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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

BRYAN PRINGLE, an individual, Plaintiff, v. WILLIAM ADAMS, JR.; STACY FERGUSON; ALLAN PINEDA; and JAIME GOMEZ, all individually and collectively as the music group The Black Eyed Peas, *et al.*, Defendants.	Case No. SACV 10-1656 JST(RZx) **PLAINTIFF BRYAN PRINGLE'S OBJECTIONS TO EVIDENCE DEFENDANTS FILED IN CONNECTION WITH THEIR MOTION FOR SUMMARY JUDGMENT** DATE: January 30, 2012 TIME: 10 a.m. CTRM: 10A

Plaintiff Bryan Pringle hereby objects to the Motion for Summary Judgment brought by defendants Shapiro Bernstein & Co, Inc., David Guetta and Frederic Riesterer (collectively, the "Moving Defendants"), as well as to particular facts presented by the Moving Defendants in support of their motion for summary judgment, on the following grounds:

Fact/Evidence	**Grounds for Objection**
Declaration of Erik Laykin ("Laykin Declaration"), p. 9, lines 3-5: "Pringle thus likely had access to old CDs from the late 1990s which he could have used to burn the NRG discs in 2009 or 2010."	Rule 602 of the Federal Rules of Evidence ("FRE") -- Lacks foundation as Mr. Laykin lacks any personal knowledge as to whether Mr. Pringle had access to "old CDs from the late 1990s" in 2009 or 2010. FRE 701 702, 703-- Improper opinion evidence. The statement that Mr. Pringle "likely had access to old CDs" is a statement of opinion that falls well outside the scope of Mr. Laykin's expertise as an information technology forensic investigator. Moreover, this testimony is not "based on sufficient facts or data" regarding Mr. Pringle's belongings, nor is it "the product of reliable principles and methods" -- both requirements under Rule 702.[1] Rule 402, 403.

[1] Citations to Rule 702 as amended effective December 1, 2011.

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Fact/Evidence	Grounds for Objection
Laykin Declaration, p. 11, lines 1-2: "Instead, it appears that Pringle disposed of his hard drives such that the information on them could never be recovered."	FRE 602 -- Lacks foundation as Mr. Laykin lacks any personal knowledge as to the facts and circumstances that led to Mr. Pringle's disposing of a hard drive that had suffered mechanical failures during the warranty period and contained no music files relating to "I Gotta Feeling." FRE 701, 702, 703-- Improper opinion evidence. This testimony is a statement of opinion regarding Mr. Pringle's motives and state of mind, which falls well outside the scope of Mr. Laykin's expertise as an information technology forensic investigator. Moreover, this testimony is not "based on sufficient facts or data" regarding Mr. Pringle's motives and the mechanical failures suffered by Mr. Pringle's hard drives, nor is it "the product of reliable principles and methods" -- both requirements under Rule 702. FRE 402, 403.
Laykin Declaration, p. 11, line 25 to p. 12, line : "Indeed, it appears that Pringle has used the simplest 'anti-forensics'	FRE 602 -- Lacks foundation as Mr. Laykin lacks any personal knowledge as to the facts and circumstances that led to

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Fact/Evidence	Grounds for Objection
technique available to him to prevent the Defendants and this Court from learning the true nature of the activity that took place on Pringle's computers, and thus whether or not his claims have any merit."	Mr. Pringle's disposing of a hard drive that had suffered mechanical failures during the warranty period and contained no music files relating to "I Gotta Feeling." FRE 701, 702, 703-- Improper opinion evidence. This testimony is a statement of opinion regarding Mr. Pringle's motives and state of mind, which falls well outside the scope of Mr. Laykin's expertise as an information technology forensic investigator. Moreover, this testimony is not "based on sufficient facts or data" regarding Mr. Pringle's motives and the mechanical failures suffered by Mr. Pringle's hard drives, nor is it "the product of reliable principles and methods" -- both requirements under Rule 702. FRE 402, 403.
Declaration of Paul Geluso ("Geluso Declaration"), p. 5, line 26 to p. 6, line 3: "Because, as explained above, the creators of 'I Gotta Feeling' could not have sampled the guitar twang sequence from 'Take A Dive' (Dance Version), the	FRE 702: In setting forth one possible explanation for the similarity of the guitar twang sequences, and describing it as "the *only apparent explanation*," Mr. Geluso has unjustifiably extrapolated from the facts to an unfounded

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Fact/Evidence	Grounds for Objection
only apparent explanation for this identity is that Mr. Pringle sampled the isolated guitar twang sound file from Beatport.com (or from one of the re-mixes that sampled the Beatport.com sound file), and inserted the guitar twang sequence into his 'Take a Dive' (Dance Version)."	conclusion. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered"). Nor has Mr. Geluso adequately accounted for obvious alternative explanations for the similarity between the tracks; indeed, Mr. Geluso does not account for *any* alternate explanations. *See, e.g., Claar v. Burlington N.R.R.*, 29 F.3d 499, 502 (9th Cir. 1994) (testimony excluded where the expert failed to make "any effort to rule out other possible causes"). FRE 402, 403.
Geluso Declaration, p. 16, lines 13-15: "Thus, the only explanation for the correlation between these sounds is that Pringle sampled the guitar twang sequence from the isolated stems that were available on Beatport."	FRE 702: In setting forth one possible explanation for the similarity of the guitar twang sequences, and describing it as "the *only explanation,*" Mr. Geluso has unjustifiably extrapolated from the facts to an unfounded conclusion. *See Gen. Elec.*, 522 U.S. at 146 (noting that in some cases a trial court "may conclude that there is simply too great an

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Fact/Evidence	Grounds for Objection
	analytical gap between the data and the opinion proffered"). Nor has Mr. Geluso adequately accounted for obvious alternative explanations for the similarity between the sequences; indeed, Mr. Geluso does not account for *any* alternate explanations. *See, e.g.*, *Claar*, 29 F.3d at 502 (testimony excluded where the expert failed to make "any effort to rule out other possible causes"). FRE 402, 403.
Geluso Declaration, p. 19, lines 18-25: "Thus, the only apparent explanation for the near identity between the guitar twang samples in Mr. Pringle's NRG file and Defendants' isolated guitar twang sequence that was available at Beatport.com is that Mr. Pringle acquired a copy of the guitar twang sequence in the clear (such as from the Beatport.com stem or from one of the 'I Gotta Feeling' re-mixes that featured the guitar twang sequence in the clear) and sampled each of the chords that comprise the guitar twang sequence into his ASR10 which he then used to create the derivative 'Take a	FRE 702: In setting forth one possible explanation for the similarity of the guitar twang sequences, and describing it as "the *only explanation*," Mr. Geluso has unjustifiably extrapolated from the facts to an unfounded conclusion. *See Gen. Elec.*, 522 U.S. at 146 (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered"). Nor has Mr. Geluso adequately accounted for obvious alternative explanations for the similarity between the sequences; indeed, Mr. Geluso does not account for *any* alternate

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Dive' (Dance Version) mix."	explanations. *See, e.g., Claar*, 29 F.3d at 502 (testimony excluded where the expert failed to make "any effort to rule out other possible causes").
Geluso Declaration, p. 20, lines 1-3: "It is therefore my professional opinion, to a high degree of certainty, that the guitar twang sequence was independently created by Mr. Riesterer, and subsequently copied by Bryan Pringle."	FRE 702, 703: As explained in the above objections, Mr. Geluso's conclusion that Mr. Pringle sampled the guitar twang sequence from the Black Eyed Peas is an unsupported leap that leaves "too great an analytical gap between the data and the opinion proffered." *Gen. Elec.*, 522 U.S. at 146. Accordingly, his "professional opinion . . . that the guitar twang sequence was independently created by Mr. Riesterer, and subsequently copied by Bryan Pringle" is not "the product of reliable principles and methods" as is required by Rule 702. FRE 402, 403.
Declaration of Alain J. Etchart ("Etchart Declaration") (entirety)	Plaintiff asks the Court to strike the Declaration of Alain J. Etchart in its entirety. Mr. Etchart was never identified as a person having discoverable information -- not in any of the Moving Defendants' initial

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Fact/Evidence	Grounds for Objection
	disclosures, nor in any of the Moving Defendants' subsequent discovery responses. Consequently, plaintiff has not had the opportunity to cross-examine this witness, who is located in France. Moreover, because the Moving Defendants have procured Mr. Etchart's declaration in the summary judgment context, the Moving Defendants have effectively foreclosed any possibility for cross-examination of Mr. Etchart before plaintiff is required to respond to the motion for summary judgment, as Mr. Etchart must be subpoenaed using the lengthy procedure proscribed under the Hague convention. Cross-examination "is a fundamental right that a court may abridge only to curb abuse." Jones, Rosen Wegner & Jones, RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS AND EVIDENCE (The Rutter Group 2010) ("The Rutter Guide"), ¶ 10:2 (citing *Alford v. United States*, 282 US 687, 691-92, 51 S. Ct. 218, 219 (1931); *Deitchman v. E.R. Squibb & Sons, Inc.*,

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Fact/Evidence	Grounds for Objection
	740 F.2d 556, 562 (7th Cir. 1984); *Treharne v. Callahan*, 426 F.2d 58, 62 (3rd Cir. 1970)). Accordingly, Mr. Etchart's testimonial evidence should be stricken. *See Brady v. Potter*, 476 F. Supp. 2d 745, 749 (N.D. Ohio 2007) (disregarding all testimonial evidence in a declaration where witness was not previously "identified as a person having discoverable information, and therefore, the plaintiff was without opportunity to cross-examine him"). See also, United States Constitution, Fifth Amendment. Rule 402, 403, 703
Declaration of Thibaud Fouet ("Fouet Declaration") (entirety)	Plaintiff asks the Court to strike the Declaration of Thibaud Fouet in its entirety. Mr. Fouet was never identified as a person having discoverable information -- not in any of the Moving Defendants' initial disclosures, nor in any of the Moving Defendants' subsequent discovery responses. Consequently, plaintiff has not had the opportunity to cross-examine this witness, who is

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Fact/Evidence	Grounds for Objection
	located in France. Moreover, because the Moving Defendants have procured Mr. Fouet's declaration in the summary judgment context, the Moving Defendants have effectively foreclosed any possibility for cross-examination of this witness before plaintiff is required to respond to the motion for summary judgment, as Mr. Fouet must be subpoenaed using the lengthy procedure proscribed under the Hague convention. Cross-examination "is a fundamental right that a court may abridge only to curb abuse." The Rutter Guide, ¶ 10:2 (citing *Alford*, 282 US at 691-92; *Deitchman*, 740 F.2d at 562; *Treharne*, 426 F.2d at 62). Accordingly, Mr. Fouet's testimonial evidence should be stricken. *Brady v. Potter*, 476 F. Supp. 2d at 749. See also, United States Constitution, Fifth Amendment. Rule 402, 403, 703
Declaration of Jean-Charles Carre ("Carre Declaration") (entirety)	Plaintiff asks the Court to strike the Declaration of Jean-Charles Carre in its entirety. Mr. Carre was first identified

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Fact/Evidence	Grounds for Objection
	by the Moving Defendants as a person having discoverable information in their supplemental initial disclosures, which were served the day *after* the Moving Defendants filed their motion for summary judgment. Consequently, plaintiff has not had the opportunity to cross-examine this witness, who is located in France. Moreover, because the Moving Defendants have procured Mr. Carre's declaration in the summary judgment context, the Moving Defendants have effectively foreclosed any possibility for cross-examination of Mr. Carre before plaintiff is required to respond to the motion for summary judgment, as Mr. Carre must be subpoenaed using the lengthy procedure proscribed under the Hague convention. Cross-examination "is a fundamental right that a court may abridge only to curb abuse." The Rutter Guide, ¶ 10:2 (citing *Alford*, 282 US at 691-92; *Deitchman*, 740 F.2d at 562; *Treharne*, 426 F.2d at 62). Accordingly, Mr. Carre's testimonial evidence should be

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	stricken. *Brady v. Potter*, 476 F. Supp. 2d at 749. See also, United States Constitution, Fifth Amendment. Rule 402, 403, 703
Carre Declaration, p. 3, lines 17-19: "Moreover, given the limited public awareness of Gum Productions, especially prior to 2007, it is highly unlikely that Pringle, whom I understand lives in Texas, would have even heard of Gum Productions between 2001 and 2004."	Rule 602 of the Federal Rules of Evidence ("FRE") -- Lacks foundation as Mr. Carre lacks any personal knowledge as to what Mr. Pringle was likely to know or not know between 2001 and 2004. FRE 701 -- Improper opinion evidence/ 703, 402, 403.
The Moving Defendants' Uncontroverted Material Fact No. 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" (citing the Garraud, Riesterer, Guetta and Carre Declarations).	In addition to the objection (above) to the Carre Declaration as a whole, plaintiff objects to the use of Mr. Carre's Declaration to support this purported Uncontroverted Material Fact. The cited testimony offered by Mr. Carre is directly disputed by testimony by plaintiff regarding correspondence with Mr. Garraud. Bona fide factual disputes such as this may not be disposed of through use of affidavits. *Jackson v Griffith*, 480 F.2d 261, 267 (10th Cir. 1973). Instead, Mr. Carre's testimony

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	shows the existence of a dispute over a material issue of fact. *Accord Castillo v. United States*, 34 F.3d 443, 445-46 (7th Cir. 1994) (noting that the purpose of inviting affidavits in summary judgment proceedings is to determine whether there is dispute over material issue of fact, rather than to enable judge to resolve dispute by picking one affidavit over another that contradicts it) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Jackson*, 480 F.2d at 267. FRE 402, 403, 701, 703
The Moving Defendants' Uncontroverted Material Fact No. 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" (citing the Fouet Declaration).	In addition to the objection (above) to the Fouet Declaration as a whole, plaintiff objects to the use of Mr. Fouet's Declaration to support this purported Uncontroverted Material Fact. The cited testimony offered by Mr. Fouet is directly disputed by The Declarations of Bryan Pringle and Jeffrey Pringle. Mr. Fouet does not attach any documentary evidence to his declaration to support his testimony; thus, this is a case of competing declarations. Bona

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	fide factual disputes such as this may not be disposed of through use of declarations or affidavits. *Jackson*, 480 F.2d at 267 (10th Cir. 1973). See also *Castillo*, 34 F.3d at 445-46 (stating that the purpose of inviting affidavits in summary judgment proceedings is to determine whether there is dispute over material issue of fact, rather than to enable judge to resolve dispute by picking one affidavit over another that contradicts it).

Dated: December 19, 2011

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By: /s/ Dean A. Dickie
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CERTIFICATE OF SERVICE

On December 19, 2011, I electronically filed the foregoing PLAINTIFF BRYAN PRINGLE'S OBJECTIONS TO EVIDENCE DEFENDANTS FILED IN CONNECTION WITH THEIR MOTION FOR SUMMARY JUDGMENT using the CM/ECF system which will send notification of such filing to the following registered CM/ECF Users:

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I am unaware of any attorneys of record in this action who are not registered for the CM/ECF system or who did not consent to electronic service.

I certify under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct.

Dated: December 19, 2011 /s/Colin C. Holley

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