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11 Attorneys for Defendants
WILLIAM ADAMS; STACY FERGUSON; ALLAN PINEDA; and JAIME
12 GOMEZ, all individually and collectively as the music group THE BLACK EYED
PEAS; will.i.am music, llc; TAB MAGNETIC PUBLISHING; CHERRY RIVER
13 MUSIC CO.; HEADPHONE JUNKIE PUBLISHING, LLC; JEEPNEY MUSIC,
INC.; EMI APRIL MUSIC, INC.

14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

16 BRYAN PRINGLE, an individual,
17 Plaintiff,
18 v.

Case No. SACV10-01656 JST (RZx)
Hon. Ralph Zarefsky
Courtroom 540

19 WILLIAM ADAMS, JR.; STACY
FERGUSON; ALLAN PINEDA; and
20 JAIME GOMEZ, all individually and
collectively as the music group the
21 Black Eyed Peas; DAVID GUETTA;
FREDERICK RIESTERER; UMG
22 RECORDINGS, INC.; INTERSCOPE
RECORDS; EMI APRIL MUSIC,
23 INC.; HEADPHONE JUNKIE
PUBLISHING, LLC; WILL.I.AM.
24 MUSIC, LLC; JEEPNEY MUSIC,
INC.; TAB MAGNETIC
25 PUBLISHING; CHERRY RIVER
MUSIC CO.; SQUARE RIVOLI
26 PUBLISHING; RISTER EDITIONS;
and SHAPIRO, BERNSTEIN & CO.,

DISCOVERY MATTER
**DEFENDANTS' SUPPLEMENTAL
MEMORANDUM OF LAW IN
SUPPORT OF JOINT
STIPULATION ON MOTION TO
COMPEL SUPPLEMENTAL
RESPONSES TO
INTERROGATORIES AND FOR
MONETARY SANCTIONS**

Date: January 23, 2012
Time: 10:00 a.m.

Pretrial Conf.: March 12, 2012
Trial Date: March 27, 2012

27 Defendants.
28

1 Pursuant to Local Rule 37, Defendants William Adams; Stacy Ferguson;
2 Allan Pineda; and Jaime Gomez, all individually and collectively known as the
3 music group The Black Eyed Peas; will.i.am music, llc; Tab Magnetic Publishing;
4 Cherry River Music Co.; Headphone Junkie Publishing, LLC; Jeepney Music, Inc.;
5 EMI April Music, Inc. (collectively, "Defendants") submit this Supplemental
6 Memorandum of Law in support of the Joint Stipulation on Defendants' Motion to
7 Compel further responses to interrogatories propounded by Defendant Stacy
8 Ferguson and Defendant Headphone Junkie Publishing, LLC, to strike or otherwise
9 overrule Plaintiff's meritless objections to certain interrogatories, and for an award
10 of sanctions for the attorneys' fees to bring this Motion in the amount of \$15,000.00.

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Dated: January 9, 2012

Kara Cenar
Jonathan Pink
BRYAN CAVE LLP

By: /s/ Jonathan Pink

Jonathan Pink
Attorneys for Defendants
WILLIAM ADAMS; STACY
FERGUSON; ALLAN PINEDA; and
JAIME GOMEZ, all individually and
collectively as the music group THE
BLACK EYED PEAS; will.i.am music,
llc; TAB MAGNETIC PUBLISHING;
CHERRY RIVER MUSIC CO.;
HEADPHONE JUNKIE PUBLISHING,
LLC; JEEPNEY MUSIC, INC.; EMI
APRIL MUSIC, INC.

1 **I. SUMMARY OF ARGUMENTS**

2 The Motion to Compel should be granted, and Plaintiff should be ordered to
3 provide responses to the following three relevant categories of discovery requested
4 or be precluded from presenting the issues at trial: (a) Plaintiff’s claimed creation of
5 the guitar twang sequence (which includes issues regarding Plaintiff disposing of
6 computer hard drives during the litigation) (Dkt 157, pages 15-39, Irog Nos. 1- 4,
7 16-19, 21, and 22) (**hereinafter Category No. 1**), (b) Plaintiff’s sampling claim
8 (Dkt 157, pages 39-42, Irog. No. 18) (**hereinafter Category No. 2**), and (c) the
9 Plaintiff’s lack of evidence of access by the Defendants to Plaintiff’s work. (Dkt 157,
10 Page 42-55, Irog Nos. 5- 8, 12-5, and 25) (**hereinafter Category 3**). General Issues
11 are addressed below as well. (**Hereinafter General Issues**).

12 **Regarding Category No. 1:** Whether Plaintiff copied Defendants’ work (not
13 vice-versa)¹ and whether Plaintiff has engaged in backdating computer files are very
14 much long standing issues and defenses in this case that surfaced back in July 23,
15 2010 in a pre-suit letter requesting preservation of computer hard drive evidence.
16 (*See* Dkt 157-1, Pink. Decl. ¶ 4, Exhibit 1.)² The identification and location of
17 Pringle’s hard drives has been an issue as far back as the initial scheduling
18 conference. (*See* Dkt 157-1, Pink Decl. ¶¶ 6-7, Exhibit 3). Specific evidence
19 supporting that Pringle copied from Defendants is presently before the Court. (*See*
20 Dkt 162, Geluso Decl. ¶¶10-13.) Specific computer forensic expert evidence on
21 Pringle’s inability to authenticate the dates on his NRG files (i.e., the backdating
22 issues) is presently before the Court as is the issue of Plaintiff disposing of hard
23 drives. (*See e.g.*, Dkt 22-2, Laykin Decl. at C, ¶¶ 1-4; *see also* Dkt 157-1, Pink

24 _____
25 ¹ Defendants believe the hard drives contained the instrumental “stem” of
26 Defendants’ work that Plaintiff obtained from the Internet and placed into his work
27 in an effort to manufacture this lawsuit.

28 ² Plaintiff’s counsel’s inflammatory declaration attempting to paint this issue as
“just surfacing since learning of Bryan Pringle’s destruction of computer hard drives
during the litigation,” is entirely unfounded.

1 Decl. ¶ 11, Exhibit 7 at pages 34:2-49:20; 190:6-191:23.) Plaintiff and his counsel
2 may "disagree" with Defendants' theory – *i.e.*, that Plaintiff accessed and copied
3 Defendants' work, but their disagreement is not a valid basis to object and withhold
4 discovery relevant to that defense. Rule 26 firmly provides Defendants are entitled
5 to this discovery. *See* FRCP 26(b)(1) ("Parties may obtain discovery regarding any
6 nonprivileged matter that is relevant to any party's claim or defense.")

7 Moreover, the hard drives that are the subject of the discovery requests in the
8 Motion admittedly contain evidence relevant to issues of creation and authenticity of
9 the NRG files relied upon by Plaintiff to support his assertion of creation in 1999,
10 and the alleged creation of the isolated guitar twang given to Plaintiff's experts. *See*
11 Pink Decl., ¶ 2, Ex. 1 at 55:18-57:4; *see also id.* at ¶ 3, Ex. 2 ("Link files and meta
12 data entries on the system originally creating the CD are also obvious choices to
13 consider."). The hard drives also contain evidence of Pringle's creation of the
14 deposit copy in 2010, as opposed to 1999, which he used to obtain the registration in
15 2010 to commence this suit. The questionable deposit copy relates to Defendants'
16 affirmative defenses 4, 5, 7, and 17. *See* Dkt 105.

17 Pringle's disposing of the hard drives (two while the litigation is pending: one
18 in January 2011³ and one in August 2011) not only bears directly on the issue of
19 unclean hands (9th defense) and estoppel (15th defense) but also raises issues of
20 spoliation and Pringle and his counsel's duty to candidly inform the Court and
21 Defendants that the hard drives were destroyed. *See Keithley v. Homestore.com,*
22 *Inc.*, 629 F. Supp. 2d 972, 977 (N.D. Cal. 2008) (duty to candidly inform Court and
23 opposing counsel about spoliation). It is precisely such conduct, apparently
24 intended to hamper legitimate discovery, that necessitated this Motion and justifies
25 an award of sanctions, including dismissal. Indeed, Plaintiff's conduct here mirrors
26 the conduct of the plaintiffs in *Pharmacy Records v. Nassar*, 2010 WL 2294538 (6th

27 ³ In between Plaintiff seeking a Temporary Restraining Order and seeking a
28 Preliminary Injunction. (*See* Dkt 15 and 73.)

1 Cir. 2010), who destroyed and fabricated evidence in a copyright infringement case
2 involving a musical “beat.” There, the plaintiffs failed to produce key evidence and
3 discovery revealed: there was no evidence of the original recording; the recording
4 produced was created from some other, non-original sources; key forensic evidence
5 was intentionally destroyed; and the computer files were backdated.⁴ *Id.* at *3-4.
6 The case was dismissed without prior warning because the “conduct at issue is not
7 merely contestable, but in contravention of basic notions of fairness and professional
8 responsibility. A party does not need formal notice to know that spoliation of
9 evidence and misrepresentations may lead to dismissal.” *Id.* at *5. Similar
10 sanctions, including dismissal, are justified here.

11 **Regarding Category No. 2:** Plaintiff is also playing fast and loose with the
12 issue of *whether* his sampling claim is or is not being pursued in this case (flip
13 flopping between the two positions when it is convenient), *and why*. (See Dkt 191,
14 Koppenhoefer Decl. ¶ 2 (claiming prior representations regarding withdrawal of this
15 claim were never made).) In the current Motion, Plaintiff states he is “not seeking
16 to recover” for this claim, now contending there is some unknown “willful refusal to
17 disclose evidence.” Dkt. No. 157 at 37:21. This assertion is wrong and is an attempt
18 to deflect from the fact that the sampling claim was a sham from the outset. A
19 sample claim (as opposed to a copyright composition claim) requires Plaintiff to
20 show that there was some physical appropriation of *a specific sound recording*
21 physically present in the accused sound recording. See e.g., *Newton v. Diamond*, 204
22 F.Supp.2d 1244, 1252-57 (C.D. Cal. 2002). The master recordings of the accused
23 sound recording are in the custody of UMG defendants and were produced and
24 made available to Plaintiff’s counsel back in the summer when discovery opened.
25 Both fact and expert discovery is closed, and there has been no identification of
26 *Plaintiff’s* specific sound recording nor any trial expert disclosures showing such

27 ⁴ As noted, Pringle destroyed the hard drives that could have conclusively
28 established Pringle’s own backdating of the NRG files.

1 claimed sample is physically present in the accused work. The refusal to respond to
2 discovery or to formally withdraw the claim is improper. An order compelling a
3 response is required for purposes of removing an unnecessary issue from trial and to
4 support an objective unreasonableness determination for fees under 17 U.S.C. §505.

5 **Regarding Category No. 3, Lack of Access to Pringle’s Works:** The
6 principle deficiencies regarding the interrogatory responses for access issues are: (a)
7 Plaintiff’s “investigation continues” response for individuals it concedes had no
8 access (Irog Nos. 6-9) thereby leaving the claim open ended and ever changing, (b)
9 Plaintiff’s failure to answer the interrogatory (by not providing where, when, how
10 and type of communication) regarding his claim that William Adams had access to
11 any work (Irog No. 5), (c) the failure to answer and attempt to co-mingle and blur
12 answers between Pringle’s contentions regarding access to the original Take a Dive
13 (which has no guitar twang), and access to Pringle’s other music or demo CD’s
14 (Irog 12-13), (d) the failure to answer and attempt to co-mingle and blur answers
15 between Pringle’s contentions regarding access to the derivative Take a Dive (which
16 is claimed to have a guitar twang), and access to Pringle’s Original work or other
17 music or demo CD’s (Irog 14), (e) the failure and willful omission of identification
18 of all individuals with knowledge of information relating to his claim of access by
19 *any* defendant (Irog 15) thereby leaving Defendants open to “surprise” witnesses
20 and declarations after close of discovery⁵, and (f) Pringle’s failure to provide a
21 complete factual basis for his claim of infringement (including access and copying)
22 of his alleged “other works,” claiming now it is not relevant. (*See* Complaint ¶ 56).⁶

23 ⁵ Pringle submits the declaration of his brother Jeffrey Pringle to support his claim
24 that Defendant Guetta had access. Failure to disclose this individual in response to
25 the interrogatory or in initial disclosures prevented any discovery from this person,
and discovery is now closed. *See* Dkt 190 at ¶ 9.

26 ⁶ Plaintiff actually concedes that he should supplement certain interrogatories
27 regarding Defendants’ alleged access to his works. That concession does not moot
28 this Motion for three reasons: (1) Plaintiff effectively concedes the Motion has
merit; (2) Plaintiff has yet to provide full and complete supplemental responses to

1 **General Issues:** Despite the relevance of the subject requests, Plaintiff
2 contends he need not respond because the requests are objectionable. As the party
3 asserting the objections, Plaintiff bears the burden of justifying them. *Blankenship*
4 *v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.1975). Plaintiff, however, makes no
5 attempt to support any of the individual objections asserted. Instead, he contends
6 that Defendants asserted their own objections in separate discovery responses, and
7 as such, he is somehow excused from responding to Defendants' discovery. *See*
8 Dkt. No. 157, Joint Stipulation, 10:8-13; 12:6-7; 15:13-15; 31:3-11). This, of
9 course, is not the law in this Circuit, or anywhere else throughout the nation. *See*
10 *National Academy of Recording Artists & Sciences, Inc. v. Point Events, LP*, 256
11 F.R.D. 678, 680-81 (C.D. Cal. 2009). Discovery is not conducted on a "tit-for-tat"
12 basis. *Id. citing* Fed. R. Civ. P. 26(d)(2) ("[M]ethods of discovery may be used in
13 any sequence; and ... discovery by one party does not require any other party to
14 delay its discovery."). Defendants have been forthright in their discovery responses.
15 Nonetheless, even if Plaintiff's accusations regarding Defendants' discovery
16 responses were correct, his "tit-for-tat" objections are not legitimate or legally
17 sufficient. *Point Events*, 256 F.R.D. at 680-81. Because Plaintiff has asserted
18 meaningless, improper, and unsupported objections, this Motion must be granted.

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26 *any* of the interrogatories in dispute; and (3) even if Plaintiff were to supplement
27 those responses prior to the hearing date, sanctions are still authorized and
28 warranted pursuant to FRCP Rule 37.

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II. CONCLUSION

Defendants respectfully request that the Court grant their Motion, and order any other relief including awarding Defendants sanctions for having to bring this Motion in the amount of \$15,000.00. (See Dkt. No. 157-1, Pink Decl. ¶ 16).

Dated: January 9, 2012

Kara Cenar
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By: /s/ Jonathan Pink

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