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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 DAVID T. GALLANT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS SHAPIRO, BERNSTEIN & CO, INC., FREDERIC RIESTERER AND DAVID GUETTA [DOC. 193]

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 David T. Gallant in Opposition to Defendants' Motion for Summary Judgment (Doc. 193).

GENERAL OBJECTIONS

A. Gallant Is Not A Fact Witness, And Thus His Statements Lack Foundation And Are Hearsay.

The majority of statements in Gallant's declaration simply recount alleged events that took place concerning Mr. Pringle's computer equipment and Pringle's destruction thereof. These statements are not offered for the purpose of conducting any scientific testing or expert analysis, but merely to try to lend some aura of expert credibility to Pringle's own testimony. Gallant is thus improperly being offered as a fact witness even though he has no first-hand knowledge of the events described in his Declaration. Gallant's Declaration is therefore inadmissible under Fed. R. Evid. 104, 602 (lack of foundation, speculation), 801-802 (hearsay), and 403 (confusion of the issues and cumulative presentation of evidence). *See 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."); *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"); Fed. R. Evid. 703 Advisory Committee Notes (2000) ("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.")

C. Gallant's Declaration is Inadmissible As A Result Of Pringle's Spoliation Of Evidence.

Gallant's 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, Gallant's 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 Gallant 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 was retained in May 2010, testified:

> Q. Are you aware that ***certain of Mr. Pringle's***
> ***hard drives that were used in 2010 and 2011 were discarded?***
> ***A. Yes.***
> Q. Okay. And it would be accurate to say that you were never asked to make a forensic copy of those hard drives before they were discarded.
> MR. DICKIE: Objection. Asked and answered repetitively. Now it's just into harassment.
> ***A. As I've stated, I have never been asked to make a forensic copy of any hard drive belonging to Mr. Pringle.***
> Q. Have you ever gone and looked at any of Mr. Pringle's computer equipment?
> A. No.
> Q. Have you ever visited Mr. Pringle's home to see any of his computer equipment?
> 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.[1] 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 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.

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[1] 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.

> 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.

D. Gallant's Declaration, Attempting To Date Music Files, Should Be Precluded Because It Is Based Upon Incomplete Data.

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. *Elsayed Mukhtar v. Cal. State Univ., Hayward,* 299 F. 3d 1053, 1063-64 (9th Cir. 2002).

As discussed above, Pringle destroyed evidence that all experts agree would be important to review in determining the true date of Pringle's "Take a Dive" (Dance Version) creation files:

> 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. (emphasis added).

(Frederiksen-Cross Dep. Tr. 65-67, 109-110; Gallant Dep. Tr. 215:20-216:10, 221-222.)

The evidence on the Pringle hard drives, made unavailable by Pringle, is also material to whether Pringle copied the guitar twang sequence from the re-mixed versions of "I Gotta Feeling" and inserted it into his prior song. Pringle admitted accessing and obtaining remixed versions of "I Gotta Feeling" from the Beatport

competition and other sources. (Pringle Dep. Tr. at 25-29.) Frederiksen-Cross admitted that Pringle could have added the guitar twang to his song Take a Dive in 2009 or 2010:

> Q. Are you saying that it's absolutely impossible
> 03 3 that in 2009 or 2010 Mr. Pringle added the guitar twang
> 04 4 sequence to Take A Dive to create the (Dance Version)?
> 05 5 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.

(Frederiksen-Cross Dep. Tr. 190) In fact Frederiksen Cross explained in detail how Pringle could do this using an ASR-10 and computer. (*Id.* at 190-197.) She also admitted that Pringle could have inserted the Beatport guitar twang stem, or a re-mixed version of "I Gotta Feeling" into "Take a Dive" (Dance Version). (*Id.* at 196-201 ("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.")

To permit Gallant to proffer opinions regarding the dates of Pringle's music files based upon the "available" evidence, knowing that the evidence destroyed by Pringle held evidence that was material to that analysis, would be a failure to serve the Court's "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 a result of Pringle's disposal of his hard drives, the Gallant opinion regarding the purported dates of the computer files is based upon incomplete data, and is 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. 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 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'").

E. Gallant's 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 of the Federal Rules of Civil Procedure prevents a party from refusing to provide evidence during discovery and then attempt to us that withheld evidence in opposition to a summary judgment motion. In this case, Pringle was served with 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 the expert

testimony of David Gallant. 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 interrogatory No. 19 bars his ability to present that evidence now through the declaration of Gallant.

F. Gallant's Report Is Inadmissible Under *Daubert* For Lack Of Reliability.

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)).

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 Fed.Appx. 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").

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 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].

In this case Gallant does not meet the *Daubert* standard for admissible evidence.

First, Gallant's testimony does not assist the trier of fact nor does his opinion employ specialized knowledge or expertise or provide something that the average lay person could not ascertain by themselves through their own evaluation of admissible evidence. The dates Gallant proffers as creation dates are simply the dates shown on the properties field of the CD-ROM, something the average lay juror can read for themselves, should the disc become authenticated and admitted into evidence. The other information that Gallant attempts to reference in connection with his "opinion" on the creation dates is non-scientific information that the average lay person/juror can evaluate without expert assistance if such information meets the standards for admissibility. For example no specialized knowledge is required to know that the photos were taken with a certain model camera. Thus Gallant's proffered testimony offers nothing more than what Pringle's lawyers can argue in closing arguments if the information gets admitted into evidence. *United States v. Frazier*, 387 F.3d 1244, 1262-63 (11th Cir. 2004) (citing 4 *Weinstein's Federal Evidence* § 702.03[2][a]).

Second, neither Pringle nor his lawyers can attempt to use an expert to try to place before the jury information that is otherwise inadmissible for lack of foundation, authenticity, hearsay, or otherwise. *See* Rule 703 Fed.R.Evid. Advisory Committee notes. Pringle is required to authenticate and date his own computer files (something he has refused to do in response to Headphone Junkie's Interrogatory No. 19) in violation of Rule 26, and Rule 37 Fed.R.Civ.P. and is required independently enter into evidence all other alleged items of alleged information he claims supports his contention regarding the dating of his CD ROM. Gallant cannot get this information admitted into evidence, nor can he discuss it with the jury.

Third, Gallant and his opinions fail to meet the reliability prong of the Daubert test. Gallant testified that the dates shown in the properties files of the new CD ROM are dates that are easily changed or set to any date. (Gallant Dep. Tr. 126:15-127.) Gallant testified that the operating system used to create the CD Rom is information that is required to be considered in order to determine if the files were created on a date not shown on the CD ROM. (*Id.* at 50:7-57.) Notwithstanding Gallant's knowledge and expertise telling him that this analysis was necessary in order to reliably date the Pringle NRG files, Gallant never asked to inspect Pringle's Hard Drives and neither he nor Pringle took steps to preserve the evidence. (*Id.* at 193:16-193:24.) Worse, Pringle has now discarded the hard drives, making it *impossible* to use the information on the hard drives to reliably date the NRG files or to negate that Pringle created the files and then back dated them.

INDIVIDUAL OBJECTIONS

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

Gallant Declaration	Evidentiary Objections
1. I have personal knowledge of the facts set forth in this Declaration. If called as a witness I could and would testify competently to the following facts.	Inadmissible Hearsay. Fed. R. Evid. 801,802. Lacks Foundation/Speculative. Fed. R. Evid. 104, 602.
2. I am president of Gallant Computer Investigative Services (GCIS), LLC. GCIS is licensed as a Private Investigations Company by the Texas Private Security Bureau (A15633). I have over 23 years investigative experience, including over 15 years dedicated primarily to computer related crimes and	

Gallant Declaration	Evidentiary Objections
computer forensics. I served as a federal agent in the US Air Force with the Air Force Office of Special Investigations (AFOSI) for almost 15 years, and was the case agent on numerous significant investigations and provided computer forensics support and/or consultation to hundreds of investigations. Following my retirement from the Air Force in 2001, I entered the corporate computer forensics/computer security industry with a startup company, and helped build it into an internationally recognized leader in computer forensics, incident response, and incident response training. I am an AccessData Certified Instructor and AccessData Certified Examiner, as well as a contract instructor for AccessData Corp., for whom I teach an introductory computer forensics course to both law enforcement and corporate investigators. I have trained hundreds of federal, state and local law enforcement officials, as well as IT security personnel in the proper methodology for securing and analyzing computer evidence. I am a Certified Information Systems Security Professional (CISSP), an internationally recognized computer security certification. I am a contract instructor for New Horizons Computer Learning Center, where I teach CISSP preparatory courses to IT security personnel. I have multiple computer forensics	

Gallant Declaration	Evidentiary Objections
certifications and have published numerous articles on computer forensics, e- discovery, and other computer security-related matters. Specific information regarding my qualifications is contained in my CV as appended to my August 6, 2011 Expert Report ("Report"), a true and correct copy of which is attached as Exhibit 1 to this Declaration.	
3. I was retained by the Gould Law Group on May 7, 2010, as a computer forensics expert, to analyze a CD-ROM that contained the creation file of the derivative version Bryan Pringle's song, "Take a Dive," to determine the date(s) the file(s) were created, as well as the date the CD-ROM was created (burned).	Pursuant to Rule 106 Fed.R.Evid. this Court should consider the following deposition testimony of David Gallant pp. 22-24 (given the wrong NRG file). Pursuant to Rule 601 Fed.R.Evid. Gallant lacks foundation to state that the CD-Rom given to him in May 2010 contained the music file, because he did not listen to the music files. (Gallant Dep. Tr. 43-44.) Pursuant to Rule 201 Fed.R.Evid. this Court should take judicial Notice of the fact that both Mr. Pringle and Mr. Gallant previously provided declarations under the penalties of perjury that turned out to be a false identification of the alleged CD ROM and alleged Creation Dates for the music files at issue in this case. See Dkt. 15
4. On December 21, 2010, Mr. Pringle personally delivered to me one CD-ROM for analysis. The disc was a white Verbatim brand, and the serial number was 9E24F22 1861. It was hand marked, "PROMO PHOTOS/ 1999 ENSONIQ.NRG FILES." (A copy of the disk's label	Unauthenticated CD Rom is inadmissible and does not become admissible by providing to an expert. Fed.R.Evid. 703, advisory Committee notes. Hearsay 801-802 Fed.R.Evid. as to what Pringle told him.

Gallant Declaration	Evidentiary Objections
is appended to my Report.) Mr. Pringle informed me he was the person who labeled the disk. I initialed, dated, and initiated chain of custody on the evidence (Tag 2).	
a. Mr. Pringle stated he created the music files contained on Tag 2 in 1999 using an ASR-10 keyboard and saved the files to an external SCSI hard drive. He then took the SCSI hard drive and connected it to a Windows computer (he believed a Windows 98 system) and used Ensoniq Disk Manager (EDM) software to create the .NRG images. (Mr. Pringle stated he no longer possesses the hardware or software he used to create Tag 2 due to a burglary of his storage facility located in Abilene, TX, in October 2000, in which over $12,000 worth of equipment was stolen. Pringle provided a copy of the police report with is attached to this report). The .NRG image files not only contained the various parts to the music, but also contained the operating system files needed to boot the ASR-10 keyboard. These images appear to be Nero Image files (.NRG) (based solely on the file extension "NRG"). Mr. Pringle explained he used Nero to extract the image files to create a new CD-ROM to boot the ASR-10.	Lack of Foundation as to the creation of the music files Fed.R.Evid. 601-602 Hearsay 801-802 Fed.R.Evid. as to what Pringle told him. Lack of foundation 601-602 Fed.R.Evid. and Hearsay and Hearsay within Hearsay 801-802, 805 as to Police Report. Inadmissible information does not become admissible by having an expert testify. Fed.R.Evid. 703, Advisory Committee notes. *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").

Gallant Declaration	Evidentiary Objections
	Improper testimony under 702 Fed.R.Evid. as no specialized knowledge necessary to view the properties files shown.
b. I copied the file, "DISK05.NRG" to the desktop of a forensic computer running Windows XP Pro (64 bit), and burned this file as an image to a new CD-ROM using Nero Burning ROM Ver 6.6.0.3. I initiated chain of custody on this newly burned CD-ROM (Tag 3). Mr. Pringle then took this CD-ROM, and under my direct observation, booted an Ensoniq ASR- 10 keyboard that had an external CD-ROM drive attached. He demonstrated how the keyboard works, and played for me his song, "Take a Dive" from the ASR-10 keyboard. After the demonstration, I maintained control and custody of this CD-ROM.	To the extent that this is submitted to establish the truth of what is asserted it is improper under rule 703 Fed.R.Evid. No authenticity has been established for the CD-Rom and the demonstration referenced is Hearsay 801-802 Fed.R.Evid. Inadmissible information does not become admissible by having an expert testify. Fed.R.Evid. 703, Advisory Committee notes. *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").
5. On January 3, 2011, I created a forensic copy of both CD-ROMs (Tags 2 and 3) using Forensic	Lack of Foundation 601-602 Fed.R.Evid.; Hearsay 801-802 Fed.R.Evid.

Gallant Declaration	Evidentiary Objections
Toolkit Imager, Version 3.0.0.1443, and processed them with FTK Version 3.2.0.32216 (License number: 1-1205090). The CD's (Tag 2) volume name was "990909_0118." This appears to be the default disk name that is used by most CD writing software. It typically corresponds to the date and time the CD is created. In this case, that would mean Sept 9, 1999 at 1:18.	Relevance 401-402 Fed.R.Evid. and misleading and prejudicial under Rule 403 Fed.R.Evid. The dates set forth are not dates of the underlying music files on the CD; See, and under Rule 106 Fed.R.Evid. this Court should consider Gallant Testimony at page 204:12-24 through page 206:1-3: Q. And you say I can see the file creation dates. 12 12 Can you tell me what the file creation dates are? 13 13 A. The file creation dates of the NRG files. 14 14 Q. So that would be the -- the creation date of 15 15 the image file? 16 16 A. Yes, the NRG image files. 17 17 ***Q. But not necessarily the underlying data within*** ***18 18 those files.*** ***19 19 A. There's no way to determine dates for the*** ***20 20 underlying data in the NRG files. They don't exist.*** 21 21 Q. And you determined that how? 22 22 A. From Mr. Giebler's interview. (Emphasis added) As to the dates of the image files, Foundation under Rule 601-602; Relevance 401-402 Fed.R.Evid. and Misleading and prejudicial under Rule 403 Fed.R.Evid. Under Rule 106 Fed.R.Evid. this Court should consider Gallant's testimony at page 50:15-24 through page 53:1-24.

Gallant Declaration	Evidentiary Objections
	Quoting page 53:1-24: Q. Is it possible to set the clock back and select 09 9 a particular date when you're creating an image file? 10 10 MR. DICKIE: Object to the form of the 11 11 question. 12 12 A. Yes, it's possible. 13 13 Q. The specific image files that are at issue in 14 14 this case on the disk that Mr. Pringle gave you in 15 15 December of 2010, is it possible with respect to the 16 16 image files to select a particular date for those files? 17 17 A. Theoretically possible, yes. 18 18 Q. And is it possible for -- the disk that was 19 19 provided to you in May of 2010, is it possible for those 20 20 image files that a specific date could have been 21 21 selected when those files were saved? 22 22 MR. DICKIE: Objection. Calls for 23 23 speculation again. 24 24 A. It's theoretically possible. Inadmissible information does not become admissible by having an expert testify. Fed.R.Evid. 703, Advisory Committee notes. *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

Gallant Declaration	Evidentiary Objections
	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").
a. Forensic analysis of Tag 2 determined there were two "sessions" written to the disk. This means that groups of files were saved to the disk on two different occasions. Session one contained one directory named "promo photos" which contained 134 digital photographs. This files were all dated 9-8-1999. The second session contained four files present as follows: "DISK02.NRG," "DISK03.NRG," "DISK04.NRG," and "DISK05.NRG." These files were all dated 8-22-1999. There was also a directory named "promo photos." Cursory analysis metadata associated with each of the 134 images contained in the "promo photo" directory disclosed the images were all taken on 09-06-1999 and 09-	Lack of Foundation 601-602 Fed. R. Evid; Hearsay 801-802 Fed.R.Evid. Lack of Foundation 601-602 Fed.R.Evid. ; Relevance 401-402 Fed.R.Evid.; Misleading 403 Fed.R.Evid. Under Rule 106 Fed.R.Evid. the Court should consider Gallant deposition testimony page 214:7-24: **Q. So a person could take music files and photo** 07 7 files today and burn an image of those files setting the 08 8 clock in their computer to any date and that would be 09 9 the creation date for that image file. 10 10 MR. DICKIE: Object to the form of the 11 11 question. 12 12 Q. Wouldn't it, sir? 13 13 MR. DICKIE: Object to

Gallant Declaration	Evidentiary Objections
08-1999 with an Olympus C900Z/D400Z digital camera. According to the Olympus website (http://www.olympusglobal.com-/en/cordhistory/camera/popup/-digital_c900z_movie.cfm), this camera was released in 1998.	the form of the 14 14 question. It's an improper hypothetical not asking the 15 15 witness about what the evidence that he's actually 16 16 referred to is all about. 17 17 Q. You can answer my question. 18 18 A. Anything is possible with the right technology. 19 19 Anything is possible. 20 20 Q. And would that scenario, that hypothetical that 21 21 I gave you, would that be possible? 22 22 A. I believe that falls -- 23 23 MR. DICKIE: Same objection. 24 24 A. -- under the category of anything. Inadmissible information does not become admissible by having an expert testify. Fed.R.Evid. 703, Advisory Committee notes. *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*

Gallant Declaration	Evidentiary Objections
	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").
b. The file named "DISK05.NRG," which, according to Mr. Pringle, is the creation file containing the derivative version of Pringle's song "Take a Dive," has a creation date of 8-22-1999, with a last modified time of 12:54 p.m.	Lack of Foundation 601-602 Fed.R.Evid.; Hearsay 801-802 Fed.R.Evid. as to what Mr. Pringle told him. Relevance 401-402: The dates proffered are not dates of the music files. See, and under Rule 106 Fed.R.Evid. this Court should consider Gallant Testimony at page 204:12-24 through page 206:1-3: Q. And you say I can see the file creation dates. 12 12 Can you tell me what the file creation dates are? 13 13 A. The file creation dates of the NRG files. 14 14 Q. So that would be the -- the creation date of 15 15 the image file? 16 16 A. Yes, the NRG image files. 17 17 ***Q. But not necessarily the underlying data within*** ***18 18 those files.*** ***19 19 A. There's no way to determine dates for the*** ***20 20 underlying data in the NRG files. They don't exist.*** 21 21 Q. And you determined that how? 22 22 A. From Mr. Giebler's interview. (Emphasis added)

Gallant Declaration	Evidentiary Objections
	As to the dates of the image files, Foundation 601-602; relevance 401-402; Misleading/speculation 403 Fed.R.Evid. Under Rule 106 Fed.R.Evid. this Court should consider Gallant's testimony at page 50:15-24 through page 53:1-24. Quoting page 53:1-24: Q. Is it possible to set the clock back and select 09 9 a particular date when you're creating an image file? 10 10 MR. DICKIE: Object to the form of the 11 11 question. 12 12 A. Yes, it's possible. 13 13 Q. The specific image files that are at issue in 14 14 this case on the disk that Mr. Pringle gave you in 15 15 December of 2010, is it possible with respect to the 16 16 image files to select a particular date for those files? 17 17 A. Theoretically possible, yes. 18 18 Q. And is it possible for -- the disk that was 19 19 provided to you in May of 2010, is it possible for those 20 20 image files that a specific date could have been 21 21 selected when those files were saved? 22 22 MR. DICKIE: Objection. Calls for 23 23 speculation again. 24 24 A. It's theoretically possible. Under Rule 106 Fed.R.Evid. the Court

Gallant Declaration	Evidentiary Objections
	should consider Gallant deposition testimony page 214:7-24: Inadmissible information does not become admissible by having an expert testify. Fed.R.Evid. 703, Advisory Committee notes. *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").
c. I also examined the original CD-ROM (Tag 2) with a utility called NerolnfoTool, which determined that the content of this particular CD-ROM was created on "9 September 1999" (i.e. the CD-ROM was burned September 9, 1999). This corresponds to the CD volume name described above. NeroInfoTool is a free "non-forensic" application that identifies when a CD-ROM was burned, as well as	Foundation 601-602; Hearsay 801-802; Relevance 401-402; Misleading/Speculation 403 Fed.R.Evid. Pursuant to Rule 106 Fed. R. Evid. This Court should consider the following testimony of David Gallant: Q. Okay. So the September 9th, 1999, Nero 03 3 InfoTool report date is not a forensic form of proof? 04 4 A. No, I never said that it was a

Gallant Declaration	Evidentiary Objections
other information concerning the computer's CD-ROM drives.	forensic form of 05 5 proof, but we don't need to use -- always use forensic 06 6 tools to help us draw conclusions with our, you know, 07 7 forensic cases. 08 8 Q. Did you determine any forensic way to prove 09 9 that September 9, 1999 date was a true date? 10 10 A. The only way he was able to establish that was 11 11 with Nero InfoTool. 12 12 Q. Which is not a forensic tool? 13 13 A. It doesn't have to be a forensic tool to be of 14 14 value to us. 15 15 Q. But it's not a forensic tool, is it? 16 16 A. No, it's not a forensic tool. Gallant Dep. Tr. at 199. The dates set forth are not dates of the underlying music files on the CD; See, and under Rule 106 Fed.R.Evid. this Court should consider Gallant Testimony at page 204 ln 12-24 through page 206 ln 1-3. As to the dates of the image files, Foundation under Rule 601-602; Relevance 401-402 Fed.R.Evid. and Misleading and prejudicial under Rule 403 Fed.R.Evid. Under Rule 106 Fed.R.Evid. this Court should consider Gallant's testimony at page 50 ln 15-24 through page 53 ln 1-24. Quoting page 53 ln 1-24:

Gallant Declaration	Evidentiary Objections
	Q. Is it possible to set the clock back and select 09 9 a particular date when you're creating an image file? 10 10 MR. DICKIE: Object to the form of the 11 11 question. 12 12 A. Yes, it's possible. 13 13 Q. The specific image files that are at issue in 14 14 this case on the disk that Mr. Pringle gave you in 15 15 December of 2010, is it possible with respect to the 16 16 image files to select a particular date for those files? 17 17 A. Theoretically possible, yes. 18 18 Q. And is it possible for -- the disk that was 19 19 provided to you in May of 2010, is it possible for those 20 20 image files that a specific date could have been 21 21 selected when those files were saved? 22 22 MR. DICKIE: Objection. Calls for 23 23 speculation again. 24 24 A. It's theoretically possible. Inadmissible information does not become admissible by having an expert testify. Fed.R.Evid. 703, Advisory Committee notes. *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

Gallant Declaration	Evidentiary Objections
	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").
d. As stated, there were only two sessions written to this disk, with the last session written on September 9, 1999. Due to this fact, no additional data was added to the CD-ROM, and thus none of the existing tiles on the CD-ROM, including "DISK05.NRG" were modified after September 9, 1999. This means that the guitar twang sequence existed in the original "DISK05.NRG" file and could not possibly have been added to the file contained on the CD-ROM after September 9, 1999 (i.e. Mr. Pringle could not have gone back and later added the guitar twang sequence to the "DISK05.NRG" file contained on the CD-ROM, after he heard "I Gotta Feeling").	Lack of Foundation 601-602; Hearsay 801-802; Relevance 401-402 Fed.R.Evid; Misleading/Speculation 403 Fed. R. Evid. The dates set forth are not dates of the underlying music files on the CD; See, and under Rule 106 Fed.R.Evid. this Court should consider Gallant's testimony at page 204:12-24 through page 206:1-3. As to the dates of the image files, Foundation under Rule 601-602; Relevance 401-402 Fed.R.Evid. and Misleading and prejudicial under Rule 403 Fed.R.Evid. Under Rule 106 Fed.R.Evid. this Court should consider Gallant's testimony at page 50:15-24 through page 53:1-24. Quoting page 53:1-24: Q. Is it possible to set the clock back and select 09 9 a particular date when you're creating an image file?

Gallant Declaration	Evidentiary Objections
	10 10 MR. DICKIE: Object to the form of the 11 11 question. 12 12 A. Yes, it's possible. 13 13 Q. The specific image files that are at issue in 14 14 this case on the disk that Mr. Pringle gave you in 15 15 December of 2010, is it possible with respect to the 16 16 image files to select a particular date for those files? 17 17 A. Theoretically possible, yes. 18 18 Q. And is it possible for -- the disk that was 19 19 provided to you in May of 2010, is it possible for those 20 20 image files that a specific date could have been 21 21 selected when those files were saved? 22 22 MR. DICKIE: Objection. Calls for 23 23 speculation again. 24 24 A. It's theoretically possible. Inadmissible information does not become admissible by having an expert testify. Fed.R.Evid. 703, Advisory Committee notes. *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

Gallant Declaration	Evidentiary Objections
	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").
6. On January 3, 2011, I contacted Verbatim Americas, LLC, via their customer support web page and requested they research their records to determine the date the CD-ROM disc (Tag 2) (serial number 9E24F221861) was manufactured and sold in the United States. On March 17, 2011, Verbatim Customer Support advised by telephone, then via email, that this particular CD-ROM was manufactured in Taiwan on February 24, 1999 and this type of CD-ROM has been out of production since late 1999. The last shipment to a distributor was December 29, 2003. A copy of their email is appended to my report.	Foundation 601-602 Fed.R.Evid. Hearsay 801-802 Fed.R.Evid. Inadmissible information does not become admissible by having an expert testify. Fed.R.Evid. 703, Advisory Committee notes. *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").

Gallant Declaration	Evidentiary Objections
7. On March 15, 2011, Mr. Pringle forwarded to me an email from Mr. Gary Giebler, Giebler Enterprises, in which Mr. Giebler informed him he (Pringle) purchased EDM on May 18, 1999. The serial number for his copy of EDM was "3998." A copy of his receipt is attached to my report.	Foundation 601-602 Fed.R.Evid. Hearsay 801-802 Fed.R.Evid. Inadmissible information does not become admissible by having an expert testify. Fed.R.Evid. 703, Advisory Committee notes. *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").
8. On March 17, 2011, I purchased a copy of EDM from Giebler Enterprises and discussed with Mr. Giebler how the software created the .NRG files. He advised he wrote the EDM program, as well as the ASR-10 operating system. The ASR-10 operating system is not compatible with any other operating system, and it had to be booted using an EDM created disk. The EDM files are a 'proprietary" .NRG format	Foundation 601-602 Fed.R.Evid. Hearsay 801-802 Fed.R.Evid. Inadmissible information does not become admissible by having an expert testify. Fed.R.Evid. 703, Advisory Committee notes. *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

Gallant Declaration	Evidentiary Objections
that are compatible with Nero for the purposes of creating a bootable CD-ROM or floppy disk. He advised that since I was able to extract the DISK05.NRG file from Tag 2, burn a new CD- ROM with Nero that was able to boot the ASR-10 keyboard, that .NRG file could ONLY have been created with EDM. I was able to use EDM to view the contents of the various .NRG files. When asked if there would be dates associated with the ASR-10 operating system that might help "date" the .NRG files, he advised there were not and that the best indicator of the original date of the files would be the dates on the CD-ROM. He also stated there was a possibility that the licensee and license number might be located within the _NRG files. Analysis of the .NRG files to locate this information pertaining to Mr. Pringle's license information was unsuccessful.	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").
9. Based on the analysis of the data provided to me, August 22, 1999, at 12:54 pm was the last time the "DISK05.NRG" file, which contains the creation file for the derivative version of "Take a Dive," was modified. Additionally, my analysis concludes the CD-ROM that contained this file was created (burned) on September 9, 1999, and could not have been subsequently burned (i.e. no new material could have been added) after that date. The totality of the information available	Foundation 601-602 Fed.R.Evid. Hearsay 801-802 Fed.R.Evid. Relevance 401-402 Fed.R.Evid. Misleading/Speculation 403 Fed.R.Evid. The dates set forth are not dates of the underlying music files on the CD; See, and under Rule 106 Fed.R.Evid. this Court should consider Gallant's testimony at page 204:12-24 through page 206:1-3. Q. And you say I can see the file creation dates. 12 12 Can you tell me what the file

Gallant Declaration	Evidentiary Objections
to me supports Mr. Pringle's claim of creating the DISK05.NRG file and CD-ROM in 1999. The manufacturing date of the CD-ROM itself (Feb 1999) and the date of his purchase of EDM (May 1999) along with my forensic findings, support this conclusion. None of the data or information I reviewed supports any other conclusion or otherwise refutes the authenticity of Mr. Pringle's claim.	creation dates are? 13 13 A. The file creation dates of the NRG files. 14 14 Q. So that would be the -- the creation date of 15 15 the image file? 16 16 A. Yes, the NRG image files. 17 17 ***Q. But not necessarily the underlying data within*** ***18 18 those files.*** ***19 19 A. There's no way to determine dates for the*** ***20 20 underlying data in the NRG files. They don't exist.*** 21 21 Q. And you determined that how? 22 22 A. From Mr. Giebler's interview. (Emphasis added) As to the dates of the image files, Foundation under Rule 601-602; Relevance 401-402 Fed.R.Evid. and Misleading and prejudicial under Rule 403 Fed.R.Evid. Under Rule 106 Fed.R.Evid. this Court should consider Gallant's testimony at page 50:15-24 through page 53:1-24. Quoting page 53:1-24: Inadmissible information does not become admissible by having an expert testify. Fed.R.Evid. 703, Advisory Committee notes. *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

Gallant Declaration	Evidentiary Objections
	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").
10. I have also reviewed the Declaration of Erik Laykin dated November 14th, 2011, as well as the draft transcript of his deposition dated December 7, 2011, and offer an opinion as to some of the comments he made. A true and correct copy of my December 16, 2011 Rebuttal Report ("Rebuttal") containing those opinions is attached to this Declaration as Exhibit 2.	
11. Mr. Laykin stated in his declaration (page 4, paragraph 12) that Mr. Pringle reported his computer stolen in 2000 yet claimed he burned the music image to CD on May 17, 2001, thus could not have burned the CD-Rom containing his "Take a Dive" song at that time. Mr. Laykin seems to be basing the CD burn date of May 2001 from my declaration dated November 18, 2010. That burn date pertained to the first CD-Rom (Tag 1) analyzed and reported in that declaration. In my	To the extent that Gallant attempts to offer his prior inadmissible statements regarding dates by quoting his prior report, the same objections set forth with respect to his original report apply. Foundation 601-602 Fed.R.Evid. Hearsay 801-802 Fed.R.Evid. Relevance 401-402 Fed.R.Evid. Misleading/Speculation 403 Fed.R.Evid. The dates set forth are not dates of the underlying music files on the CD; See, and under Rule 106 Fed.R.Evid. this Court

Gallant Declaration	Evidentiary Objections
subsequent report dated August 6, 2011, in which I reported my findings for Tag 2, the CD-Rom containing the "Take a Dive" song, in paragraph 4C I stated: "I also examined the original CD-ROM (Tag 2) with a utility called NeroInfo Tool, which determined that the content of this particular CD-ROM was created on "9 September 1999" (i.e. the CD- ROM was burned September 9, 1999). This corresponds to the CD volume name described above. NeroInfo Tool is a free "non-forensic" application that identifies when a CD-ROM was burned, as well as other information concerning the computer's CD-ROM drives."	should consider Gallant's testimony at page 204:12-24 through page 206:1-3. As to the dates of the image files, Foundation under Rule 601-602; Relevance 401-402 Fed.R.Evid. and Misleading and prejudicial under Rule 403 Fed.R.Evid. Under Rule 106 Fed.R.Evid. this Court should consider Gallant's testimony at page 50:15-24 through page 53:1-24. Inadmissible information does not become admissible by having an expert testify. Fed.R.Evid. 703, Advisory Committee notes. *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").
12. This burn date predates the theft of Mr. Pringle's property. I	Foundation 601-602 Fed.R.Evid. Hearsay 801-802 Fed.R.Evid.

Gallant Declaration	Evidentiary Objections
also reviewed the police report Mr. Pringle provided to me. He did not report his computer stolen, but rather "several items of music equipment" were stolen. The major items that were stolen were very specifically identified in the report, and it would be logical that if a computer had been stolen, Mr. Pringle would have listed it in the report. Mr. Pringle informed me that among the "several items of music equipment" were removable hard drives that contained the original compilations of the "Take a Dive" song. I also reviewed an excerpt of Mr. Pringle's deposition dated August 24, 2011, page 155, line 21 where he specifically stated he didn't recall if they stole his computer in 2000. Q. So the hard drive that was taken along with the ASR-10 that was stolen, what was on that hard drive? A. Well, there was many hard drives. It was instrumentation, MIDI 13:19:06 sequences, samples. I don't recall if they stole my computer too, but there was a lot of different drives and removable drives that were taken and basically just (demonstrating)	Relevance 401-402 Fed.R.Evid. Misleading/Speculation 403 Fed.R.Evid. The dates set forth are not dates of the underlying music files on the CD; See, and under Rule 106 Fed.R.Evid. this Court should consider Gallant's testimony at page 204:12-24 through page 206:1-3. Q. And you say I can see the file creation dates. 12 12 Can you tell me what the file creation dates are? 13 13 A. The file creation dates of the NRG files. 14 14 Q. So that would be the -- the creation date of 15 15 the image file? 16 16 A. Yes, the NRG image files. 17 17 ***Q. But not necessarily the underlying data within*** ***18 18 those files.*** ***19 19 A. There's no way to determine dates for the*** ***20 20 underlying data in the NRG files. They don't exist.*** 21 21 Q. And you determined that how? 22 22 A. From Mr. Giebler's interview. (Emphasis added) As to the dates of the image files, Foundation under Rule 601-602; Relevance 401-402 Fed.R.Evid. and Misleading and prejudicial under Rule 403 Fed.R.Evid. Under Rule 106 Fed.R.Evid. this Court should consider Gallant's testimony at page 50:15-24 through page 53:1-24.

Gallant Declaration	Evidentiary Objections
	Inadmissible information does not become admissible by having an expert testify. Fed.R.Evid. 703, Advisory Committee notes. *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").
13. Mr. Laykin goes to great lengths to discuss the possibility of finding evidence Mr. Pringle downloaded the song, "I Gotta Feeling" from the Internet on the hard drive Mr. Pringle returned to the manufacturer due to defects. Mr. Pringle informed me he purchased his current computer in July 2004. He upgraded various hardware components on this computer through the years. It originally had a 200 GB hard drive which he upgraded to a 640 GB hard drive on/about May 18,	With respect to what Pringle told Gallant, hearsay 801-802 Fed.R.Evid.; Foundation 601-602 Fed.R.Evid. Improper subject of expert testimony 702-703 Fed.R.Evid. With respect to what may or may not have transferred from computer hard drive to computer hard drive, Lack of Foundation 601-602 Fed.R.Evid.. Gallant has never inspected any hard drive or computer of Mr. Pringle Pursuant to Rule 106 Fed.R.Evid. this Court should consider the following from the deposition of Mr. Gallant, page 57:24-

Gallant Declaration	Evidentiary Objections
2009. At that time he reinstalled the operating system (Windows XP) from the original installation CD-ROM and transferred his data to the new drive. This would create a pristine installation without any residual system files (including Internet history) remaining from the previous hard drive. He also reinstalled the programs he commonly used and transferred data to the new hard drive. Again, this would not have transferred any system files (to include Internet history) to the new drive. On January 5, 2010, he purchased two new hard drives (500 GB each) and installed one in this system and believes he gave one to a friend. Again he reinstalled the operating system into the computer and transferred his data and programs to the new drive in the same manner as described above. No system files (including Internet history) would have transferred. In July/August 2011, Mr. Pringle began experiencing intermittent hardware issues with the computer and believed the issue may have been the hard drive he purchased in January 2010. On August 1, 2011, after receiving an return merchandise authorization (RMA) number from Western Digital, he returned the drive for an exchange after copying his data to an external source. He provided two copies of this data to me for safeguarding, and I provided one of these copies to Mr. Daniel	58:6: 24 24 Q. And it would be fair to say that you did not do any analysis of Mr. Pringle's hard drive that was used 02 2 in 2010 in connection with any of your opinions? 03 3 MR. DICKIE: Objection. Asked and 04 4 answered multiple times. 05 ***5 A. Yes. As I've said, I have not had access to*** ***06 6 any hard drive from Mr. Pringle.*** See also page 31:16-19 of Gallant Dep. Tr.: 16 Q. Were you ever asked to make a forensic copy of 17 **17 any hard drive of Mr. Pringle's in connection with your** 18 18 work in this case? 19 19 A. No.

Gallant Declaration	Evidentiary Objections
Aga on August 8, 2011. Western digital shipped Mr. Pringle a replacement drive on August 9, 2011.	
14. Internet browsers are typically configured by default to clear their internet history on a scheduled basis. Users can also manually delete the history at will, or set their browser to delete the history more or less frequently than the default settings, or automatically when they exit the program. These actions typically do a decent job of clearing the temporary internet files and cookies, but do on occasion leave remnants of files that can be forensically analyzed depending on how the remote web site was configured. For instance, sites that use the hypertext transfer protocol secure (HTTPS) protocol are designed to transmit the data in an encrypted format and the data that remains on the computer is encrypted. Sites that typically use the IMPS protocol are banking sites, most of the commonly used online email sites, or sites that accept credit card transactions. Computer forensics can not decrypt that data into clear text. In addition to history deletions, browsers now have an optional privacy function that prevents any browsing history from being written to the computer. This action thwarts computer forensics on systems unless they are forensically imaged on site while running since any remnant data that may remain	With respect to what may or may not have occurred on Pringle's hard drives, or what could have been copied on Pringle's hard drives: Lack of Foundation 601-602 Fed.R.Evid.. Gallant has never inspected any hard drive or computer of Mr. Pringle Pursuant to Rule 106 Fed.R.Evid. this Court should consider the following from the deposition of Mr. Gallant, page 57:24-58:6: 24 24 Q. And it would be fair to say that you did not do any analysis of Mr. Pringle's hard drive that was used 02 2 in 2010 in connection with any of your opinions? 03 3 MR. DICKIE: Objection. Asked and 04 4 answered multiple times. 05 ***5 A. Yes. As I've said, I have not had access to*** ***06 6 any hard drive from Mr. Pringle.*** See also page 31:16-19 of Gallant Dep. Tr.: 16 Q. Were you ever asked to make a forensic copy of 17 **17 any hard drive of Mr. Pringle's in connection with your** 18 18 work in this case? 19 19 A. No.

Gallant Declaration	Evidentiary Objections
will reside only in RAM. When a computer is turned off, for all intents and purposes, RAM is cleared of all data.	Moreover Pringle discarded hard drives (requested in discovery and which had been requested to be preserved) during the pendency of this litigation. Pursuant to Rule 37 Fed.R.Civ. P. Gallant should be barred from testifying as to what may or may not have been shown on the discarded hard drives.
15. According to the web site www.beatport.com (http://www.beatport.com-/search?query=i%20gotta%20feeling-&facets[1=fieldType: track), the song, "I Gotta Feeling" was first released on the site April 13, 2010. If Mr. Laykin's theory was accurate, then the Internet history for the transaction would likely have been deleted either automatically or manually by Mr. Pringle through the course of normal computer activity. Also, if Mr. Laykin was accurate in portraying Mr. Pringle as a meticulous computer genius who was perpetrating a fraud, then one would expect him to not use his personal computer to download and create the music files, hut would rather expect him to use an unknown computer. Mr. Laykin's theory is not consistent.	With respect to what may or may not have been preserved on Pringle's hard drives, or what could have been copied on Pringle's hard drives: Lack of Foundation 601-602 Fed.R.Evid.. Gallant has never inspected any hard drive or computer of Mr. Pringle Pursuant to Rule 106 Fed.R.Evid. this Court should consider the following from the deposition of Mr. Gallant, page 57:24-58:6: 24 24 Q. And it would be fair to say that you did not do any analysis of Mr. Pringle's hard drive that was used 02 2 in 2010 in connection with any of your opinions? 03 3 MR. DICKIE: Objection. Asked and 04 4 answered multiple times. 05 ***5 A. Yes. As I've said, I have not had access to*** ***06 6 any hard drive from Mr. Pringle.*** See also page 31:16-19 of Gallant Dep. Tr. 16 Q. Were you ever asked to make a

Gallant Declaration	Evidentiary Objections
	forensic copy of 17 **17 any hard drive of Mr. Pringle's in connection with your** 18 18 work in this case? 19 19 A. No. Moreover Pringle discarded hard drives (requested in discovery and which had been requested to be preserved) during the pendency of this litigation. Pursuant to Rule 37 Fed.R.Civ. P. Gallant should be barred from testifying as to what may or may not have been shown on the discarded hard drives.
16. Additionally, the four available Black Eyed Peas' downloads all require the user purchase the download. In order to purchase the download, the user would need to create an account, log in and finalize the transaction with a credit card. As stated in paragraph 6 above, details of the credit card transaction would have been encrypted. Since the details of the credit card transaction, if it had been conducted, would be encrypted on Mr. Pringle's defective hard drive (per Mr. Laykin's theory), an investigator would alternatively be able to obtain evidence of the purchase and download from Beatport.com. In my opinion, it would be better evidence to show a credit card purchase by Mr. Pringle to prove he actually downloaded the music - regardless of what computer he may have used. Additionally,	Lack of Foundation 601-602 Fed.R.Evid. Based on incomplete data; Gallant did not investigate whether the isolated "I Gotta Feeling" music stems, including the guitar twang sequence, was available elsewhere on the Internet. With respect to what may or may not have been preserved on Pringle's hard drives, or what could have been copied on Pringle's hard drives: Lack of Foundation 601-602 Fed.R.Evid.. Gallant has never inspected any hard drive or computer of Mr. Pringle Pursuant to Rule 106 Fed.R.Evid. this Court should consider the following from the deposition of Mr. Gallant, page 57:24-58:6: 24 24 Q. And it would be fair to say that you did not do any analysis of Mr. Pringle's hard drive

Gallant Declaration	Evidentiary Objections
"Beatport" would likely have transaction logs that would show Mr. Pringle created an account that could he traced back to the Internet Protocol address of his computer. I left two messages (11-29-11 and 12-5-11) for Beatport to contact me to discuss these records - they did not return my calls.	that was used 02 2 in 2010 in connection with any of your opinions? 03 3 MR. DICKIE: Objection. Asked and 04 4 answered multiple times. 05 ***5 A. Yes. As I've said, I have not had access to*** ***06 6 any hard drive from Mr. Pringle.*** See also page 31:16-19 of Gallant Dep. Tr.: 16 Q. Were you ever asked to make a forensic copy of 17 **17 any hard drive of Mr. Pringle's in connection with your** 18 18 work in this case? 19 19 A. No. Moreover Pringle discarded hard drives (requested in discovery and which had been requested to be preserved) during the pendency of this litigation. Pursuant to Rule 37 Fed.R.Civ. P. Gallant should be barred from testifying as to what may or may not have been shown on the discarded hard drives.
17. On page 8, paragraph 28, Mr. Laykin stated, " In my experience, it is not uncommon for individuals who use CD Rom discs on a regular basis, such as those in the electronic music industry, to retain a number of unused CDs, and to burn data to those old CDs years later. CD Rom discs are often purchased in bulk, for instance in packages of 25, 50, 100 or even 250	

Gallant Declaration	Evidentiary Objections
discs. Indeed, Mr. Pringle testified to having repeatedly sent out demo CDs in batches as large as 200 at a time, over a period of many years. Pringle thus likely had access to old CDs from the late 1990s which he could have used to burn the NRG discs in 2009 or 2010."	
18. CD-Rom technology has evolved over the years. In the 1999 era, the technology was not reliable, the cost per disk was comparatively high, and most importantly, the successful burn rate was extremely low. I can attest to a success rate during that time frame of less than 50% and sometimes even lower. There is nothing unreliable about a CD-Rom that was able to be successfully burned. The issue was that it took many attempts and many CD-Roms before one could be burned successfully.	With respect to the success rate lack of foundation 601-602 Fed.R.Evid. Hearsay 801-802 Fed.R.Evid. Inadmissible under 703 Fed.R.Evid. See Advisory Committee notes.
19. On page 8, paragraph 27, Laykin stated, "Similarly, older digital storage media such as CDs, which are also readily available for purchase, have been known to be used to make it more difficult to determine the true date of back-dated files."	
20. Contrary to Mr. Laykin's claim, "old digital storage media" from circa 1999 is NOT readily available for purchase." I conducted a search on E-Bay for the Verbatim model 94328 CD-Rom used by Mr. Pringle to save the music files in question. There were NO	Hearsay 801-802 Fed.R.Evid.; Relevance 401-402; Inadmissible under 703 Fed.R.Evid. See Advisory Committee notes.

Gallant Declaration	Evidentiary Objections
vendors who could provide these CD-Rows. I then conducted a Google search for the Verbatim 94328 CD-Rom. None of the sites that Google identified had any of these disks in inventory. I sent queries to some of the sites and they all responded that the particular CD-Rom was not available.	
21. During his deposition on December 7, 2011, Mr. Laykin also discusses a theory that Mr. Pringle may have backdated the NRG files in question as well as the date the CD-Rom was burned. He stated that in order to attempt to prove that theory, a computer forensic examiner would need to have access to the computer used to perpetrate this fraud and that he had no proof to support this theory. He acknowledged in his deposition that he had no evidence to support his theory of backdating - including his analysis of the two CD-Roms I provided to him via Mr. Danial Aga on August 8, 2011.	During the pendency of this litigation Pringle discarded two computer hard drives that had been requested in discovery and which had been requested to be preserved prior to the commencement of the litigation. Pursuant to Rule 106 Fed.R.Evid. this Court should consider the following page and line numbers of the Deposition of Gallant, page 34:2-19: 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***

Gallant Declaration	Evidentiary Objections
	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) Pursuant to Rule 37 Fed. R. Civ. P. Plaintiff and Gallant should be estopped and barred from asserting arguments that there is "no evidence of backdating Pringle's computer files". Fed.R.Evid 106 this court should consider the following deposition testimony of Mr. Gallant: Page 215: Q. All right. Directing your attention back to 20 20 Exhibit 59A, and the response from Mr. John Zeke 21 21 Thackray. He states, Hi, David. As always, ***the*** ***22 22 obvious is to consider what was the date and time stamp*** ***23 23 of the system creating the CD-ROM,*** but you will have no 24 24 doubt considered that. Do you see that sentence? A. Yes, I do. 02 ***2 Q. What is the system creating the CD-ROM?*** ***03 3 A. That would be the computer***

Gallant Declaration	Evidentiary Objections
	that created the ***04 4 CD-ROM.*** 05 5 Q. And so that -- there isn't a computer that you 06 6 were able to -- to analyze. 07 7 A. The computer from 1999 was not available to me. 08 ***8 Q. And the computers from current dates were also*** ***09 9 not made available to you.*** ***10 10 A. That's correct.*** Pursuant to Rule 106 Fed.R.Evid. the Court should consider pages 221-222 of the deposition of Gallant. Q. ***If -- and this is a hypothetical -- Mr. Pringle*** ***18 18 did not create the files in the 1999 time frame, but*** ***19 19 created it in the 2009/2010 time frame and then*** ***20 20 manipulated to appear they were created earlier, would*** ***21 21 the computer system that he used during that 2009/2010*** ***22 22 time frame potentially have metadata that should be*** ***23 23 reviewed?*** 24 24 MR. DICKIE: Object to the form of the question. Calls for speculation, and it's an incomplete 02 2 hypothetical which doesn't identify the computer, the 03 3 systems -- the operating systems or any of the other 04 4 important information which would go into such a 05 5 hypothetical question.

Gallant Declaration	Evidentiary Objections
	06 6 Q. You can answer my question. 07 *7 A. It's possible. I don't know without examining* *08 8 the computer or running tests on other computers that --* *09 9 in the same scenario with the same hardware, same* *10 10 software, same versions, same CD brands, same type of* *11 11 CD.* Q. But it starts with evaluating the computers 13 13 that were in use by Mr. Pringle during the 2009/2010 14 14 time frame? 15 15 A. No. I would say it starts with a computer used 16 16 by Mr. Pringle in 1999, if that was available, and start 17 17 from there. 18 18 Q. Okay. But you would also not -- not look at 19 19 the 2009/2010 computer, would you? 20 20 MR. DICKIE: Objection. Misstates his 21 21 testimony in which he specifically disagreed with you on 22 22 what he would do. 23 23 Q. Please answer my question. 24 24 A. Could you repeat the question? MS. CENAR: Please read it back for the 02 2 witness. 03 3 (Requested portion was

Gallant Declaration	Evidentiary Objections
	read.) 04 ***4 A. I would look at any computer that was made*** ***05 5 available to me.*** (emphasis added). Everyone was deprived of reviewing the computers because Mr. Pringle discarded them during the pendency of the litigation.

Dated: January 9, 2012

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