringle had used in 2009 and 2010 is “probably in a landfill” because Pringle discarded it in December 2010 or January 2011.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 34:2-37:23, 340:20-342:20)
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1	108.	Pringle acknowledged that he “did not make a full and complete copy of the entire drive from 2010” including any “program-related files or Internet-related files[.]”	Dickstein Decl., Ex. E (Pringle Dep. Tr. 49:1-51:4, 286:3-15)
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4	109.	These and other system files from Pringle’s hard drives would contain evidence of the true date of the NRG file.	Laykin Decl. ¶¶ 30-36; Geluso Decl. at ¶ 15 n.8
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6	110.	Pringle testified that in July or August 2011, he returned to the manufacturer the computer hard drive that he had been using since January 2011.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 31:4-33:24)
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8	111.	Pringle testified that the “I Gotta Feeling” re-mixes that he obtained which had the guitar twang sequence in the clear were saved to either the 2009/2010 hard drive that he discarded in late 2010 or early 2011, or the 2011 drive that he returned to the manufacturer in July 2011.	Dickstein Decl., Ex. E (Pringle Dep. Tr. 190:6-191:23)
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