

Founded in 1852
by Sidney Davy Miller

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July 8, 2011

Via Email

Kara Cenar, Esq.
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**Re: Civil Action No. SACV10-1656 JST (RZx) -
Bryan Pringle – Discovery**

Dear Counsel:

We write in response to your June 30, 2011 letter which was sent in follow-up to the parties' meet and confer on Plaintiff's discovery pursuant to the Local Rules and Rules 11 and 37 Fed.R.Civ.P. (the "Letter"). Of note, we received your 12-page letter on the eve of the 4th of July weekend and have been working to respond to it and your requests since that time. Unfortunately, since that time we have also been forced to respond to Defendants' *ex parte* motion in this matter on an emergent basis. Accordingly, this letter responds to the multiple issues raised in your Letter and we are working to obtain supplemental responses to discovery from Mr. Pringle. Your demands that we do so by today, July 8, 2011, are unreasonable given the circumstances.

Due to the length of the Letter and amount of information requested, we will address each portion of your Letter by answering directly to the appropriate corresponding section. With respect to the sections of your Letter that are longer in length, we have directly inserted the relevant portions of your Letter (in *italics*) so that we may directly respond to each point accordingly.

Generally speaking, your letter is yet another example of your continued practice of misrepresenting and twisting of facts in order to conform them to a favorable conclusion for Defendants. Accordingly, responding to what we believe to be inaccurate summaries of statements made during the parties' meet and confer is unreasonable. Nonetheless, we are providing responses to those statements. We disagree with the vast majority of statements made in your Letter and we will highlight those contradictions here.

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The only portion where there is no presumption of validity is the guitar twang sequence.

As to the validity of the guitar twang sequence, Mr. Pringle will testify that he: (a) independently composed the guitar twang sequence; and (b) backed up the derivative version of "Take a Dive" to an .NRG file on or around August 22, 1999. We have also provided you with the findings of our computer expert's analysis, which will confirm Mr. Pringle's testimony, that the .NRG file containing derivative version of "Take a Dive" (i.e. the guitar twang sequence), was created on August 22, 1999, and burned to the disc in our expert's possession on September 9, 1999, both of which predate the creation of "I Gotta Feeling" by approximately ten years.

In addition, we have offered, on multiple occasions, to provide your computer forensics expert access to inspect both the original back-up disc containing the .NRG file with the derivative version of "Take a Dive," and the relevant portions of Mr. Pringle's current computer hard drive, at the office of our computer forensics expert, Mr. David Gallant, and under Mr. Gallant's supervision. Thus far, you have not made any efforts to schedule any such inspection.

A. Plaintiff Has Not Refused To Sit For His Deposition

Bryan Pringle has been identified as the only witness with knowledge of the basis of his claims. See Initial Disclosures, para 1, a, p. 2. No other witness has been identified in the initial disclosures as having any knowledge of facts relevant to this claim. Plaintiff confirmed in response to Interrogatory Nos. 5-6, that no one other than himself assisted with, participated in, or has knowledge concerning the creation of the musical composition or sound recording for Take A Dive.

Plaintiff intends to file Supplemental Rule 26 Disclosures, pursuant to Rule 26(e) Fed.Rules.Civ.P., identifying additional parties that may have knowledge of facts alleged in the FAC, which have been revealed to him over the course of discovery. However, no further individuals will be named that have knowledge regarding Plaintiff's creation of the musical composition or sound recording for "Take a Dive."

In discovery Bryan Pringle was noticed for deposition for July 14, 2011, but based upon representations of Plaintiff's counsel Katharine Dunn and Ryan Greely during a telephonic meet and confer held on June 28, 2011, and again on June 30, 2011, Mr. Pringle is refusing to appear for his deposition on that date, or in this District for a deposition. As part of our meet and confer, we request confirmation that Mr. Pringle's deposition will go

response. We request that the response be supplemented to reflect counsel's representations so that the request can be used as part of the evidentiary record in this case.

To clarify, Plaintiff's counsel never represented that "there are no backup files of the NRG file," as the NRG file itself is the backup file of the derivative version of "Take a Dive."

Again, this request for confirmation that Plaintiff's music equipment is no longer in his possession and that he has no backup files of said equipment does not fall under any of your existing Interrogatories or other written discovery requests. Please provide us with the above request in the form of a formal written discovery request, and Plaintiff will gladly provide you with said information. Otherwise, you can obtain said information from Plaintiff at his deposition.

F. Plaintiff's Sampling and Copying Of The Black Eyed Peas' Work To Make A Version Of Take A Dive

In Requests Nos. 35, 36, 37, 38, and 40, Plaintiff was asked to produce documents on his computer hardware, software, and computer files regarding "every version" of Take a Dive created up to and through December 2010. Plaintiff's responses to these Requests are incomplete and evasive. We know, as do you, that Plaintiff Bryan Pringle created a version of Take a Dive with the vocals of The Black Eyed Peas' I Gotta Feeling sampled over or within it. Mr. Pringle posted that version of Take a Dive on the internet, on his personal website, and Plaintiff's counsel Miller Canfield linked to such postings on their law firm's website. See prior correspondence between Mr. Dean Dickie and Ms. Cenar on this topic. The computer records regarding Mr. Pringle's access to, copying of and use of The Black Eyed Peas' vocal track in this instance (as well as every other instance prior to this time frame), are materially relevant to Mr. Pringle's access to, sampling of and copying of the song I Gotta Feeling, as well as the unclean hands defense.

As stated to you on both meet and confer calls, this request for documents or information relating to where and how Mr. Pringle obtained the Black Eyed Peas' music does not fall under any of your existing Interrogatories or other written discovery requests. Please provide the above request in the form of a formal written discovery request, and Plaintiff will gladly provide you with an appropriate response. Otherwise, the requested information can be obtained from Plaintiff at his deposition.

Further, we have offered, on multiple occasions, to provide your computer expert with access to the relevant portions of Mr. Pringle's current computer hard

drive containing his music files, which would allow you to access said information. To date, you have not made any attempts to schedule that inspection by your computer expert.

Plaintiff's counsel Katharine Dunn and Ryan Greely took the position that the "version" of Take A Dive that Pringle made with The Black Eyed Peas vocal track is not a "version" of Take a Dive. We deem this assertion to be entirely without merit. These same Plaintiff's counsel refused to produce the files from Pringle's computer system, but offered to make the entire hard drive available for inspection. In light of that offer, please provide the details of the computer system sufficient so that our computer expert can obtain a flash copy of Mr. Pringle's hard drive. Please provide this information no later than July 8, 2011 so that we may make necessary arrangements.

The MP3 of the derivative version of "Take a Dive" with the Black Eyed Peas' vocal track of "I Gotta Feeling" placed over it is not a version of "Take a Dive." Mr. Pringle did not compose, author or record the accapella for "I Gotta Feeling," and thus it is not a version of his song. Again, we ask that you provide the above request in the form of a formal written discovery request, and Plaintiff will provide an appropriate response.

Counsel for Plaintiff has *never* refused to produce the files from Mr. Pringle's computer. We simply stated that there are no documents or ESI related to Mr. Pringle's obtaining any of the Black Eyed Peas' music that could be accessed without forensic inspection of Mr. Pringle's hard drive. Contrary to your assertion, we agreed to produce all relevant files related to all versions of "Take a Dive" from Mr. Pringle's computer in a supplemental production by July 15, 2011.

During the meet and confer, Plaintiffs counsel Ryan Greely represented that Mr. Pringle obtained new computer equipment sometime in 2007, and thus computer records of Mr. Pringle's access and copying of The Black Eyed Peas' music appears to still exist. The scope of the aforementioned Requests necessarily includes production of all current computed files, electronic information and the like as to how Mr. Pringle obtained The Black Eyed Peas' music to sample, how many times he has engaged in this activity, as well as to the issue of the source or originality of Mr. Pringle's "guitar twang sequence" or whether he copied it from some other sources. See e.g, Request No. 3. As part of this final meet and confer we ask that these Requests for Production be supplemented with respect to Mr. Pringle's current computer files. We request the supplemental responses no later than July 8, 2011.

Interrogatory Nos. 5 and 6 relate directly to the fraud on the Copyright Office affirmative defense, and also go directly to the lack of authentication, and thus admissibility of the Ryan Greely MP3(s). Request Nos. 35- 37 also requires production of all the computer files of the individuals involved in creating the deposit copy for the copyright application (and if Mr. Greely then his files as well) and Mr. Pringle on the creation of the MP3s, including the version made and submitted as a deposit copy to the Copyright Office. We ask that a full and complete supplemental response to Interrogatory Nos. 5 and 6 be provided as well as a supplemental production of responsive documents to Request for Production Nos. 35, 36, 37, 38, 40, and 41.

Again, just to clarify, Mr. Greely did not create any MP3s of any version of "Take a Dive"; all MP3s and other sound recordings of the derivative version of "Take a Dive," including the one submitted to the Copyright Office, were created by Mr. Pringle. With respect to your requests for computer files related to the creation of the MP3s, there are none other than the MP3s themselves, which we have agreed to provide to you in our supplemental production. To the extent that you seek metadata associated with the creation of any sound recording by Mr. Pringle, that would require an inspection of Mr. Pringle's computer hard drive, which we have offered to provide for inspection at the offices of our computer expert.

Also, there has not been a single document, item or other corroborating piece of evidence produced or identified to support the authentication of the NRG file, or its creation, or the MP3s, or their date of creation. Request for Production Nos. 1, 2, 5, 35, 36, 37, 38, 40, and 41 call for such documents and things to be produced in this case. Please, by July 8, 2011 provide the accurate information regarding the individuals involved in the creation of the MP3s submitted to the Copyright Office, and otherwise in this case, and provide a supplemental production regarding these items.

Again, Mr. Pringle was solely responsible for creation of all MP3s of any version of "Take a Dive" and there are no documents or ESI related to the creation of these MP3s, other than the MP3s themselves.

E. Plaintiff Has Refused Discovery On And Is Unable To Prove Originality

Plaintiff confirmed in response to Interrogatory Nos. 5 and 6, that no one other than himself assisted with, participated in, or has knowledge concerning the creation of the musical composition or sound recording for Take A Dive. He of course is refusing to appear for his deposition. Plaintiff was asked in Interrogatory

No. 9 to state with specificity each element of the musical composition of Take A Dive that was original to him. Plaintiff objected to the interrogatory on the basis of "attorney client privilege", and then refused to provide an answer other than to say "the entire musical composition of TAKE A DIVE" is original to Plaintiff." Plaintiff was asked to produce all of the things used to create every version of Take A Dive (Dance Version) and Take a Dive Dance Version and nothing was produced.

Again, there is no need for supplementation.

Very truly yours,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.



Katharine N. Dunn

KND/bs

cc: Counsel of Record