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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)

Hon. Josephine Staton Tucker
Courtroom 10A

EVIDENTIARY OBJECTIONS TO THE DECLARATION OF BARBARA FREDERIKSEN-CROSS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS SHAPIRO, BERNSTEIN & CO, INC., FREDERIC RIESTERER AND DAVID GUETTA [DOC. 189]

Complaint Filed: October 28, 2010
Trial Date: March 27, 2012
Hearing Date: January 30, 2012
10:00 AM

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court's Initial Standing Order at 11(c)(iii), Defendants Shapiro, Bernstein & Co, Inc. ("Shapiro Bernstein"), Frederic Riesterer and David Guetta (collectively, "Defendants") respectfully submit these Evidentiary Objections to the Declaration of Barbara Frederiksen-Cross in Opposition to Defendants' Motion for Summary Judgment (Doc. 189).

GENERAL OBJECTIONS

A. The Frederiksen-Cross Opinions Are Inadmissible Under *Daubert*

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence, which provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. District courts exercise a "critically important…gatekeeping function" to ensure "the reliability and relevancy of expert testimony." *Jinro America Inc. v. Secure Investments, Inc.*, 266 F.3d 993 (9th Cir. 2001) (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) and citing *Daubert*, 509 U.S. at 594–95); *Primiano v. Cook*, 2010 WL 1660303, at *4 (9th Cir. April 27, 2010); *DSU Medical Corp. v. JMS Co. Ltd*, 296 F.Supp.2d 1140, 1146 (N.D. Cal. 2003); *MySpace Inc. v. Graphon Corp*., 2010 WL 4916429, at *13 (N.D. Cal. Nov. 23, 2010) (*citing Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 579-80 (1993)). As the Ninth Circuit has observed: The trial court's 'special obligation' to determine the relevance and reliability of an expert's testimony [] is vital to ensure accurate and unbiased decision-making by the trier of fact. *Kumho Tire* described the 'importance of *Daubert*'s gatekeeping requirement ... to make certain that an

expert ... employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. [] Or, more specifically, the trial judge must ensure that 'junk science' plays no part in the decision. *Kumho Tire*, 526 U.S. at 147, 152.

Rule 702 "sets forth three distinct but related requirements: (1) the subject matter at issue must be beyond the common knowledge of the average layman; (2) the witness must have sufficient expertise; and (3) the state of the pertinent art or scientific knowledge permits the assertion of a reasonable opinion." *Mesfun v. Hagos*, 2005 WL 5956612 (C.D. Cal. 2005) (citing *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) and *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997)). As the proponent of the expert testimony, Plaintiff, bears the "burden to show that [its] expert [is] 'qualified to testify competently regarding the matters he intend[ed] to address; [] the methodology by which the expert reach[ed] his conclusions is sufficiently reliable; and [] the testimony assists the trier of fact." *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253,1257 (11th Cir. 2002) (alterations in original) (quoting *Maiz v. Virani*, 253 F.3d 641, 662 (11th Cir. 2001)).

The inquiry as to whether an expert is qualified is distinct from the determination of reliability. *United States v. Barrera-Medina*, 139 F. App'x 786, 793 (9th Cir. 2005) (holding that district court erred when it failed to inquire at hearing on motion-in-limine as to reliability and failed to "make any later reliability finding on the record").[1]

In determining the reliability of the opinion, the *Daubert* Court "set out four factors to be reviewed when applying Rule 702: (1) whether the theory or technique

[1] "If admissibility could be established merely by the ipse dixit of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong." *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004).

can be or has been tested, (2) whether the theory or technique has been subjected to peer review, (3) whether the error rate is known and standards exist controlling the operation of the technique, and (4) whether the theory or technique has gained general acceptance." *Cooper v. Brown*, 510 F.3d 870, 880 (9th Cir. 2007) (quoting *United States v. Benavidez-Benavidez*, 217 F.3d 720, 724 (9th Cir. 2000)).

Under *Daubert*, expert testimony is only admissible if it will "assist the trier of fact." *Daubert*, 509 U.S. at 591. To meet the assistance prong of *Daubert*, the testimony must concern matters that are beyond the understanding of the average lay person. *Mesfun v. Hagos*, 2005 WL 5956612 (C.D. Cal. 2005) (citing *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) and *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997)). "Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." *United States v. Frazier*, 387 F.3d 1244, 1262-63 (11th Cir. 2004) (citing 4 *Weinstein's Federal Evidence* § 702.03[2][a]).

1. Frederiksen-Cross Admits She Is Unqualified To Provide Musicological Analysis And Has Not Undertaken Any Proper Analysis On This Subject Matter.

Pringle submits the declaration of Frederiksen-Cross, a computer forensic expert, to provide musicological and sound recording analysis, and to attempt to critique musicological and sound recording analysis of other experts. See Frederiksen-Cross Declaration ¶¶ 6, 13-14, 22-25, 45-61. As the proponent of the expert testimony, Plaintiff bears the "burden to show that [its] expert [is] 'qualified to testify competently regarding the matters he intend[ed] to address; [] the methodology by which the expert reach[ed] h[er] conclusions is sufficiently reliable; and [] the testimony assists the trier of fact." *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253,1257 (11th Cir. 2002) (alterations in original) (quoting *Maiz v. Virani*, 253 F.3d 641, 662 (11th Cir. 2001)). *Mesfun v. Hagos*, 2005 WL 5956612

(C.D. Cal. 2005) (citing *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) and *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997)).

Frederiksen-Cross admitted at her deposition that she is not qualified to render any opinions as a musicologist. Frederiksen-Cross Dep. Tr. at 32:10-32:16.

> Q. Do you have any expertise in -- as a musicologist?
> A. I am not a trained musicologist, no. I am trained in the analysis of computer-based evidence.
> Q. Have you ever been or provided any expert testimony in -- as a musicologist?
> A. No, Ma'am. That would be outside my remit in these kinds of cases.

Frederiksen-Cross admitted that she was not asked to form a separate opinion as to Geluso's opinions "because there are other individuals involved in this case who are better qualified than I to do that as musical experts." Frederiksen-Cross Dep. Tr. at 205.

Frederiksen-Cross admits that her assessments are not as a musicologist. Frederiksen-Cross Dep. Tr. at 182.

> Q. All right. And you're doing that just based on -- not as a musicologist?
> A. That's correct. That's just my assessment as a person who has some background in music but I am not a provision -- professional musician, I am not a composer, and I am not a musicologist.

Frederiksen-Cross Dep. Tr. at 182-183

> Q. All right. So you don't know from a musicological standpoint whether the guitar twang sequence fit perfectly into the already existing music for Take A Dive, do you?
> A. No. It seemed that way to me as a -- as a lay musician, but not as a -- I mean, I don't present myself as a musicologist and I will not offer a musicologist's opinion.

A person admittedly not trained as a musicologist has no foundation or basis to critique the process of another musicologist nor provide "lay opinions". Her declaration on these points does not assist the trier of fact and thus does not meet the standard for admissibility. Under *Daubert*, expert testimony is only admissible if it will "assist the trier of fact." *Daubert*, 509 U.S. at 591. To meet the assistance prong of *Daubert*, the testimony must concern matters that are beyond the understanding of the average lay person. *Mesfun v. Hagos*, 2005 WL 5956612 (C.D. Cal. 2005) (citing *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) and *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997)). These paragraphs of the Frederiksen Cross declaration should be stricken as inadmissible.

2. **The Qualification Of The Opinions In The Frederiksen Cross Declaration To "Available Evidence" Makes The Declaration Inadmissible Under The Reliability Prong Of The *Daubert* Test.**

The Ninth Circuit has observed that the trial court's "special obligation" to determine the relevance and reliability of an expert's testimony is vital to ensure accurate and unbiased decision-making by the trier of fact. *See Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F. 3d 1053, 1063-64 (9th Cir. 2002).

The Frederiksen-Cross Declaration contains material and critical qualifications to every opinion provided – that it is based upon the "available evidence". (*See e.g.* Cross Decl. ¶¶ 7:17-18 ("This Declaration is based on the evidence that has been made available to me…"); *Id.* at ¶¶ 26-27 ("nothing in the available evidence…"); *Id.* at ¶ 10 ("nothing in the evidence I have reviewed")).

In this case this special qualification has been placed upon Frederiksen-Cross' opinions because material evidence—residing on Mr. Pringle's hard drives—has been made unavailable to Frederiksen-Cross by Mr. Pringle's disposal of the hard drives during the middle of this litigation.

Plaintiff Bryan Pringle has personally physically removed, and then disposed of two computer hard drives relevant to this litigation. (Frederiksen-Cross Dep. Tr.

104:10-109:1.) One hard drive was disposed of in January 2011, between Pringle's TRO and Preliminary Injunction applications (Doc. 15, 73) and the other was disposed of in August 2011, after a meet and confer had taken place between counsel regarding Defendants requests to inspect Pringle's computer equipment. (Doc. 110 at 10-11; Frederiksen-Cross Dep. Tr. at 104:10-109:1.) Both were discarded long after Defendants' counsel made an express preservation of evidence request. (Doc. 161, Dickstein Decl., Ex. J.) All three computer forensic experts testified that if these discarded hard drives were available they would consider them in connection with the issues of the dating/backdating of the Pringle computer files in this case:

> Q. Okay. So if you were -- Strike that.
> If you wanted to determine whether Mr. Pringle had backdated a computer file and CD in 2010, what would you look at?
> MS. KOPPENHOEFER: I'm just going to object as to it's an incomplete hypothetical and it calls for speculation and it assumes facts not in evidence.
> A. In a hypothetical where you said someone had created a file in 2010 that was backdated, I -- I'd need to know when in 2010 just to be -- be clear, but I'm assuming that let's point -- let's pick an arbitrary point. The middle of 2010. Is that okay for with respect to my answer?
> Q. No. Let's pick January of 2010 through December 31st, 2010.
> A. Okay. In those specific time frames if you suspected someone had, in this case Mr. Pringle, had backdated a file, you would want to look at whatever information was available with respect to that file starting with the file itself, the media it was incorporated upon, the surrounding files, and then whatever other information you had available with respect to that, the history of that file's creation, handling or deletion. Anything that touched that file.
> So to the extent that you're looking at a file that's created in 2010, you would want to look at anything

from that point forward in time that might be available to you that could help answer that question.

Q. Such as?

A. The file itself, the media it's on. Certainly you might want to look at the testimony regarding the file. If -- if you knew the system the file had been created on and that system were available, you might want to look at that.

If you had any -- any other evidence that was in existence about that file's creation, to do a thorough evaluation you'd want to look at whatever was available.

Q. And when you say if you knew the system it was created on you'd want to look at that, are you talking about the computer?

A. Assuming that the file was created on a computer. And I think that's your hypothetical, is that this is a file created by Mr. Pringle on a computer at some point in 2010. So, yeah, you would want to look at -- at whatever computer he used to create that if it were available.

(Frederiksen-Cross Dep. Tr. 109-110) (emphasis added); *see also id.* at 65-67; Gallant Dep. Tr. 215:20- 216:10, 221-222.)

The evidence on the Pringle hard drives, made unavailable by Pringle, is further material to Pringle's claim of creation and the evidence that Pringle actually copied from the remixed versions of the song "I Gotta Feeling" and merged it into his prior song. Pringle admitted to accessing and obtaining remixed versions from the Beatport competition and elsewhere. (*See* Pringle Dep. Tr. 25-29.) Frederiksen-Cross admitted that it was *technologically possible* for Pringle to have added the guitar twang to his song Take a Dive in 2009 or 2010, just that she has "seen no evidence." (Frederiksen-Cross Dep. Tr. 190.)

Q. Are you saying that it's absolutely impossible that in 2009 or 2010 Mr. Pringle added the guitar twang sequence to Take A Dive to create the (Dance Version)?

A. An absolute impossibility?

06 6 Q. Yes.
07 7 A. No, I've seen no evidence to suggest that. But I
08 8 would not say that it is an absolute impossibility.
09 9 Q. So it is possible that that could have been done?
10 10 A. Again, I see no evidence to suggest that it was
11 11 but in theory, at least, given the right set of hypothetical
12 12 facts it -- it's plausible that it could have been given the
13 13 right set of -- of facts.

In fact Frederiksen-Cross explains in detail on pages 190-197 how Pringle could do this using an ASR-10 and computer. Frederiksen-Cross also admitted that Pringle could have merged the BeatPort Stems and/or remixed versions of the same into his existing song. See Frederiksen-Cross Dep. Tr. at 196:21-24 through 201 (p. 197 "Assuming for a moment that he had obtained the specific Beatport stem with the guitar twang sequence and assuming that he had the other hardware configurations set up, that is one possible scenario where he could have input into the ASR-10 a guitar twang sequence that could then be merged to his existing song").

Plaintiff Bryan Pringle has destroyed this material evidence by disposing of his computer hard drive in January 2011. The date of destruction is particularly troublesome because it is ***well after*** the Defendants sent a preservation demand raising the issue of backdating computer files (*See* Doc 161, Dickstein Decl., Ex. J), it was in the middle of temporary restraining order and preliminary injunction proceedings initiated by Bryan Pringle where the dating of his computer files was squarely at issue (*See* Doc. 15, 73), and it was around the time that Defendants lawyers were asking about the existence and location of Pringle's hard drives as part of a Rule 26(f) conference. (*See* Doc. 110 at 10-11.)[2] The joint submission made to

[2] *See Keithley v. Homestore.com, Inc*., 629 F. Supp. 2d 972, 977 (N.D. Cal. 2008) (duty to candidly inform Court and opposing counsel about spoliation). (*See* Doc. 110 at 10-11) ("Moreover, Plaintiff's counsel has refused to even confirm the existence of certain categories of ESI, including (i) computer equipment and files related to Mr. Pringle's alleged creation of the works at issue in 1998 and 1999, (ii)

the Court at that time expressly raised the issue of Pringle copying from Defendants' work. (*See* Doc. 110.) The destruction and disposal of this computer hard drive was never disclosed by Plaintiff's lawyers until Pringle was conveniently "unable to recall" what he did with the computer hard drives. (Pringle Dep. Tr. 34:2-35:13.)

To permit Frederiksen-Cross to proffer qualified opinions "based upon the available evidence" knowing that the evidence destroyed by Pringle holds material evidence relating to that qualified opinion would be a failure to engage in the important role of the District court to exercise a "critically important…gatekeeping function" to ensure "the reliability and relevancy of expert testimony." *Jinro America Inc. v. Secure Investments, Inc.*, 266 F.3d 993 (9th Cir. 2001) (quoting *Kumho Tire Co.,* 526 U.S. at 152 and citing *Daubert,* 509 U.S. at 594–95); *Primiano,* 2010 WL 1660303, at *4; *DSU Medical Corp.,* 296 F.Supp.2d at 1146; *MySpace Inc.*, 2010 WL 4916429, at *13 (*citing Daubert,* 509 U.S. at 579-80).

Moreover, as a result of Pringle's disposal of his hard drives, the Frederiksen-Cross opinions regarding the purported dates of the computer files are based upon incomplete data, and are inadmissible. *See, U.S. v. City of Miami, Fla.*, 115 F.3d 870, 873-74 (11th Cir. 1997) (reversing trial court's adoption of expert testimony that was based on incomplete data); *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 423 (5th Cir. 1987) (excluding expert opinion based on incomplete data); *Brown v.*

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back up discs, old hard drives or other ESI related to Mr. Pringle's alleged creation of these works, and (iii) computer systems used by Mr. Pringle subsequent to his alleged creation of the works at issue, which may contain evidence refuting the alleged creation dates and showing that Mr. Pringle had access to Defendants' works prior to creating his own works. Plaintiff's refusal to engage in a meaningful discussion of these ESI issues has made it impossible for Defendants to know what additional categories of ESI will need to be produced in native format or forensically examined, or to assess the timing or costs involved in possible review of native files or forensic examination.")

Parker–Hannifin Corp., 919 F.2d 308, 311-12 (5th Cir. 1990) (expert had incomplete data about the specific occurrence in question and, while expert's theory might have explained the occurrence, other theories explain it equally well; therefore, expert testimony amounts to speculation and is of no assistance to the jury, and was properly excluded by the trial court); *Dreyer v. Ryder Automotive Carrier Group, Inc.*, 367 F. Supp. 2d 413, 446 (W.D.N.Y. 2005) (excluding expert testimony because it was "founded upon unverified and therefore potentially incomplete and inaccurate data" and "lack of compliance with Rule 702's requirement that data upon which a proposed expert's testimony is based be 'sufficient'").

3. **Frederiksen-Cross Declaration Inadmissible Under The Assistance Prong Of *Daubert* And Rule 703 Fed. R. Evid.**

Pringle submits the Declaration of Frederiksen-Cross at paragraphs 10-14, 21-44 in an attempt to argue Pringle's lawyers' theories regarding the various inadmissible hearsay conversations with Pringle, with Pringle's lawyers, and with various non-parties. None of these paragraphs are based upon Frederiksen-Cross' special expertise as a computer forensic expert, nor are they based upon her personal knowledge. These paragraphs are simply inadmissible evidence under 601-602, 801-802, 805 Fed. R. Evid. Rule 703, and the advisory committee notes regarding the same, make it clear that such inadmissible evidence does not become admissible simply because it is relied upon by an expert. See, Rule 703 Fed. R. Evid. Advisory Committee notes.

Moreover, under *Daubert*, expert testimony is only admissible if it will "assist the trier of fact." *Daubert*, 509 U.S. at 591. To meet the assistance prong of *Daubert*, the testimony must concern matters that are beyond the understanding of the average lay person. *Mesfun v. Hagos*, 2005 WL 5956612 (C.D. Cal. 2005)

(citing *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) and *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997)). "Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." *Frazier*, 387 F.3d at 1262-63 (citing 4 *Weinstein's Federal Evidence* § 702.03[2][a]).

4. Frederiksen-Cross Testimony On Pringle's Intent When Disposing Of His Computer Hard Drives Is Inadmissible.

Pringle has disposed of two computer hard drives during the pendency of this litigation. Pringle attempts to use a computer forensic expert, Frederiksen-Cross to testify about Pringle's mental state and intent when Pringle discarded each of his hard drives. (Cross Decl. ¶ 43.) This is classic inadmissible expert testimony. *U.S. Gypsum Co. v. Lafarge North America Inc.*, 670 F. Supp. 2d 768, 775-76 (N.D. Ill. 2009) (Computer forensics expert's testimony regarding the mental state of parties was not admissible, including with respect to the spoliation of documents. The court stated that "[t]here is nothing before the court to suggest that [the expert] is particularly qualified to understand the mental attitudes of others. Even assuming he were, he is able to render an opinion on intent only by drawing inferences from the evidence. Such opinions merely substitute the inferences of the expert for those the jury can draw on its own"); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 643 F. Supp. 2d 482. 505 (S.D.N.Y. 2009) ("Both parties' experts will provide opinions crucial to this highly technical case, but decisions concerning whether the facts presented fulfill the legal requirements of knowledge, reasonableness, irresponsibility, sufficiency, and intent remain the exclusive province of the jury"). The opinion lacks foundation as well. Frederiksen-Cross has never met Mr. Pringle (Frederiksen-Cross Dep. Tr. at 70:1-3), has had only two short phone conversations with him (Frederiksen-Cross Dep. Tr. at 69) and was

retained only after the destruction of the hard drives had occurred (Frederiksen-Cross Dep. Tr. at 7:16-23).

Moreover, Frederiksen-Cross changed her opinion set forth in paragraph 43 after having her memory refreshed with Defendants' July 23, 2010 preservation of evidence request, and acknowledged that Pringle *was* on notice to preserve his computer equipment. Frederiksen-Cross made handwritten changes to her declaration in the middle of her deposition, making changes to this paragraph 43 "to be more fair to the truth." (Frederiksen-Cross Dep. Tr. 281-291.) Frederiksen-Cross expected the revised declaration to be submitted to the Court. (*Id.* at 290.)

B. Frederiksen-Cross' Declaration Is Inadmissible As A Result Of Plaintiff Bryan Pringle's Spoliation Of Evidence.

Frederiksen-Cross' testimony is offered to authenticate computer files that purportedly show that Pringle created "Take a Dive" (Dance Version) in 1999. But because Pringle spoliated computer evidence that would directly undercut the authenticity of that evidence, Frederiksen-Cross' incomplete and necessarily unreliable testimony must be stricken. (Frederiksen-Cross Dep. Tr. 104:10-109:1, 118:20-24-120, 122-123, 128-130.)

A Court may impose sanctions as part of its inherent powers that are governed not by rule or by statute but by the control necessarily vested in the Court to manage its own affairs so as to achieve the orderly and expeditious disposition of its cases. *See Ruben Perez v. Vezer Industrial Professionals*, 2011 US Dist. LEXIS 136827 (E.D. Cal. Nov. 29, 2011). If a party breaches its duty to preserve evidence, the opposite party may move the court to sanction the party destroying evidence. *Perez, citing, In RE Napster, Inc. Copyright Litigation*, 462 F. Supp.2d 1060, 1066 (N.D. Cal. 2006).

Any attempt by Pringle or his lawyers to side-step the seriousness of this misconduct, which undercuts the integrity of the evidence central to Pringle's claim and which Frederiksen-Cross purports to authenticate, should be rejected. Pringle

received repeated direct demands to preserve all of his computer equipment. (Dickstein Decl., Ex. J.) Defendants' July 24, 2010 preservation letter stated in pertinent part:

> I hope you share our genuine concerns regarding the computer files Mr. Pringle is using to try to convince you (and us) that his dates are what he is holding them out to be. I am sure you are aware that there are easy ways for Mr. Pringle to modify the Creation, Accessed and Modified dates of his computer files, There are software programs available on the internet that permit it, and there are articles all over the web with step by step instructions on how to alter these dates.
>
> Since he is an unsolicited client from Texas that you have never represented before or met before, I'm not sure how you can confront Mr. Pringle with this information without running the risk of him altering or tampering with computer files in the future or trying to fix things. Given that you have advanced a claim on his behalf, I am sure you have already advised Mr. Pringle of his duty to preserve all computer records. Out of caution, before Mr. Pringle is confronted with the topic of potential altered dates, et cetera, it is likely appropriate for you to ***have an independent forensic computer person image his entire hard drive, et cetera, to capture and preserve everything on his system before you confront him. It will be something we will necessarily request in discovery should this case ever reach a filed action.*** I leave the preservation mechanism to your choice as long as there is a mechanism put in place to preserve the evidence before he is alerted to concerns over his file dating practices and inconsistencies. (emphasis added)

Plaintiff's counsel then agreed to preserve the evidence in July 2010, but none of Pringle's computer experts were ever asked to make a forensic copy of his hard drives. Pringle's computer expert David Gallant, who was retained in May 2010, testified:

> Q. Are you aware that ***certain of Mr. Pringle's***
> ***03 3 hard drives that were used in 2010 and 2011 were***
> ***04 4 discarded?***
> ***05 5 A. Yes.***
> 06 6 Q. Okay. And it would be accurate to say that you

07 7 were never asked to make a forensic copy of those hard
08 8 drives before they were discarded.
09 9 MR. DICKIE: Objection. Asked and
10 10 answered repetitively. Now it's just into harassment.
11 11 ***A. As I've stated, I have never been asked to make***
12 12 a forensic copy of any hard drive belonging to
13 13 Mr. Pringle.
14 14 Q. Have you ever gone and looked at any of
15 15 Mr. Pringle's computer equipment?
16 16 A. No.
17 17 Q. Have you ever visited Mr. Pringle's home to see
18 18 any of his computer equipment?
19 19 A. No.
(emphasis added).

(*See also* Cross Dep. Tr. 84:6-15) (acknowledging that no image copies of Pringle's computer hard drives were ever made).

Pringle first discarded a hard drive in January 2011.[3] This was during the time that Defendants' counsel were trying to obtain information from Pringle's counsel about the status of Pringle's ESI during a Rule 26(f) meeting. Pringle's lawyers had an obligation to participate in this conference in good faith, and they

[3] This hard drive was used between Jan 2010 and January 2011 when Pringle removed it and sent it to the manufacturer for replacement. (Frederiksen-Cross Dep. Tr. 118:20-24-120.) This is the hard drive that was in existence when Pringle sought a TRO and when questions regarding backdating of computer files were raised. (*See* Doc. 15, TRO Declaration.) The computer hard drive disposed of in January 2011 was the computer hard drive that was in existence when the "correct" NRG file surfaced for the first time. This is also the computer hard drive that was in use when the deposit copy was created, and this is the hard drive that Pringle had when Pringle made isolated Guitar twangs for Stewart and Rubel. From Jan 2010 to Jan 2011 Beatport stems and remixes using Beatport stems were available for download at various places on the Internet. Pringle testified that he downloaded remixes from this competition. This relates directly to the issue of Pringle copying Defendants.

had a duty to candidly inform the Court and opposing counsel about the status of Mr. Pringle's ESI, including any that had been destroyed. *See Keithley v. Homestore.com, Inc*., 629 F. Supp. 2d 972, 977 (N.D. Cal. 2008).

The Court was informed of Plaintiff's counsel's lack of cooperation in discovery relating to ESI, including computer hard drives:

> Defendants submit that there has not been the required Rule 26(f) conference on the topic of Mr. Pringle's ESI, thereby making it impossible to formulate appropriate ESI procedures. Without a full discussion of these issues and implementation of appropriate ESI procedures, Defendants' ability to obtain important evidence without engaging in expensive and time-consuming motion practice (which Plaintiffs' proposal would entail), will be impaired. In particular, Defendants believe that metadata for many files will be required, and that in addition to sound and music files, there are other categories of ESI in Mr. Pringle's possession, that will need to be produced in native form or forensically examined. ***Moreover, Plaintiff's counsel has refused to even confirm the existence of certain categories of ESI, including (i) computer equipment and files related to Mr. Pringle's alleged creation of the works at issue in 1998 and 1999, (ii) back up discs, old hard drives or other ESI related to Mr. Pringle's alleged creation of these works, and (iii) computer systems used by Mr. Pringle subsequent to his alleged creation of the works at issue, which may contain evidence refuting the alleged creation dates and showing that Mr. Pringle had access to Defendants' works prior to creating his own works.*** Plaintiff's refusal to engage in a meaningful discussion of these ESI issues has made it impossible for Defendants to know what additional categories of ESI will need to be produced in native format or forensically examined, or to assess the timing or costs involved in possible review of native files or forensic examination. (emphasis added).

(Joint Rule 26(f) Report to Court, Doc. 110 at 10-11) It was improper for Plaintiff and his counsel during the Rule 26(f) meeting not to disclose the fact that Pringle had discarded one of his hard drives in January 2011. *See Keithley*, 629 F. Supp. 2d at 977.

On February 24, 2010, the Court "declined at [that] time to order the parties to conduct staged discovery or to formally modify the manner in which depositions

are scheduled. However, the Court "expect[ed] counsel to meet and confer regarding discovery issues, including both scheduling and efficient ordering of discovery." (Doc. 115.)

Notwithstanding the Court's Order, counsel continued to conceal Mr. Pringle's disposal of his hard drive in January 2011. Because that disposal was not disclosed until August 2011, eight months later, the Court and Defendants are now faced with Mr. Pringle's professed "lack of recollection" as to exactly what he did with this discarded hard drive. (Pringle Dep. Tr. 34:2-35:13.)

Pringle's concealment of his destruction of computer evidence continued. In March 2011, Defendants served Interrogatories and Document Requests concerning information residing on Pringle's hard drives, including information used to create variations of "Take A Dive" Dance Version in 2010. Neither Pringle (who verified the responses) nor his counsel disclosed the fact that Pringle had discarded the his hard drives.

In July 2011, as part of the meet and confer process, the Plaintiff's lawyers expressly offered up an inspection of Mr. Pringle's then existing hard drive, still concealing the fact that two of the relevant hard drives had already been discarded, one in January 2010, and another in January 2011. (*See* Dickstein Decl., Ex. J.) On the eve of the scheduled inspection, on August 1, 2011 Pringle removed yet another computer hard drive and allegedly sent it back to the manufacturer for replacement. Pringle saved only the files he deemed "important" to him and his case. Defendants were not offered the same opportunity.

Pringle's disposal of the computer hard drives destroys material evidence relevant to this case.

- All experts agree that Pringle's NRG files do not contain a creation date for the underlying music files placed on this CD ROM. (Gallant Dep. Tr. 204:12-24-206:1-3.)

- All experts agree that the NRG image files can be backdated, manipulated or set to any date a person may want. (Gallant's Dep. Tr. 50:15-53:24; Frederiksen-Cross Dep. Tr. 53-66, 140:19-141:22.)
- All experts agree that, when you are trying to determine if a file has been backdated, analysis ***of the computer that was used*** to make the disk thought to be backdated, should be evaluated. (Gallant Dep. Tr. 215:20-216:10, 221-222; Frederiksen-Cross Dep. Tr. 40:3-49, 65-67, 97-102, 109-118.)

Through his destruction of his computer hard drives, Pringle has willfully destroyed evidence relevant to the very basis for his claim. This Court has the authority under Rule 26 and Rule 37 Fed. R. Civ. P. to sanction Pringle by dismissal of his claim, or exclusion of evidence (such as the NRG file and all testimony regarding the same). Defendants submit that dismissal is appropriate in this case, but at a minimum Pringle should be precluded from presenting expert testimony supporting his theory of the dating of the computer files. The sanction is appropriate because Pringle has made the opinions of his own experts unreliable and incomplete.

C. Frederiksen-Cross Declaration Is Inadmissible As A Result Of Plaintiff Bryan Pringle's Failure To Disclose, To Supplement, An Earlier Response, Rule 37 Fed. R. Civ. P.

Rule 37 Fed. R. Civ. P. prevents a plaintiff from refusing to provide evidence during discovery but then attempt to use the withheld evidence to oppose a motion for summary judgment. In this case Pringle was served with Defendant Headphone Junkie's Interrogatory No. 19 which asked Pringle to provide his knowledge of the actual creation dates for the NRG files he was asserting were his creation files. Pringle objected to providing ***his*** knowledge and instead merely referenced the intent to rely on the expert testimony of David Gallant. David Gallant in turn attempts to rely upon hearsay conversations with Bryan Pringle that were not

disclosed in response to the interrogatory. Plaintiff's failure to provide an answer to headphone Junkie's Interrogatory No. 19 bars his ability to present the evidence at trial, including through Frederiksen-Cross.

D. Frederiksen-Cross Is Not A Fact Witness, And Thus Her Statements Lack Foundation And Are Hearsay.

Although Ms. Frederiksen-Cross obviously has no knowledge of the underlying events involved in this action, certain portions of her Declaration discuss the circumstances under which Mr. Pringle destroyed his computers. Ms. Frederiksen-Cross has no personal knowledge of these events, nor does she use them as party of any expert analysis. She simply recounts events that supposedly took place, according to Plaintiff. These statements are thus inadmissible. *See* Fed. R. Evid. 104, 602 (lack of foundation), 801-802 (hearsay), 403 (prejudice, confusion of the issues, unreasonably duplicative).

E. Impermissible Use Of Frederiksen-Cross Declaration Beyond That Permitted Under Rules 702 and 703 Fed. R. Evid.

The Frederiksen-Cross Declaration has been submitted and Plaintiff is attempting to use the statements made in the declaration to try to admit otherwise inadmissible evidence. The use of the Frederiksen-Cross Declaration for this improper purpose is objected to under Rule 703 Fed. R. Evid. As made clear in the Advisory Committee notes in the 2000 amendments:

> Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted.

Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1261-62 (9th Cir. 1984) ("Rule 703 merely permits such hearsay, or other inadmissible evidence, upon which an expert properly relies, to be admitted to explain the basis of the expert's opinion. It does not allow the admission of the reports to establish the truth of what they assert.

. . . Upon admission of such evidence, it then, of course, becomes necessary for the court to instruct the jury that the hearsay evidence is to be considered solely as a basis for the expert opinion and not as substantive evidence.") (citations omitted); *U.S. v. 0.59 Acres of Land*, 109 F.3d 1493, 1497 (9th Cir. 1997) ("[I]nadmissible evidence under the Rules of Evidence cannot be properly admitted simply by attachment to an appraiser's report.").

INDIVIDUAL OBJECTIONS

Even if this Court does not disregard the entirety of the Frederiksen-Cross Declaration, various portions are objectionable and inadmissible as specified below.

Frederiksen-Cross Declaration	Evidentiary Objections
1. I am the Senior Managing Consultant of Johnson-Laird, Inc. ("JLI"). JLI is an Oregon corporation that provides consulting services to computer hardware and software manufacturers and computer-related technical assistance to the legal profession in the United States, Canada, Japan, Singapore, and Europe. JLI specializes in providing consulting services to corporations and attorneys on intellectual property matters (such as "clean room" development procedures, forensic analysis of computer-related evidence, copyright and patent infringement, and analysis with respect to misappropriation of trade secrets) and performing assessment of computer software and Techno-archeology™ (the analysis of software development projects). JLI also specializes in technical due-diligence services in	

Frederiksen-Cross Declaration	Evidentiary Objections
the context of software audits, mergers, and acquisitions.	
2. My background includes over 36 years experience with software design, programming, performance optimization, problem diagnosis, and system administration of hardware, operating systems, application software, and database management systems. I am familiar with a wide variety of operating systems, development platforms, programming languages, revision control systems used for software development, and software development standards and practices.	
3. I have extensive experience with tools and techniques used for forensic evidence preservation, computer forensics investigation, and litigation support services. My experience includes extensive use of system monitoring tools, hardware monitors, memory dumpers, debugging environments, disassemblers, and reverse compilers. I am also familiar with tools and techniques used by individuals, businesses, and large corporations for system backup, recovery, and archival in a wide variety of hardware and software platforms. A copy of my CV is attached as Exhibit A to this declaration.	
4. I have personal	Lack of Foundation 601-602 Fed. R. Evid.

Frederiksen-Cross Declaration	Evidentiary Objections
knowledge of the facts stated in this Declaration and if called as a witness, I could and would testify competently regarding the following facts.	Declaration states facts provided to her by others and are not based upon her personal knowledge.
5. I have been asked to prepare this declaration at the request of counsel for Plaintiff Bryan Pringle in the above-captioned matter.	
6. In this declaration I have been asked by Plaintiff's counsel to provide my professional opinion with respect to analysis and opinions described in the declarations of Defendants' experts Erik Laykin and Paul Geluso. Specifically, I have been asked to address:	
a) Mr. Laykin's allegations that Mr. Pringle may have falsified a CD which contains a copy of his music for "Take A Dive (Dance Version)";	
b) Mr. Laykin's opinions with respect to whether Mr. Pringle deliberately spoliated evidence to obscure the origin of his music; and	Objection under 702, improper for Frederiksen-Cross to opine about Pringle's intent and mental state. *U.S. Gypsum Co. v. Lafarge North America Inc.*, 670 F. Supp. 2d 768, 775-76 (N.D. Ill. 2009) (Computer forensics expert's testimony regarding the mental state of parties was not admissible, including with respect to the spoliation of documents. The court stated that "[t]here is nothing before the court to suggest that [the expert] is particularly qualified to understand the mental attitudes of others. Even assuming he were, he is able to render an opinion on intent only by drawing inferences from the

Frederiksen-Cross Declaration	Evidentiary Objections
	evidence. Such opinions merely substitute the inferences of the expert for those the jury can draw on its own."); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 643 F. Supp. 2d 482. 505 (S.D.N.Y. 2009) ("Both parties' experts will provide opinions crucial to this highly technical case, but decisions concerning whether the facts presented fulfill the legal requirements of knowledge, reasonableness, irresponsibility, sufficiency, and intent remain the exclusive province of the jury").
c) The analysis techniques used by Mr. Geluso in the context of his analysis to determine the true origin of the Black Eyed Peas' song "I Gotta Feeling."	*Daubert* Objection and objection under 702 Fed. R. Evid. Frederiksen-Cross not qualified for musicological opinions. Frederiksen-Cross Dep. Tr. at 32:10-32:16; 182:8-183:6.
7. This declaration is based on the evidence that has been made available to me and the analysis I have performed to date. In order to prepare this declaration I have reviewed the initial complaint, the declarations of Messrs. Pringle, Laykin, Geluso, Warner, Rubel, Riesterer, and Etchart, the report of Mr. Gallant, depositions transcripts for Mr. Riesterer and Mr. Pringle, and information relating to the use of the Beatportal.com web site and the Black Eyed Peas Remix contest. I have also reviewed portions of the electronic music files produced as evidence in this matter as well as documents relating to the filing of Mr. Pringle's copyright and the loss or replacement of computer hard drives and music equipment once	Frederiksen-Cross opinions should be excluded because they are based upon incomplete data. *U.S. v. City of Miami, Fla.*, 115 F.3d 870, 873-74 (11th Cir. 1997) (reversing trial court's adoption of expert testimony that was based on incomplete data); *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 423 (5th Cir. 1987) (excluding expert opinion based on incomplete data); *Brown v. Parker–Hannifin Corp.*, 919 F.2d 308, 311-12 (5th Cir. 1990) (expert had incomplete data about the specific occurrence in question and, while expert's theory might have explained the occurrence, other theories explain it equally well; therefore, expert testimony amounts to speculation and is of no assistance to the jury, and was properly excluded by the trial court); *Dreyer v. Ryder Automotive Carrier Group, Inc.*, 367 F. Supp. 2d 413, 446 (W.D.N.Y. 2005) (excluding expert

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owned by Mr. Pringle. A complete list of the materials I reviewed is attached to this report as Exhibit B.	testimony because it was it was "founded upon unverified and therefore potentially incomplete and inaccurate data" and "lack of compliance with Rule 702's requirement that data upon which a proposed expert's testimony is based be 'sufficient'").
8. For the convenience of the reader, I will present a summary of my opinions, followed by a timeline of events and then the bases for my opinions.	
9. Although it is true that dates on a computer file or a computer CD can be modified, Mr. Laykin does not present even a single piece of evidence that proves, or even suggests that any file dates were modified on the Pringle CD containing the Disk05.NRG file ("Pringle CD"). Nothing in the available evidence I have reviewed suggests any such tampering.	Frederiksen-Cross bases her opinion on incomplete data and thus it should be excluded. See also spoliation objection. *Daubert* Objection and objection under Rule 703 Fed. R. Evid. to the lack of qualifications for evaluation of musicological analysis.
10. Mr. Laykin appears to ascribe a sinister purpose to Mr. Pringle's disposal of failed hardware. Nothing in the evidence I have reviewed suggests that Mr. Pringle deliberately spoliated evidence or sought to avoid the responsibility of preserving relevant files and media.	*Daubert* Objection. Frederiksen-Cross cannot testify as to Pringle's mental state or intent. *U.S. Gypsum Co. v. Lafarge North America Inc.*, 670 F. Supp. 2d 768, 775-76 (N.D. Ill. 2009) (Computer forensics expert's testimony regarding the mental state of parties was not admissible, including with respect to the spoliation of documents. The court stated that "[t]here is nothing before the court to suggest that [the expert] is particularly qualified to understand the mental attitudes of others. Even assuming he were, he is able to render an opinion on intent only by drawing inferences from the evidence. Such opinions merely substitute

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	the inferences of the expert for those the jury can draw on its own."); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 643 F. Supp. 2d 482. 505 (S.D.N.Y. 2009) ("Both parties' experts will provide opinions crucial to this highly technical case, but decisions concerning whether the facts presented fulfill the legal requirements of knowledge, reasonableness, irresponsibility, sufficiency, and intent remain the exclusive province of the jury").
11. Mr. Laykin's assertion that Mr. Pringle failed to preserve or produce any backup from his computer system is false and misleading.	Pursuant to Rule 106 Fed. R. Evid. the Court should consider the following page and line numbers of the deposition of Frederiksen-Cross 84 ln 6-15 (no images of hard drive made); and Gallant Dep. Tr. 35-37:3. (Never asked to make forensic copy).
12. Mr. Laykin's assertion that Mr. Pringle failed to preserve a proper forensic backup is misleading in so far as it suggests that Mr. Pringle possessed the knowledge, training, or tools required to perform such a backup.	Pursuant to Rule 106 Fed R. Evid. the Court should consider the following portions of the deposition of Frederiksen-Cross 84 ln 6-15 (no images of hard drive made); and Gallant Dep. Tr. 35-37:3. (Never asked to make forensic copy). Inadmissible speculation not based on personal knowledge and unrelated to any expert analysis. Fed. R. Evid. 602, 702.
13. The comparison described in paragraphs 18-20 of Mr. Geluso's declaration lacks scientific rigor and does not provide proof that "I Gotta Feeling" was derived from "David Pop Guitar." Further, the "David Pop Guitar" files upon which Mr. Geluso relies in forming his opinion contain references to sound devices that did not exist at the time the "David Pop Guitar" files were purportedly created.	*Daubert* objection above; Inadmissible under Rules 702-703 because Frederiksen-Cross is not qualified as a musicologists or sound recording expert. Pursuant to Rule 106 Fed R. Evid the Court should consider the following portions of the deposition of Frederiksen-Cross Dep. Tr. 32:10-32:6, 182:8-183:6; 197:20-200:11; 214:5.

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14. The analysis described in paragraphs 29-31 of Mr. Geluso's declaration cannot prove that the guitar samples in Mr. Pringle's file are derived from a guitar twang sequence that was available on Beatportal.com during the "I Gotta Feeling" Re-Mix Contest.	*Daubert* Objection above; Inadmissible under Rules 702-703 because Frederiksen-Cross is not qualified as a musicologist or as a sound recording expert. Pursuant to Rule 106 Fed R. Evid the Court should consider the following portions of the deposition of Frederiksen-Cross Dep. Tr. 32:10-32:6, 182:8-183:6; 196:21-197:13; 313:16-320:18.
14.[sic] Although it is true that dates on a computer file or a computer CD can be modified, Mr. Laykin does not present even a single piece of evidence that proves, or even suggests that any file dates were modified on the Pringle CD.	*Daubert* Objection above; Inadmissible pursuant to Rule 37 Fed. R. Civ. P. for spoliation of evidence.
15. Nothing in the available evidence suggests any such tampering. The CD in question has four ".NRG" files that contain music and also a subdirectory with 134 photos in "JPEG" format. The manufacture date of the physical CD recording media, the creation and modification dates of the music files and JPEG photographs stored on the media, and the metadata contained within the 134 jpeg files are all consistent with Mr. Pringle's testimony that his files were created in 1999.	*Daubert* Objection above; Inadmissible pursuant to Rule 37 Fed. R. Civ. P. for spoliation of evidence. Pursuant to Rule 106 Fed R. Evid the Court should consider the following portions of the deposition of Frederiksen-Cross Dep. Tr. 37:3, 77.
16. As a part of my analysis I independently reviewed both the file system dates generated by the operating system and also portions of the embedded metadata contained within these files. The .NRG files have embedded metadata	This testimony should be stricken because of Pringle's spoliation of relevant evidence. Pursuant to Rule 106 Fed R. Evid the Court should consider the following portions of the deposition of Frederiksen-Cross Dep. Tr. 146:24-163:1; 169:10.

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consistent with their creation on an ASR-10 keyboard, as can be seen in the excerpt below from file DISK05.NRG:	
17. The files created by the ASR-10 keyboard do not contain embedded date information, but the file system dates recorded by the operating system for the NRG files on this CD are shown below:	
18. The photographs contained in the folder "Promo Photos" have embedded metadata that identifies the date the photos were taken, as well as the type of camera used. An example of one of the photographs (P9080056.JPG) is shown below, followed by an excerpt of the metadata that is embedded within the file:	This testimony should be stricken because of Pringle's spoliation of relevant evidence. Pursuant to Rule 106 Fed R. Evid. the Court should consider the following portions of the deposition of Frederiksen-Cross Dep. Tr. 146:24-169:10.
19. The operating system file dates associated this file, showing the dates it was stored and last modified are shown below:	This testimony should be stricken because of Pringle's spoliation of relevant evidence. Pursuant to Rule 106 Fed R. Evid. the Court should consider the following portions of the deposition of Frederiksen-Cross Dep. Tr. 146:24-169:10.
20. Via Google searches I was also able to independently verify that the Olympus C900Z (also called a D400Z) digital camera used to take this photo was released in 19983.	Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted. *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984) ("Rule 703 merely permits such hearsay, or other inadmissible evidence, upon which an expert properly relies, to be admitted to explain the basis of

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	the expert's opinion. It does not allow the admission of the reports to establish the truth of what they assert. . . . Upon admission of such evidence, it then, of course, becomes necessary for the court to instruct the jury that the hearsay evidence is to be considered solely as a basis for the expert opinion and not as substantive evidence") (citations omitted); *U.S. v. 0.59 Acres of Land*, 109 F.3d 1493, 1497 (9th Cir. 1997) ("[I]nadmissible evidence under the Rules of Evidence cannot be properly admitted simply by attachment to an appraiser's report").
21. Mr. Laykin suggests Mr. Pringle may have faked the evidence of his music's origin by creating a CD on old media with backdated files. In constructing this hypothetical Mr. Laykin appears to rely on the following chain of assumptions, but does not provide any evidence that supports even one of his hypothetical requirements:	
a) He assumes that Mr. Pringle wanted to create a backdated NRG file;	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation of the hard drives.
b) He assumes Mr. Pringle retained blank CD recording media for approximately ten years, and was also able to somehow determine the age of this media to identify how old it was;	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation of the hard drives.
c) He assumes that the blank CD recording media was stored in an environment with sufficient protection from heat and damage that it would still be useable	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation of the hard drives.

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after ten years in storage;	
[fn4] In my own experience, CD media from the mid to late 1990's was very sensitive to heat and other environmental conditions. If stored or handled improperly the media itself became very unreliable and was subject to both warping and delamination.	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation of the hard drives. Objection under Rule 703 Fed. R. Evid. and advisory committee notes. Statement inadmissible. Ms. Frederiksen-Cross has no demonstrated expertise in the physical properties of optical media such as CDs, including their rate of failure and degradation over time.
d) He must also assume that Mr. Pringle discovered a copy of the guitar twang from an Internet source, that the guitar twang sequence coincidentally matched a song that Mr. Pringle wrote and copyrighted a decade before, and that Mr. Pringle was able to integrate the guitar sequence somehow with the music for "Take A Dive" that Mr. Pringle had already composed, in order to create a new recording that he would then backdate;	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation of the hard drives.
e) He assumes that Mr. Pringle deliberately set the computer date back to 1999, so that the files he wrote would have operating system dates from 1999;	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation of the hard drives.
f) He assumes that Mr. Pringle coincidentally kept at least 134 contemporaneous photos, including photos of himself, whose external file dates and internal metadata dates are from September	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation of the hard drives.

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6th and 8th 1999.	
22. In constructing his hypothetical, Mr. Laykin fails completely to address the July 29, 1998 copyright registration of Mr. Pringle's music. The materials deposited with the U.S. Copyright office as a part of the 1998 filing included a deposit copy with an earlier version of Mr. Pringle's Song "Take A Dive." The deposit materials provide uncontested proof that Mr. Pringle had already written at least one version of "Take A Dive" by the time he filed for a copyright on his music in 1998.	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation of the hard drives.
23. The version of "Take A Dive" that was deposited with the copyright office in 1998 lacks the "guitar twang" that has been the topic of much analysis in this litigation, but nonetheless is clearly identifiable as the same song. See for example the expert report of Alex Norris (Nov. 28, 2011) at paragraph 5:	With respect to opinion regarding "the same song" See Daubert Objection. Inadmissible under 702-703 for lack of qualification and reliability or application of scientific principles. Pursuant to Rule 106 Fed. R. Evid. See the following portions of Frederiksen-Cross Dep. Tr. 32:10-32:16; 182:8-183:6.
After reviewing both the version of "Take A Dive" that I heard on YouTube and the version of "Take A Dive" I heard from the CD entitled "Deadbeat Club," I have determined that the version of "Take A Dive" that I first heard on YouTube which was recorded in 1999 is an obvious derivative version of this version that I heard on "Deadbeat Club," which was recorded in 1998. The exact same ambient sounds at the beginning of	*Daubert* Objection. Ms. Frederiksen-Cross admittedly has no experience in musicological analysis, and no basis to conclude what is "an obvious derivative version". Inadmissible under 702-703 for lack of qualification and reliability or application of scientific principles. Pursuant to Rule 106 Fed. R. Evid. See the following portions of Frederiksen-Cross Dep. Tr. 32:10-32:16; 182:8-183:6.

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both versions, the identical keyboard motifs at :09 seconds, the identical bass parts, the identical chord progression, the identical sonic sweeps at similar points in time of both tracks, the identical changes in the bass parts at similar points in each track, the identical key, the identical tempo, and the identical timbre's with regard to all of the aforementioned similarities indicate to me that these two tracks are the same song.	
24. I have listened to both versions of the song myself, and I concur with Mr. Norris' opinion.	*Daubert* Objection. Ms. Frederiksen-Cross admittedly has no experience in musicological or sound recording analysis. Inadmissible under 702-703 for lack of qualification and reliability or application of scientific principles. Pursuant to Rule 106 Fed. R. Evid. See the following portions of Frederiksen-Cross Dep. Tr. 32:10-32:16; 182:8-183:6.
25. Mr. Laykin does not address the problems this pre-existing version of "Take A Dive" poses for his hypothetical. In paragraph 32 of his declaration, Mr. Laykin states:	*Daubert* Objection. Inadmissible under 702-703 for lack of qualification and reliability or application of scientific principles. Pursuant to Rule 106 Fed. R. Evid. See the following portions of Frederiksen-Cross Dep. Tr. 32:10-32:16; 182:8-183:6.
Pringle's disposal of his 2009 and 2010 hard drives also prevented us from examining his recent user activity, which could not only include a review of unallocated space, but also of temporary Internet	

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files and other artifacts, which would provide insight into his activities at that time. This activity could show that the music files in question were actually downloaded from the Internet in 2009 or 2010, after the release of "I Gotta Feeling," and subsequently backdated and/or modified to appear as though they had been created in 1999.	
26. This statement appears to be baseless speculation, and embraces an assumption that Mr. Pringle discovered a song that had a guitar twang sequence that fit perfectly into the already existing music for "Take A Dive".	*Daubert* Objection; with respect to "fit perfectly" opinion, Frederiksen-Cross is not qualified to offer expert musicological or sound recording opinion testimony.
27. Mr. Laykin's hypothetical also necessarily assumes that Mr. Pringle located and downloaded a version of "I Gotta Feeling" that included only the guitar twang sequence, or that Mr. Pringle was somehow able to redact all other elements of the hypothetically downloaded music file. Mr. Laykin's analysis provides no factual basis to suggest that any such download ever occurred, and provides no explanation of how the guitar twang sequence could be isolated.	*Daubert* objection; Ms. Frederisken-Cross has no experience with musicological or sound recording analysis. Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation. This statement is based on insufficient data insofar as Mr. Frederiksen-Cross has not even attempted to determine whether the musical parts of "I Gotta Feeling" are available elsewhere on the Internet, and whether Mr. Pringle could have the isolated guitar twang sequence from those other sources and merged it into his 1998 song "Take a Dive."
28. Mr. Laykin's hypothetical also fails to address whether or how Mr. Pringle could have imported the downloaded materials into the ASR-10 keyboard,	*Daubert* objection; Ms. Frederisken-Cross has no experience with musicological or sound recording analysis. Frederiksen-Cross' opinion should be

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which I understand cannot directly read in or manipulate common sound file formats such as MP3 or .WAV files.	barred as a result of Pringle's spoliation.
29. In paragraph 29 of his November 17, 2011 declaration, Mr. Laykin states that:	
In my experience as a computer forensic investigator, I find it highly circumspect that an individual such as Pringle, who claims to rely upon computer technology for his craft of creating digital music, has failed to maintain any of his computers which would have a digital relationship of some sort to the files in question. Not only are backups and archives unavailable, which alone is highly unusual, but even his more recent computers used in 2009 and 2010 are unavailable for examination. Through Pringle's reluctance or inability to provide any of these original computers, he has prevented the files residing on the NRG discs from ever being authenticated or disproved as genuine.	
30. Mr. Laykin' s assertion that he finds "circumspect" the fact that Mr. Pringle "failed to maintain any of his computers" ignores critical facts from both the timeline of events and documentary evidence that provide insight into the reasons that Mr. Pringle no longer has certain materials. In choosing to ignore factual evidence Mr. Laykin	*Daubert* Objection; Ms. Frederisken-Cross has no experience with musicological or sound recording analysis. Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation. This statement should be stricken as an improper statement of Plaintiff's mental state in spoliating evidence.

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seems to willfully ascribe malicious intent to circumstances that have a more benign explanation.	
31. The evidence most likely to be dispositive to Mr. Pringle's copyright case was music equipment that was stolen from his storage unit in 2000. This was the equipment that Mr. Pringle used when creating "Take A Dive" and "Take A Dive (Dance Version)." As such it would be likely to contain the most relevant information with respect to the development of Mr. Pringle's music.	*Daubert* objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation. Inadmissible under Rule 703 Fed. R. Evid. See advisory Committee Notes. Frederiksen-Cross' statement that this was the equipment used is not evidence and is refuted by other evidence. See also under Rule 106 Fed R. Evid. deposition testimony of Gallant regarding hard drives not part of the police report. Gallant Dep. Tr. at 78:6-80:20.
32. The theft of Mr. Pringle's recording hardware in 2000 is documented in a police report, and therefore the fact that Mr. Pringle no longer possessed this equipment is irrelevant to any spoliation issue. The theft occurred years before this litigation was pending, and the police report dated October 19, 2000 provides a record that confirms the theft occurred. The police report includes a list of stolen musical equipment, including an [L]Ensoniq keyboard and an external SCSI hard drive enclosure that could be used with ASR-10 keyboard.	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation. Inadmissible under Rule 703 Fed. R. Evid. See advisory Committee Notes. See also under Rule 106 Fed R. Evid. deposition testimony of Gallant regarding hard drives not part of the police report. Gallant Dep. Tr. at 78:6-80:20.
33. In his Nov. 17, 2011 declaration, at paragraph 17, Mr. Laykin states that "Pringle has testified to having discarded two computer hard drives while this	Pursuant to Rule 106 Fed. R. Evid. this Court should consider Frederiksen-Cross Dep. Tr. 118:20-24 – 120; 122-123; 128-130 wherein she agrees that Pringle discarded his hard drives.

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litigation was pending – one in December 2010 or January 2011, and another in the summer of 2011." In my opinion this statement somewhat mischaracterizes Mr. Pringle' s testimony, insofar as it ignores the circumstances surrounding the disposal of this media.	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation.
34. In paragraph 32 of his declaration Laykin asserts that examination of these drives "... could show that the music files in question were actually downloaded in 2009 or 2010, after the release of "I Gotta Feeling," and subsequently backdated and/or modified to appear as though they had been created in 1999." Although he does not explicitly identify "these music files" this appears to be a reference to the tracks posted to Beatportal.com during the 2009 "I Gotta Feeling" remix contest.	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation. This statement is based on insufficient data insofar as Mr. Frederiksen-Cross has not even attempted to determine whether the musical parts of "I Gotta Feeling" are available elsewhere on the Internet, and whether Mr. Pringle could have the isolated guitar twang sequence from those other sources and merged it into his 1998 song "Take a Dive."
35. Mr. Laykin's insistence that either of these drives would have provided relevant information relating to any such download seems somewhat misplaced. The Beatportal.com web site still contains information relating to the "I Gotta Feeling" remix contest. According to Beatportal's own site, the tracks available as a part of the remix contest download could only be downloaded during the "download phase" of the contest, August 21st-September 8, 2009.	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation. This statement is based on insufficient data insofar as Mr. Frederiksen-Cross has not even attempted to determine whether the musical parts of "I Gotta Feeling" are available elsewhere on the Internet, and whether Mr. Pringle could have the isolated guitar twang sequence from those other sources and merged it into his 1998 song "Take a Dive."
36. Any evidence	*Daubert* Objection; Hearsay; Frederiksen-

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regarding whether Mr. Pringle had downloaded any remix tracks from Beatportal.com would therefore be on a hard disk that was in use in that timeframe. At the outset of this litigation, Mr. Pringle was no longer in possession of the hard drive for that time period. In his deposition testimony, pages 33-35, Mr. Pringle testified that he upgraded the hard drive of his computer in approximately January of 2010,7 at least a month before he first became aware of "I Gotta Feeling" and its potential infringement.	Cross' opinion should be barred as a result of Pringle's spoliation.
37. The significance of this event is that the replacement hard disk that was first placed in service as of January 2010, ("the first hard disk") and later replaced in approximately January of 2011, would not have had any data relating to activities from 2009 activity except the non-temporary files that Mr. Pringle habitually copied forward when he replaced his hard disks. The first disk was placed in service at a point in time when the files Mr. Pringle allegedly downloaded from Beatportal.com were no longer available for download.	*Daubert* Objection; Hearsay; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation. This statement is based on insufficient data insofar as Mr. Frederiksen-Cross has not even attempted to determine whether the musical parts of "I Gotta Feeling" are available elsewhere on the Internet, and whether Mr. Pringle could have the isolated guitar twang sequence from those other sources and merged it into his 1998 song "Take a Dive."
38. It is my understanding that Defendants have not produced any evidence that shows Mr. Pringle ever downloaded the remix files from Beatportal.com, and Mr. Pringle has testified that he did not. All descriptions of the remix contest	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation. This statement is based on insufficient data insofar as Mr. Frederiksen-Cross has not even attempted to determine whether the

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that I have seen require participants to register and to pay a fee for the remix contest download. These requirements are also consistent with Beatportal's terms and conditions of use that I was able to locate using the internet Archive.org.	musical parts of "I Gotta Feeling" are available elsewhere on the Internet, and whether Mr. Pringle could have the isolated guitar twang sequence from those other sources and merged it into his 1998 song "Take a Dive."
39. Mr. Pringle testified that after the first hard drive failed (in approximately December 2010 or January of 2011) he installed a new hard drive in his computer (the "second drive"). Based on my conversation with Mr. Pringle, there were minor problems with this drive only a few months after the drive was installed, which he attributed to an intermittent overheating problem. Despite the intermittent problems, Mr. Pringle continued to use the second drive through the summer of 2011, but the problems became steadily more frequent and more severe. Thinking that the problem was heat related, Mr. Pringle replaced the motherboard in his computer in July of 2011, but the problems continued. By the end of July the problems were sufficiently severe that the computer would sometimes fail to boot properly. At this point he contacted Western Digital for a warranty replacement.	*Daubert* Objection; Hearsay; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation. Inadmissible under Rule 37 Fed. R. Civ. P. Pringle refused to answer the interrogatory regarding destruction of hard drives.
40. The Western Digital warranty web page shows that the claim was first opened on August 1, 2011. Based on my conversation with Mr. Dickie, counsel for Mr.	*Daubert* Objection; Hearsay; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation. Inadmissible under 703 Fed. R. Evid. And

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Pringle, Mr. Pringle had not been advised of Defendants' request to inspect his hard drive at the time he opened the warranty claim and sent his hard disk to Western Digital for repair or replacement.	advisory committee notes Inadmissible under Rule 37 Fed. R. Civ. P. Pringle refused to answer the interrogatory regarding destruction of documents on his hard drives.
41. It is worth noting that the second hard drive, like its predecessor, would not have contained evidence relating to download of Beatportal.com remix contest tracks, even if any such download had occurred, since the Beatportal.com materials were no longer available for download when the second drive was first placed in service.	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation. Pursuant to Rule 106 Fed. R. Evid. See Pringle deposition testimony admission regarding Beatport stems obtained. *See* Pringle Dep. Tr. 25-29. This statement is based on insufficient data insofar as Mr. Frederiksen-Cross has not even attempted to determine whether the musical parts of "I Gotta Feeling" are available elsewhere on the Internet, and whether Mr. Pringle could have the isolated guitar twang sequence from those other sources and merged it into his 1998 song "Take a Dive."
42. It is also worth noting that Mr. Pringle did not create the music at issue in this litigation on his computer, but rather on an ASR-10 keyboard with its own external storage media, which are both separate from Mr. Pringle's computer. The evidentiary record shows that by the January 2011 timeframe when the first disk failed, Mr. Pringle had already delivered copies of any files he believed to be relevant to Mr. Gallant. After the	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation. Pursuant to Rule 106 Fed. R. Evid. See Pringle deposition testimony admission regarding Beatport stems obtained. *See* Pringle Dep. Tr. 25-29. Inadmissible under 703, see advisory committee notes.

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second drive failed, Mr. Pringle told me that he removed it from the computer which would not boot, and placed it in an external disk enclosure, in order to attempt recovery of his files. He was successful in recovering many of his personal files, which he immediately provided to Mr. Gallant on or about August 7, 2011.	Lack of foundation Fed. R. Evid 601-602. Hearsay Fed. R. Evid 801. Inadmissible under Rule 37 Fed. R. Civ. P. Pringle objected to answering the interrogatory regarding disposal of his hard drives.
43. Given the current allegations of spoliation, it is extremely unfortunate that the first and second hard disks were not retained by Mr. Pringle after their failure and subsequent replacement. It is my opinion, based on the evidence available to me, that Mr. Pringle's failure to retain the failed hard disk is more likely the product of naivety with respect to litigation issues than to any overt attempt to destroy evidence. At the point in time when the first disk failed, Mr. Pringle would have already provided the data he believed material to his case to Mr. Gallant. No copy of Mr. Pringle's computer was requested by Defendants until months later in the litigation. Defendants had not advanced any allegations that would have suggested this computer (or its hard drives) might be relevant to the matter before the court. Given this situation, I think it unrealistic to assume that an inexperienced litigant such as Mr. Pringle would afford any special treatment to the	*Daubert* Objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation. Pursuant to Rule 106 Fed. R. Evid. the Court should consider Frederiksen-Cross Dep. Tr. 281-291 (Declaration revised) As to the opinion on Pringle's intent when discarding his hard drives, it is inadmissible. See *U.S. Gypsum Co. v. Lafarge North America Inc.*, 670 F. Supp. 2d 768, 775-76 (N.D. Ill. 2009) (Computer forensics expert's testimony regarding the mental state of parties was not admissible, including with respect to the spoliation of documents. The court stated that "[t]here is nothing before the court to suggest that [the expert] is particularly qualified to understand the mental attitudes of others. Even assuming he were, he is able to render an opinion on intent only by drawing inferences from the evidence. Such opinions merely substitute the inferences of the expert for those the jury can draw on its own"); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 643 F. Supp. 2d 482. 505 (S.D.N.Y. 2009) ("Both parties' experts will provide opinions

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failed computer or its disk drives unless he was specifically guided by his counsel to do so. In my experience such unfortunate oversights are common in litigation and by themselves do not necessarily provide evidence of any deliberate attempt at spoliation.	crucial to this highly technical case, but decisions concerning whether the facts presented fulfill the legal requirements of knowledge, reasonableness, irresponsibility, sufficiency, and intent remain the exclusive province of the jury"). This statement is based on insufficient data insofar as Mr. Frederiksen-Cross has not even attempted to determine whether the musical parts of "I Gotta Feeling" are available elsewhere on the Internet, and whether Mr. Pringle could have the isolated guitar twang sequence from those other sources and merged it into his 1998 song "Take a Dive."
44. In paragraph 29 of his November 11, 201 declaration, Mr. Laykin asserts that "Not only are backups and archives unavailable, which alone is highly unusual, but even his most recent computers used in 2009 and 2010 are unavailable for examination." Based on the evidence I have reviewed the assertion that there are no backups is false and misleading. At my request, Mr. Gallant provided me with a list of over 5000 files that Mr. Pringle has produced from the his backup media. It is further my understanding, based on conversations with Mr. Pringle that he still possesses, and has offered for inspection, the computer he was using during this interval of time.	*Daubert* objection; Frederiksen-Cross' opinion should be barred as a result of Pringle's spoliation. Pursuant to Rule 106 Fed. R. Evid. this court should consider the following deposition testimony of Gallant Dep. Tr. 35:17-37:11 Pursuant to Rule 106 Fed. R. Evid. this court should consider the following deposition testimony of Frederiksen-Cross: Dep. Tr. 84:6-15 (No images of hard drive) 106:9-107:19; 123:18. With respect to conversations with Pringle, this should be disregarded pursuant to Rule 37 Fed. R. Civ. P. because Pringle refused to identify what documents were disposed of and when in response to interrogatories requesting the same, and he and his counsel refused to disclose the discarded evidence

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	during the Rule 26 f conference. Conversations with Pringle are hearsay 801-802 Fed. R. Evid., Frederiksen-Cross lacks foundation regarding the statement made Fed. R. Evid. 601-602, and the statements are not part of the admissible evidence under Fed. R. Evid. 703.
45. In paragraph 17 of his November 17, 2011 declaration, Mr. Geluso explains that: In order to confirm whether Mr. Riesterer's "David Pop Guitar" Logic session file contains the original creation files for the guitar twang sequence that appears in "I Gotta Feeling," I attempted to re-create the guitar twang sequence using similar hardware and software that Mr. Riesterer used when he created "I Gotta Feeling" in 2008.	
46. Paragraphs 18-21 of Mr. Geluso's declaration go on to explain the analysis process he used for this comparison, wherein he opens the "David Pop Guitar" file, applies sound distortion, sound equalization, dynamic compression effects, then applies "minor setting adjustments" in an attempt to match the guitar twang sound that he hears in "I Gotta Feeling." After manipulating the file in this fashion he then generates wave forms for the file he created, and the guitar twang sequence from "I Gotta Feeling" and compares the wave forms. His declaration shows a comparison of only 12 milliseconds	*Daubert* Objection. Inadmissible under Fed. R. Evid. 703, Frederiksen-Cross' lack of qualification regarding musicological or sound recording analysis.

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(i.e. 12 thousandths of a second). As a result of this comparison he opines that the waveforms "would not match as closely as they do if Mr. Riesterer's creation file and sound effects processing techniques were not, in fact, the source of the guitar twang sequence in "I Gotta Feeling."	
47. I find several aspects of this analysis troubling, and disagree that his conclusion is the only possible explanation for his results.	*Daubert* Objection. Inadmissible under Fed. R. Evid. 703, Frederiksen-Cross' lack of qualification regarding musicological or sound recording analysis.
48. As a first point, Mr. Geluso admits that Mr. Riesterer did not save the setting(s) he used to create "I Gotta Feeling." Mr. Geluso was forced to "manually adjust" the "David Pop Guitar" file using sophisticated sound manipulation techniques to create a sound file that he could match to the "I Gotta Feeling" guitar twang sequence. In essence, Mr. Geluso manufactured the evidence he used for half of his comparison, even though he conceded that the Logic session files for "David Pop Guitar" already had a representation of the guitar twang session.	*Daubert* Objection. Inadmissible under Fed. R. Evid. 703, Frederiksen-Cross' lack of qualification regarding musicological or sound recording analysis.
49. It seems reasonable to assume that Mr. Geluso's manipulations served to increase the correspondence between the two wave forms he compared, since his stated goal was to "re-create the guitar twang sequence." A logical conclusion based on his description is that the unmodified version of	*Daubert* Objection. Inadmissible under Fed. R. Evid. 703, Frederiksen-Cross' lack of qualification regarding musicological or sound recording analysis.

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"David Pop Guitar" had substantially less correlation than his manufactured evidence. Mr. Geluso does not say whether he attempted to compare the unmodified "David Pop Guitar" guitar twang sequence to an unmodified "I Gotta Feeling" sequence or describe what the result of such a comparison might be.	
50. My second point of concern with Mr. Geluso's first experiment is that he shows only 12 milliseconds of the waveforms he compared, an interval that is only slightly greater than 1/100 of a second. He does not say whether the same correlation between wave forms existed throughout his comparison, or whether he even compared the entirety of both guitar sequences.	*Daubert* Objection. Inadmissible under Fed. R. Evid. 703, Frederiksen-Cross' lack of qualification regarding musicological or sound recording analysis.
51. Given these defects, one is left to wonder whether Mr. Geluso's analysis actually proves anything more than the fact that a skilled musician, using sophisticated equipment, can duplicate a sound effect.	*Daubert* Objection. Inadmissible under Fed. R. Evid. 703, Frederiksen-Cross' lack of qualification regarding musicological or sound recording analysis.
52. I also have concerns about the authenticity of the underlying creation files for "David Pop Guitar," which are purported to provide evidence about the origin and dates associated with the creation of "David Pop Guitar." Mr. Geluso states that he relied upon the "David Pop Guitar" files that were produced by Mr. Riesterer. The	*Daubert* Objection. Inadmissible under Fed. R. Evid. 703, Frederiksen-Cross' lack of qualification regarding musicological or sound recording analysis. Pursuant to Rule 106 Fed. R. Evid. See Frederiksen- Cross Dep Tr. 203-204:16; 222:13-223:1; had not completed analysis.

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contents of Mr. Riesterer's purported creation files raise serious questions about the authenticity of the "David Pop Guitar" evidence. Each of the three sets of "David Pop Guitar" creation files contains a Logic Pro setting file called "documentData." The contents of the "documentData" files include settings that identify sound devices. Each "documentData file" in Mr. Riesterer's production includes a reference for an "828MK3 Hybrid" device, as can be seen in the file excerpts below:	
53. These references are forensically significant because the MOTU 828mk3 Hybrid is a sound device that was first announced in January, 2011. There is no apparent explanation for why the name of this device should appear in files bearing modification dates of February 5, 2009 or October 17, 2008. The presence of the references to "828mk3 Hybrid" suggests that the file dates and contents have either been tampered with or were corrupted in some way by contamination with data that was created at a later point in time. In either case this evidence raises a red flag about the authenticity and reliability of the data Mr. Geluso relied upon. My analysis with respect to these files is still ongoing.	*Daubert* Objection. Inadmissible under Fed. R. Evid. 703, Frederiksen-Cross' lack of qualification regarding musicological or sound recording analysis. Pursuant to Rule 106 Fed. R. Evid. See Frederiksen-Cross Dep Tr. 224:10-232:18 (had not completed analysis).
54. Mr. Geluso's second sound wave experiment is described in paragraphs 30-31 of his	*Daubert* Objection. Inadmissible under Fed. R. Evid. 703, Frederiksen-Cross' lack of qualification regarding musicological or

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declaration. In this experiment Mr. Geluso compares the sound waves from an MP3 format file that was submitted with Mr. Warner's declaration (containing the Beatportal.com download file for the "I Gotta Feeling" guitar twang sequence) to an MP3 format file that he says was attached to Mr. Rubel's declaration. This second MP3 file contained the isolated guitar twang sequence from Mr. Pringle's "Take A Dive."	sound recording analysis. Pursuant to Rule 106 Fed. R. Evid. See Frederiksen-Cross Dep Tr. 224:10-232:10 had not completed analysis.
55. As a first point of concern, Mr. Rubel's declaration actually attached several different MP3 files that were derived from Mr. Pringle's music, some of which had been modified by Mr. Rubel in the course of his own analysis. Mr. Geluso does not identify which of Mr. Rubel's files he used.	*Daubert* Objection. Inadmissible under Fed. R. Evid. 703, Frederiksen-Cross' lack of qualification regarding musicological or sound recording analysis.
56. Since his comparison is not based on original tracks as produced by the respective music creation platforms, Mr. Geluso has chosen to perform this comparison using a redacted form of music data. MP3 is a so-called "lossy" compression format, meaning that it is a digital recording format that has already redacted a significant quantum of original sound fidelity in order to achieve a smaller file size. MP3 compression deliberately and selectively discards data as a function of the compression algorithms. Different MP3 encoders may use different algorithms. The	*Daubert* Objection. Inadmissible under Fed. R. Evid. 703, Frederiksen-Cross' lack of qualification regarding musicological or sound recording analysis.

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quality of an MP3 recording (and hence the amount of data discarded) is influenced by numerous factors such as bit rate, choice of encoder, and encoding algorithms.	
57. Mr. Geluso does not address the bit rate or encoding algorithms that were used to generate the two MP3 files he uses in his comparison, nor the degree to which the two MP3 files were created by similar (or dissimilar) processes. Nowhere does he explain that this waveform analysis is based on redacted sound information, or that the two files may have been created using substantially different compression algorithms, encoders, and bit rates. If he checked to determine these parameters he does not disclose this in his declaration.	*Daubert* Objection. Inadmissible under Fed. R. Evid. 703, Frederiksen-Cross' lack of qualification regarding musicological or sound recording analysis.
58. Mr. Geluso does not explain whether or why the redacted data of the MP3 is a valid basis for a forensic analysis, and does not address whether the data discarded during MP3 compression is forensically relevant. Given that he does not appear to have determined how the MP3s were created he does not (and cannot) address how the redacted character of the data might affect the accuracy of his comparison or the validity of his end conclusion.	*Daubert* Objection. Inadmissible under Fed. R. Evid. 703, Frederiksen-Cross' lack of qualification regarding musicological or sound recording analysis.
59. As with his first experiment, Mr. Geluso shows only 12 milliseconds of the wave forms he compared. He does not say	*Daubert* Objection. Inadmissible under Fed. R. Evid. 703 Frederiksen-Cross' lack of qualification regarding musicological or sound recording analysis.

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whether the same correlation between wave forms existed throughout his comparison, or whether he even compared the entirety of both guitar sequences. Nowhere does he provide an explanation to address why such a small sample should be considered adequate in the context of a much longer musical phrase.	
60. Mr. Geluso does not appear to address whether there were alternate explanations that might have accounted for his findings with respect to the similarity between Mr. Pringle's "Take A Dive (Dance Version)" guitar twang sequence and the guitar twang sequence in "I Gotta Feeling." In asserting that Mr. Pringle sampled the guitar twang sequence from another source Mr. Geluso does not appear to consider whether Mr. Pringle may have re-sampled from the ASR-10's own audio output, a technique that was sometimes used to compensate for the limited memory of the ASR-10. This omission is particularly curious in light of the testimony and evidence which show Mr. Pringle mailed demonstration CDs containing his music to multiple parties over the course of several years.	*Daubert* Objection. Inadmissible under 703 Fed. R. Evid. Frederiksen-Cross' lack of qualification regarding musicological or sound recording analysis.
61. Mr. Geluso appears unaware that the Beatportal download for the "I Gotta Feeling" remix contest required registration	*Daubert* Objection. Inadmissible under 703 Fed. R. Evid. Frederiksen-Cross' lack of qualification regarding musicological evidence.

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and payment. He does not address this potential source of evidence or whether there is any record of Mr. Pringle having made such a download.	This statement is based on insufficient data insofar as Mr. Frederiksen-Cross has not even attempted to determine whether the musical parts of "I Gotta Feeling" are available elsewhere on the Internet, and whether Mr. Pringle could have the isolated guitar twang sequence from those other sources and merged it into his 1998 song "Take a Dive."
62. This declaration is based on the evidence that has been made available to me and the analysis I have performed to date. If asked, I will provide testimony about the opinions expressed in this declaration and the bases for those opinions. JLI is compensated for my work at an hourly rate of $525 and my compensation does not in any way depend upon the outcome of this litigation.	Inadmissible under 703 See Advisory Committee notes. *Daubert* Objection; Incomplete data made available makes the opinions inadmissible.
63. If the Court permits, I reserve the option to supplement this declaration with any additional findings and opinions that I may form as a result of ongoing evidence production and my analysis of additional materials.	Objection, the deadline to provide expert additional expert disclosures and reports has passed.

Dated: January 9, 2012

LOEB & LOEB LLP

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