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11 Attorneys for Plaintiff
 BRYAN PRINGLE

13 UNITED STATES DISTRICT COURT
 14 CENTRAL DISTRICT OF CALIFORNIA
 15 SOUTHERN DIVISION

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

Case No. SACV 10-1656 JST(RZx)
**DECLARATION OF DR.
 ALEXANDER STEWART IN
 OPPOSITION TO DEFENDANTS'
 MOTION FOR SUMMARY
 JUDGMENT**
 DATE: January 30, 2012
 TIME: 10:00 a.m.
 CTRM: 10A

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1 I, Alexander Stewart, declare as follows:

2 1. I have personal knowledge of the facts set forth in this Declaration.
3 If called as a witness I could and would testify competently to the following
4 facts.

5 2. I have been asked to compare “Take a Dive” by Bryan Pringle and “I
6 Gotta Feeling” by the Black Eyed Peas. I have been provided mp3’s of two versions
7 of “Dive” as well as several versions of “Feeling” by attorneys for the Plaintiffs. My
8 comparison in the following report focuses on the version of “Take a Dive” that
9 contains no vocals (also called the “derivative” version because of its later creation)
10 (attached here as Audio Exhibit A) and the version of “I Gotta Feeling” that was
11 released on the Black Eyed Peas’ 2009 album *The E.N.D.* (attached here as Audio
12 Exhibit B). In addition, I have been given a copy of the Declaration by Dr.
13 Lawrence Ferrara dated November 14, 2011 and copies of Reports by Mark Rubel
14 dated November 7, 2010; by David Gallant dated August 6, 2011; and by Paul
15 Geluso dated November 14, 2011.

16 3. In my analysis I have found that the derivative version of “Take a
17 Dive” and “I Gotta Feeling” contain a strikingly similar passage that forms the core
18 of both songs. These passages are identical in every fundamental respect: melody
19 (upper notes), harmony, rhythm, duration, metric placement, morphology, and
20 timbre or tone color. This similarity is so profound that it can only be the result of
21 copying. It is my understanding, based on the Report of Mr. Gallant, that the
22 derivative version of “Take a Dive” was created earlier than “I Gotta Feeling.”
23 Quantitatively, this eight-measure pattern is important to both songs, appearing
24 fourteen times in “Dive” and fifteen times in “I Gotta Feeling.” Qualitatively, this
25 distinctive repeated passage is heard prominently in both works and is an integral
26 component of the “hook” or most valuable part of the songs in question.

27 4. Because much of “Feeling” has been constructed around this twangy
28

1 guitar figuration, both songs share certain fundamental characteristics. While these
2 elements considered separately and apart from the core passage may be heard in
3 other musical works, taken together they point to a common source. Before
4 continuing with my analysis, I provide a brief summary of my qualifications and
5 methodology.

6 **Qualifications**

7 5. I am Associate Professor of Music at the University of Vermont, where,
8 among other duties, I direct the Jazz Studies and Latin American and Caribbean
9 Studies Programs. I have earned a Ph.D. in music with a concentration in
10 Ethnomusicology and a Master of Music in Jazz and Commercial Music from
11 Manhattan School of Music. I have published books, articles, and encyclopedia
12 entries and have given numerous conference papers and guest lectures. As an active
13 musician, I have over thirty years of experience performing and recording with jazz
14 and pop artists; nearly twenty of these years as a free-lance musician in New York
15 City. As a jazz musician and ethnomusicologist, in addition to printed scores, my
16 primary musical documents have been recordings, and I have transcribed (put into
17 musical notation) and carefully analyzed thousands of commercial and “field”
18 recordings. I have received many awards and grants, including a Fulbright
19 Fellowship to Mexico during 2006-7. More details can be found in my Curriculum
20 Vitae.

21 **Methodology**

22 6. When asked to compare recordings, I transcribe or put into musical
23 notation and text (when pertinent) all relevant portions for the purpose of comparing
24 parameters of melody, rhythm, harmony, and text. I then consider tone colors,
25 texture, dynamics, articulation, and other elements (defined below). If sheet music is
26 available, I may also check it for accuracy and compare it with my transcriptions. I
27 also take note of general similarities and differences in genre, style, instrumentation,
28 tempo, meter, key or mode, and formal structure.

1 7. My musical terms are defined as follows. Pitch refers to the highness
2 or lowness of a sound. A “melody” is an ordering of pitches in a specific sequence.
3 “Rhythm” is the placement and duration of sounds in time. The simultaneous
4 sounding of pitches results in “harmony.” “Text” refers to the words, lyrics, and
5 non-lexical syllables or “vocables.” Other musical parameters not so easily captured
6 in notation are: “texture,” “timbre,” and finer gradations of rhythm and pitch.
7 “Timbre” or tone color, to which the human ear is acutely sensitive, is the frequency
8 spectrum of a sound and gives instruments and singers their characteristic sounds.
9 “Texture” refers to the way sounds are interwoven in a musical composition, much
10 like different colored threads in a fabric. “Morphology” indicates shaping and
11 qualities of specific sounds in time. Expressive elements such as articulation,
12 inflection, and dynamics (loudness and softness) may be relevant in determining
13 whether copying has occurred. In making comparisons, while not necessarily giving
14 them equal weight I carefully consider all these elements.

15 **The “twangy guitar” passage**

16 8. Examples 1-3 provide the most important elements of the eight
17 measure passages that form the main instrumental theme each tune. These elements
18 consist of a twangy guitar-like sound and a bass part. In both songs the entry of the
19 bass part is delayed (“Feeling “ 0:30; “Dive” 0:17).

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1 9. Example 1 Main Instrumental Theme from “I Gotta Feeling” (0:30)

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11 10. Example 2 Main Instrumental Theme of “Take a Dive” (0:17)

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22 11. As can be seen in the above transcriptions, both songs contain an
23 identical “twangy” guitar figuration in the upper staff and a similar repeated note
24 bass pattern in the bottom staff. Example 3 isolates the upper part.

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1 12. Example 3 “Twangy” guitar passage in both songs



8 13. These parts are nearly identical in pitches, rhythm, range, sound (timbre
 9 or tone color), and morphology (attack, sustain, decay, etc.). The metric placement
 10 is identical - one chord on each of the measure’s beats (1-2-3-4), which yields a
 11 steady pulsing or throbbing effect. Example 4 depicts the pitches or notes by letter
 12 name. There are eight notes in each measure for the eight measures, yielding a total
 13 of 64 notes. These 64 notes match exactly.

14 14. Example 4 Theme of “Feeling” and “Dive” (example 3 with pitches
 15 as letters)

Measure	1	2	3	4	5	6	7	8
Top note	d d d d	c c b b	c c c c	c c c c	b b b b	b b b b	c c c c	c c c c
Lower note	g g g g	g g g g	g g g g	g g g g	g g g g	g g g g	g g g g	g g g g

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1 **Quantitative Analysis**

2 15. This theme forms the core of each song, occurring fourteen times in
3 “Take a Dive” and fifteen times in “I Gotta Feeling” as follows.

4 “Take a Dive”

5 0:17

6 0:32

7 0:46

8 1:01

9 1:16

10 1:31

11 2:45

12 2:59

13 3:14

14 3:29

15 3:44

16 3:58

17 4:13

18 4:28 (partial)

19

20 “I Gotta Feeling”

21 0:00

22 0:15

23 0:30

24 0:45

25 1:00

26 1:15

27 2:30

28 2:45

29 3:00

30 3:15

31 3:30

32 3:45 (background)

33 4:00 (background)

34 4:15

35 4:30

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37

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1 16. The passage is approximately fifteen seconds long in each song. In
 2 “Dive” the theme is heard 3:30 of 4:39 (210 of 279 seconds) or 75.3% of the time.
 3 In “Feeling” the theme is sounded during 3:45 of 4:49 (225 of 289 seconds) or 78%
 4 of the song.

5 **Qualitative Analysis**

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

17 **The bass part**

18 18. The bass line in both songs consists of a cycle of four repeated notes
 19 that last for two measures each as follows:

20 measures	1-2	3-4	5-6	7-8
21 “Feeling”	G	C	E	C
“Dive”	G	F	A	C

22 19. As can be seen, in four of the eight measures (measures 1, 2, 7, 8) the
 23 repeated bass note is the same.

24 20. Later in the song in “Dive” Pringle introduces a variation on the bass
 25 cycle at 2:30; 3:44; 3:58; 4:13; and 4:28.

26 measures	1-2	3-4	5-6	7-8
27 “Feeling”	G	C	E	C
“Dive”	E	C	E	C

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1 21. Here the pitches match in measures 3, 4, 5, 6, 7, and 8 (all except
2 measures 1 and 2).

3 22. Throughout much of the song, then, at least 50% of the pitches in the
4 bass part match and during *part* of the song the congruence in the bass reaches 75%.
5 Though the rhythms are somewhat different, the number of repeated notes in each
6 measure of the bass part is almost the same (seven in “Dive” and eight in “Feeling”).
7 But, most important, *all* of the bass pitches heard in the eight-measure cycle in
8 “Feeling” can be found in the same position of the cycle somewhere in “Dive.”

9 **General comparison of “I Gotta Feeling” and “Take a Dive”**

10 23. In terms of their overall sound, “I Gotta Feeling” and “Take a Dive”
11 share many fundamental compositional elements. First, both works can be
12 considered to be in similar genres: contemporary popular dance music
13 (“club/dance”). They share a basic instrumentation of bass, drums, guitar sounds,
14 synthesized strings and other “techno” sounds. “I Gotta Feeling” and “Take a Dive”
15 are in the same key (G Major). Moreover, both songs are in the Myxolydian mode
16 characterized by a flattened seventh degree of the scale (F-natural). They have a
17 common meter (4/4) and an almost identical tempo. As discussed further below,
18 both songs are built over an almost identical harmony or chord cycle of eight
19 measures. Finally, both songs consist of substantially similar textures or musical
20 layers: repeated bass notes, a steady bass drum and snare back beat, and a distinctive
21 guitar ostinato (repeated figuration). There is no mistaking the substantial similarity
22 in style, in general characteristics, and in concrete musical details.

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1	<i>Summary of General Characteristics</i>		
2		“Feeling”	“Dive”
3	Genre	Contemporary Dance	Contemporary Dance
4	Style	Techno	Techno
5	Key	G Major	G Major
6	Meter	4/4	4/4
7	Tempo	128	130
8	Structure	Repeating 8 bar cycle	Repeating 8 bar cycle
9	Instrumentation	Guitar sound, bass, synthesized string & other techno sounds	Guitar sound, bass, synthesized string & other techno sounds

9 **Structure**

10 24. Both “I Gotta Feeling” and “Take a Dive” are nearly the same length:
 11 4:49 and 4:39 respectively. Except for the first seventeen seconds of “Dive” they are
 12 constructed entirely from a repeating eight measure pattern. Over this repeating
 13 passage, different sounds are layered. Many of these sounds are similar – strings,
 14 keyboards, effects, etc. The eight-measure twangy guitar passage appears near the
 15 beginning of both songs and is absent for nearly exactly the same amount of time
 16 (one minute) in the middle of the songs, before returning for the remainder of each
 17 song.

18 **Protectable vs. Non-Protectable elements**

19 25. Many of the general similarities outlined above are musical “ideas” and
 20 can be found in numerous other musical works. Taken by themselves, these generic,
 21 stylistic, metric, and general structural characteristics do not rise to the level of
 22 protectable elements. They may, however, in combination with specific musical
 23 expression provide further indication of copying. The harmonic elements and bass
 24 parts in combination with the central “twangy” guitar part constitute concrete
 25 musical expression. Both the bass part and the harmony also contain important
 26 differences as well as similarities. But the basic properties of the settings of the
 27 eight-measure guitar part share fundamental similarities as outlined above. Clearly,
 28 the twangy guitar part itself, containing 64 notes, represents concrete, protectable

1 musical expression. Much of “I Gotta Feeling” appears to have been constructed
2 around this signature theme.

3 **Differences**

4 26. While the main focus of this report is to compare the derivative version
5 of “Dive” (without vocals) with “”Feeling” it should be noted that the vocal versions
6 of the songs contain important differences. Lyrically the songs deal with very
7 different subject matter. Little in the way of common words or lyrical phrases can be
8 found in both songs. Moreover, the main melodies of the vocal parts are different.
9 By focusing exclusively on the vocal version of “Dive” Dr. Ferrara’s report is able
10 to emphasize these differences.

11 **Declaration of Lawrence Ferrara**

12 27. Dr. Ferrara’s analysis fails on two major points. First, he departs from
13 sound and accepted musicological practice by failing to provide complete
14 transcriptions of the works in question.¹ Other than a short segment of the vocal
15 version of “Dive,” he has failed to provide any transcription of the Plaintiff’s works.
16 I have attached with this report a complete transcription of the derivative version of
17 “Dive.”

18 28. Second, perhaps because of his failure to transcribe Plaintiff’s works,
19 he erroneously claims that “The only differences between the original version of
20 “Take a Dive,” which I have analyzed herein, and the derivative version, is the
21 addition of the so-called “guitar twang” sequence”...and the removal of the vocals.”
22 These exact words appear not once, but twice in his report in paragraphs 68 and 76.
23 In paragraph 5 he declares that the original version and derivative version are
24 “identical” except for these two elements. In fact, the drum parts that Dr. Ferrara
25 spends a great deal of time discussing (his Music examples 7 & 8) never appear in

26 _____
27 ¹ In his August 10, 2011 Report in Case No. CV10-8123 JFW (RZx) Batts v. Adams
28 et al, Dr. Ferrara describes musicological practice as requiring complete
transcriptions.

1 the derivative version. The bass drum part he describes as “attacks on downbeat and
2 the second half of beat 2 do not exist in derivative version. Oddly enough, after his
3 sweeping statement in paragraphs 68 and 76, Dr. Ferrara contradicts himself near
4 the end of his report in his “analysis of the bass drum patterns in the derivative
5 version of ‘Take a Dive’” (paragraphs 88-90). Here he seems to acknowledge
6 another difference between the two versions of “Dive,” but because of his apparent
7 negligence in not transcribing full versions of “Take a Dive” he would appear not to
8 have noticed that the bass drum pattern in his examples 7 & 8 is completely absent
9 in the derivative version. Clearly this is an example of another difference (and an
10 important one) between the two versions of “Dive” besides the twangy guitar
11 accompaniment and the lack of vocals. As Dr. Ferrara acknowledges in paragraph 5,
12 the declarations of Mr. Byrnes and me are directed at the derivative version, not the
13 original. Because Dr. Ferrara has compared “Feeling” with a different version of
14 “Dive,” and has mischaracterized the differences between the two versions of
15 “Dive,” his analysis is methodologically and logically flawed.

16 29. Dr. Ferrara’s report also exaggerates the differences between the bass
17 note melodies and harmonic patterns between “Dive” and “Feeling.” His “argument
18 by analogy” in paragraph 26 is misleading and unworthy of a trained musicologist.
19 There is absolutely no valid comparison between the spelling of words (such as
20 “salt” and “soft”²) and the pitches in melodies or harmonies, and letters are used
21 very differently in each realm (phonetically in the case of language and as symbolic
22 of discrete pitch classes in some Western musical notation systems). While two
23 words which share some letters will almost inevitably be very different in meaning,
24 this fact bears no correlation to musical practice. Combinations of musical sounds
25 such as pitches are not analogous to words in language and do not communicate
26 semantic content. Most relevant to the actual music comparison and more in line

27 ² Moreover, his statement that “‘salt’ and ‘soft’ both use the same four letters” is
28 completely nonsensical.


1 with standard musicological practice, Dr. Ferrara agrees with my basic analysis in
2 finding that 50-75% of the repeating notes in the eight-measure bass cycle are the
3 same both “Dive” and “Feeling” (see paragraph 40 Ferrara Report).

4 30. Other than his cavalier and mostly erroneous references to the
5 derivative version of “Take a Dive,” Dr. Ferrara’s Declaration totally avoids any
6 discussion, analysis or comparison of the derivative version. Since my primary
7 focus is on that version, which contains the signature 64-note guitar sound
8 figuration, most of his report is utterly irrelevant to my analysis. His approach is
9 indicative of a strategy to avoid discussing the derivative version because of the
10 striking similarity of these important parts. Any comparison of the derivative
11 version of “Dive” and “Feeling” leads to the inevitable conclusion of copying. The
12 pivotal question then becomes, which work was created earlier. Based on my
13 reading of the expert reports by Gallant and Geluso, I understand there is
14 disagreement on this issue. Clearly, the Defense intends to build its entire case on
15 the purported earlier creation of “Feeling.”

16 **Conclusions**

17 31. It is indisputable that the twangy guitar passage heard in the derivative
18 version of “Dive” and in “Feeling” is original musical expression and is virtually
19 identical in both songs. Clearly, it forms one of the most memorable parts of each
20 song. Therefore, copying of original, valuable, and substantial musical expression
21 has occurred. Moreover, the songs contain other similar material such as harmony
22 and bass lines that support and relate to this central theme.

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1 I declare under penalty of perjury that the foregoing is true and correct.
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3 Executed this 19th day of December 2011.
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6 Alexander Stewart, Ph.D.
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EXHIBITS A AND B
(AUDIO EXHIBITS)
FILED MANUALLY

CERTIFICATE OF SERVICE

1 On December 19, 2011, I electronically filed the foregoing DECLARATION
2 OF DR. ALEXANDER STEWART IN OPPOSITION TO DEFENDANTS'
3 MOTION FOR SUMMARY JUDGMENT using the CM/ECF system which will
4 send notification of such filing to the following registered CM/ECF Users:

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27 I am unaware of any attorneys of record in this action who are not registered
28 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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