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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

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS SHAPIRO, BERNSTEIN & CO, INC., FREDERIC RIESTERER AND DAVID GUETTA

Complaint Filed: October 28, 2010
Trial Date: February 28, 2012
Hearing Date: December 19, 2011
10:00 AM

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Defendants Shapiro, Bernstein & Co, Inc. ("Shapiro Bernstein"), Frederic Riesterer and David Guetta (collectively, "Defendants") respectfully submit this Memorandum of Law in Support of their Motion for Summary Judgment.

PRELIMINARY STATEMENT

In his action for copyright infringement, Plaintiff Bryan Pringle alleges that all the defendants infringed his copyright in the musical composition entitled "Take a Dive" and the sound recording and musical composition "Take a Dive" (Dance Version). Specifically, Pringle has alleged that Defendants Riesterer, Guetta and others had access to and copied Pringle's works to create The Black Eyed Peas' hit song "I Gotta Feeling".[1]

Pringle alleges that Defendants Riesterer and Guetta and others were "direct copyright infringers" who "willfully copied… Plaintiffs' song "Take a Dive" (SMF ¶ 2; Dickstein Decl., Ex. A (First Amended Complaint ("FAC") ¶ 1)); that Plaintiff "regularly submitted demo CDs, all of which contained 'Take a Dive'… to Defendants UMG, Interscope and EMI (FAC ¶ 31); that Plaintiff advertised on the Internet (FAC ¶ 32)); and that "over the period from 1999 to 2008, Pringle received numerous letters in response to his musical submissions…" including responses from representatives from UMG, Interscope and EMI, which "implicitly acknowledges that his demo CDs, all of which contained "Take a Dive", were listened to by these individuals" (FAC ¶ 33).

In support of his motion for a preliminary injunction, Pringle declared that he went to Paris in 1999 and gave demo CDs to French record companies, music

[1] In a conference of counsel on November 1, 2011, Pringle's counsel clearly, expressly, and unequivocally stated that Pringle would withdraw his claim of infringement of his sound recording copyright. When Defendants' counsel proposed a stipulation dismissing that claim, however, Pringle's counsel refused to sign the stipulation. Statement of Material Facts ("SMF"), filed concurrently, at ¶¶ 83-84; Declaration of Tal E. Dickstein ("Dickstein Decl."), filed concurrently, at ¶¶ 16-17, Exs. O, P.

publishing companies and DJs, and had his music, including "Take a Dive (Dance Version)" played on French radio. (Doc. 73-4 at ¶¶ 7-8.)

When this Court challenged the propriety of basing a preliminary injunction solely on Plaintiff's declaration, counsel admitted at the January 31, 2011 preliminary injunction hearing: "then there is no further support for that based on what has been submitted." On the sound recording infringement claim, this Court reminded counsel that the "derivative version" registration was limited to the sound recording and not the underlying work, and that actual copying must be proven. Yet Defendants' expert explained that it was physically impossible for Defendants to have copied Plaintiff's recording, and the Court denied Plaintiff's motion.

Ten months later, Pringle's "case" is still nothing more than his unsubstantiated contentions that he carpet-bombed the music industry with demos, sent demos to people who know Defendants, and, through those "people," Defendants had access to Plaintiff's work, which they then copied. Plaintiff offers no evidence to support his claims.

Pringle has concocted an elaborate shell game. Only in this game there is no pea under any shell. Pringle has produced no evidence that Defendants had access to any of Pringle's music. The work covered by his 1998 registration (which does not include the guitar twang sound) is not substantially similar to "I Gotta Feeling". The 1999 "derivative work (with a guitar twang) was not registered until 2010, and carries no presumption of validity, yet Pringle offers no proof that it was actually created in 1999. Plaintiff's "Take a Dive (Dance Version)," as registered in the Copyright Office was, as Pringle admits, based upon re-creations that he put together in 2010. Moreover, the Copyright Office rejected the 2010 application as a registration for the underlying musical work, and Defendants' expert reiterates that the sound recording could not have been copied from Plaintiff's work, but that Plaintiff likely copied Defendants' work.

Plaintiff had no evidence supporting his claims in January 2011. Since then, he has not produced one original recording irrefutably created prior to "I Gotta Feeling," or one document supporting his naked allegations of widespread distribution of "his work" to the music industry at large, much less to Defendants.

Moreover, Pringle has admitted that he destroyed evidence by disposing of computer equipment that would have either confirmed his story or, more likely, proven that he copied from Defendants and back-dated his computer files. Even though Defendants repeatedly demanded that Pringle preserve all his electronically stored information, and his counsel represented that they would do so, on the eve of the scheduled computer inspection, counsel advised that Pringle had discarded not one, but two separate computer hard drives while this litigation was pending.

BACKGROUND

I. Defendants Independently Create the Hit Song "I Gotta Feeling"

A. Guetta and Riesterer Compose the Music for "I Gotta Feeling"

In 2008, William Adams of The Black Eyed Peas asked David Guetta to create the music for a song for The Black Eyed Peas' new album. (SMF ¶ 14; Dickstein Decl., Ex. B (Adams Tr. 236:17-239:20, 258:6-18.))

To create the music, Guetta collaborated with Frederic Riesterer, with whom Guetta had composed the song "Love is Gone" in 2007. Riesterer composed a sequence of guitar sounds using a similar electronic guitar sound (or "preset") to the one he used in "Love is Gone." Riesterer selected this preset from a French sound library named "PlugSound: Fretted Instruments." (SMF ¶ 16; Riesterer Decl. ¶¶ 4-7.) Because the PlugSound sound library included only individual notes, and not entire chords or musical phrases, Riesterer composed the guitar notes and chords for use in the new song. (SMF ¶¶ 16-19; Dickstein Decl., Ex. C (Riesterer Tr. 165:19-166:21, 179:10-181:8); Riesterer Decl. ¶¶ 5-6.) Riesterer then used sound processing software to modify the guitar chords he had created using the PlugSound preset. (SMF ¶ 17; Riesterer Decl. ¶ 7.) The result of Riesterer's modification of

the PlugSound preset and his musical composition was an original guitar "twang" sequence that was different from both the PlugSound guitar preset and the guitar sequence he used in "Love is Gone." (SMF ¶ 19; Riesterer Decl. ¶¶ 6-7.)

On December 20, 2008, Guetta sent Adams the music that he and Riesterer created, which they tentatively named "David Pop Guitar." (SMF ¶¶ 20-22; Dickstein Decl., Ex. B (Adams Tr. 75:22-78:23, 304:9-305:6.)) Adams wrote accompanying lyrics (*id.* at 35:3-38:23), but did not change the music (*id.* at 38:25-39:3; 74:21-75:2; 217:7-10; 258:22-259:13; SMF ¶ 21) The combination of Guetta and Riesterer's music with Adams' lyrics became "I Gotta Feeling," which The Black Eyed Peas released in May 2009. (SMF ¶ 22).

B. Defendants Make the Instrumental and Vocal Portions of "I Gotta Feeling" Publicly Available on the Internet

In September 2009, The Black Eyed Peas and Guetta held a contest for DJs to create re-mixes of "I Gotta Feeling." As part of this contest, each of the separate instrumental tracks (known as music "stems") of "I Gotta Feeling," including the guitar twang sequence that Riesterer and Guetta had created, as well as The Black Eyed Peas' lead and background vocal tracks, were made available for download on Beatport.com. (SMF ¶¶ 23-25; Warner Decl. ¶ 3; Dickstein Decl., Ex. D.)

During the contest, approximately 1,200 re-mixes of "I Gotta Feeling" were submitted and circulated on the Internet. (SMF ¶ 26; Warner Decl. ¶¶ 3-4.) Many of these re-mixes contained the guitar twang sequence "soloed out" – *i.e.*, without any other sounds layered on top. (SMF ¶¶ 27-28; Dickstein Decl., Ex. E (Pringle Tr. 185:3-16.)) These re-mix versions of "I Gotta Feeling" with the guitar twang sequence soloed out continue to be available on various Internet websites. (*Id.*)

II. Pringle Claims that Defendants Sampled the Guitar Twang Sequence from His Unpublished Song "Take a Dive" (Dance Version)

In October 2010, seventeen months after "I Gotta Feeling" was released, a Texas resident named Bryan Pringle filed suit against each of The Black Eyed Peas, Guetta, Riesterer and eleven record labels and music publishers, claiming that "I

Gotta Feeling" infringed the musical composition copyright in "Take a Dive" and the composition and sound recording copyright in "Take a Dive (Dance Version). (Compl., Doc. 1.)

Pringle allegedly created "Take a Dive" in 1998, and claims to have created "Take a Dive" (Dance Version) in 1999 by removing his vocals and adding a "guitar twang sequence" consisting of three[2] notes in a repeating progression. (FAC ¶ 29.)[3] Pringle alleges that "Take a Dive" is substantially similar to "I Gotta Feeling" and that the recorded guitar twang sequence in "I Gotta Feeling" was "directly sampled" from "Take a Dive" (Dance Version). (FAC ¶¶ 40-41.)

A. Pringle Is Unable to Explain How He Allegedly Created the Guitar Twang Sequence in "Take a Dive" (Dance Version)

Pringle testified "I don't specifically recall what I did in this song ["Take a Dive" (Dance Version)] as far as specifically how I constructed the song, I just don't recall." (SMF ¶ 7; Dickstein Decl., Ex. E (Pringle Tr. 219:14-24.)) Pringle is thus unable to provide even the most basic facts about creation, such as (i) the month, season or year in which he allegedly created the song (*id.* at 100:24-101:8, 204:17-206:20), (ii) how he recorded the guitar twang sound or the chords that comprise the guitar twang sequence (*id.* at 239:10-240:8, 242:3-17), or (iii) how he allegedly added the guitar twang sequence into the original version of "Take a Dive" (*id.* at 216:20-217:21, 244:6-245:6, 249:15-250:12; SMF ¶ 8.) Nor can Pringle identify anyone who can corroborate his story. (*Id.* at 201:4-202:18; SMF ¶ 9.)

The few details Pringle has provided indicate that the guitar twang sequence was not *his* original work, but something *he copied* from another source. Pringle testified that the guitar twang sequence was "just a sample" of a Fender Stratocaster

[2] Although Pringle asserts that the guitar twang sequence consists of four notes (D4, C4, B3 and G3), his transcription of the sequence itself makes clear that it contains only three notes (D4, C4 and B3) and is merely in the key of G3. (FAC ¶ 29.)

[3] Aside from removing the vocals and adding the guitar twang sequence, Pringle asserts that "Take a Dive" and "Take a Dive" (Dance Version) are exactly the same. (Pl.'s Mem. of Law for PI Motion (Doc. 73-1) at 4 n.3.)

guitar sound that he obtained from a music sample disc. (*Id.* at 230:7-231:2.) Pringle later testified that he never actually played a Stratocaster guitar, and reiterated that the guitar twang sequence was "possibly from [a music sample disc named] Best Service or it's from the other sample artists." (*Id.* at 235:20-236:20.)

B. Pringle's Mysterious NRG File is No Evidence That He Created "Take a Dive" (Dance Version) Before the Release of "I Gotta Feeling"

Pringle has no evidence of his alleged creation of "Take a Dive" (Dance Version) or the guitar twang sequence. Instead, he claims the music equipment he used, including an ASR10 sampling keyboard and computer hard drives, were stolen. (Pringle Tr. 151:5-152:12, 155:9-156:2; SMF ¶¶ 66-67.))

Pringle offers only an "NRG" disc image file. Unlike a music CD or MP3 file, an NRG file is not a mixed sound recording. It cannot be played on a CD player or a computer. It would not qualify as a "best copy" to be deposited in the Copyright Office. Instead, as sound recording expert Professor Geluso explains, Pringle's NRG file contains a series of separate sound files for each of the individual instruments that appear in "Take a Dive" (Dance Version). (SMF ¶¶ 68-74; Geluso Decl. ¶¶ 25-28.) Pringle's NRG file is not a sound recording of "Take a Dive (Dance Version)" or even of the guitar twang sequence. It contains separate files of each of the three individual chords that make up the guitar twang sequence. (*Id.*) The only way to re-create the complete "Take a Dive" (Dance Version) sound recording from the NRG file is to manually load each instrument file into an ASR10 sampling keyboard, and instruct the ASR10 to play the individual tracks together in a particular rhythmic way. (*Id.*) In other words, the various instrument files must be manipulated to create a completed sound recording.

Although the NRG file that Pringle proffers[4] shows creation and last modified dates in 1999, there is no evidence that Pringle actually created "Take a Dive" (Dance Version) and the guitar twang sequence before the release of "I Gotta Feeling." Erik Laykin, a computer forensic expert, explains that file creation and modification dates can easily be backdated by even the most inexperienced computer user, by simply changing the clock on the computer and then saving the file and burning it to a CD. (SMF ¶¶ 76-78; Laykin Decl. ¶¶ 21-29.) Laykin further explains that the creation dates of Pringle's NRG file cannot be authenticated without analyzing the computer used to create it and to burn it to a CD. (Laykin Decl. ¶¶ 30-33.) But Pringle claims that his 1999 computer was stolen, and he admitted discarding the hard drives he used after he claims to have learned of "I Gotta Feeling" in 2010. (Dickstein Decl., Ex. E (Pringle Tr. 34:2-37:23, 151:5-152:4, 155:9-156:2, 340:20-342:20.))

III. There is No Evidence Defendants Ever Had Access to Pringle's Song

A. There is No Evidence that Pringle Ever Sent a Copy of "Take a Dive" (Dance Version) to Any of the Defendants

Pringle claims that he "regularly" distributed his songs to essentially everyone in the music business, including Defendants UMG Recordings, Inc., Interscope Records (together the "UMG Defendants") and EMI April Music, Inc. ("EMI"), and he prided himself on being a pest who would "harass people" in the music business with repeated mailings of his demos. (SMF ¶ 38; Dickstein Decl., Ex. E (Pringle Tr. 66:11-16.)) Pringle further claims that he received "numerous letters in response to

[4] Pringle has had difficulty even identifying which NRG file he claims contains "Take a Dive" (Dance Version). In his November 2010 TRO application, Pringle swore that he saved the NRG file from his ASR10 sampling keyboard to his computer on June 14, 1999 and that he then burned it to a CD in May 2001. (SMF ¶¶ 80-81; Doc. 15 at ¶ 5.) Pringle even quoted that CD's serial number in his TRO declaration (*id.*) and submitted a purported expert report attesting to creation and modification dates of that file (Doc. 15 at ¶¶ 5-6). Two months later, however, in his January 2011 preliminary injunction application, Pringle changed his story and admitted that the NRG file which he had cited and given to his expert was the wrong file and did not contain the song at issue. (Doc. 73-1 at 18 n.4; SMF ¶ 82.)

his music submissions," including responses from "multiple A&R representatives at Interscope, UMG and EMI." (SMF ¶ 39; FAC ¶ 33.)

Despite these sweeping allegations, **there is no evidence whatsoever that Pringle sent "Take a Dive" (Dance Version) to anyone, let alone to the Defendants.** Pringle admits that he never had direct contact with either Guetta or Riesterer, the authors of the music for "I Gotta Feeling."[5] (SMF ¶ 42; Dickstein Decl., Ex. E (Pringle Tr. 17:1-19:7, 124:2-20.))

Pringle claims that sometime between 2001 and 2004, Guetta's former co-producer, Joachim Garraud, wrote to Pringle asking for copies of specific songs, and that Pringle then sent "Take a Dive" (Dance Version) to Garraud in France. Of course, Pringle does not have either the letter from Garraud or a copy of the letter and demo he allegedly sent to Garraud. (SMF ¶¶ 48-51; Dickstein Decl., Ex. E (Pringle Tr. 90:5-23.)) Indeed, Pringle does not recall (i) what the letter said, (ii) whether it included a specific request for music, (iii) who signed the letter, (iv) whether it was typed or handwritten, or even (v) what language it was written in. (*Id.* at 93:9-94:9, 113:1-11.)[6]

In response, the accompanying declarations of Garraud, Guetta and Riesterer confirm that none of them ever had access to Pringle's songs; never received music from Pringle; and never heard of either "Take a Dive" or "Take a Dive" (Dance Version). (SMF ¶ 53; Garraud Decl. ¶¶ 2-3; Riesterer Decl. ¶¶ 3-4, 8-9; Guetta Decl.

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[5] Both the Complaint and First Amended Complaint alleged that Guetta and Riesterer were residents of Los Angeles. (Compl. ¶¶ 14-15; FAC ¶¶ 14-15.) It was only after Riesterer submitted a declaration on November 23, 2010 (Doc. 22-3) stating that he and Guetta created the music for "I Gotta Feeling" in France that Pringle first asserted he had distributed his music in France. (Doc. 73-4 at ¶¶ 7-8.)

[6] The name Joachim Garraud is not mentioned in Pringle's pleadings, applications for injunctive relief or his Rule 26(a) Initial Disclosures. Initially, Pringle's focus was on Adams and Interscope. It was only after Pringle's counsel found a reference to Garraud on Riesterer's website that Garraud became a focal point in the Pringle fantasy. (SMF ¶ 47; *id.*, Ex. C (Riesterer Tr. 74:13-75:3.))

¶¶ 2-7.) There is also no evidence in the files of Guetta's and Garraud's production company of any correspondence with Plaintiff. (Carre Decl. ¶¶ 5-8; SMF ¶ 53.)

Finally, although Pringle claims to have sent "thousands of demo CDs for over a decade" to everyone in the music industry (Dickstein Decl., Ex. E (Pringle Tr. 76:3-6)), Pringle has no copies of any of these demo CDs or of any cover letters that he claims to have sent. (SMF ¶ 54-56; Pringle Tr. 375:22-377:22.)) Indeed, Pringle does not have any evidence that "Take a Dive" or "Take a Dive" (Dance Version) was ever received by anyone. (*Id.* at 76:3-6.) Pringle also has no way of confirming whether any demo CDs he claims to have sent actually contained "Take a Dive" or "Take a Dive" (Dance Version), because he would routinely send out CDs that did not contain all songs listed on the liner notes, and would even send out CDs with no songs at all. (*Id.* at 349:23-353:9.) And when Pringle subpoenaed documents from TAXI Music, the music promotion company Pringle worked with, TAXI produced documents that make no mention whatsoever of "Take a Dive" or "Take a Dive" (Dance Version). (SMF ¶ 57; Dickstein Decl., Ex G.)

B. There is No Evidence that "Take a Dive" (Dance Version) Was Ever Played on the Radio or Sold on CDs or on the Internet

First, there is no evidence that Pringle's music was ever played on radio stations in either the U.S. or in France. (SMF ¶¶ 58-59; Dickstein Decl., Ex. E (Pringle Tr. 291:1-292:1.)) While Pringle claims that "Take a Dive" (Dance Version) was played on the U.S. Military's Armed Forces Radio in France (*id.*), the last time an Armed Forces Radio station operated in France was in 1967.[7]

Indeed, the declarations of Thibaud Fouet, Director of the French performing rights organization, SACEM, and Gary Roth, Assistant Vice President of Broadcast Music, Inc. (with which Pringle registered as an artist) both confirm that there is no

[7] *See* http://www.afneurope.net/AboutUs/tabid/85/Default.aspx (stating that in 1967 "AFN Orleans shuts down as France withdraws from NATO and asks U.S. troops to leave.") (last visited November 11, 2011); (SMF ¶ 60.)

evidence that Pringle's song was ever publicly performed in the U.S., France or in any of SACEM's European territories. (SMF ¶ 61; Fouet Decl.; Roth Decl.)

Second, although Pringle claims that "Take a Dive" (Dance Version) was released on an album by a now-defunct record company, Pringle does not know how many copies of that album were allegedly sold, and has no evidence that might corroborate his assertion that his song was actually released to the public, such as a copy of a recording agreement or royalty statement. (SMF ¶ 62; Dickstein Decl., Ex. E (Pringle Tr. 130:3-131:10, 140:7-18.))

Third, although Pringle claims that "Take a Dive" (Dance Version) was sold on the Internet, he does not recall how many copies were sold or by which websites, nor does he have any records identifying any alleged sales. (*Id.* at 132:21-133:24.) Of course, there is no evidence that any of the Defendants ever purchased or listened to any of Pringle's music on CD or the Internet. (SMF ¶ 64; *id.* at 142:23-143:16.)

Given the absence of widespread distribution, it is not surprising that Pringle acknowledged that he earned only "[b]eer money" from the sale of *all* his music. (SMF ¶ 65; *id.* at 338:21-339:4.)

IV. Pringle Belatedly Applies to Register a Copyright in "Take a Dive" (Dance Version) After "I Gotta Feeling" Has Become a Worldwide Hit

A. The Copyright Office Denies Pringle's Application for a Copyright in the Musical Composition of the Guitar Twang Sequence

Although Pringle claims to have created "Take a Dive" (Dance Version) in 1999, he did not apply to register his copyright in that work until November 15, 2010, well after the release of "I Gotta Feeling." Pringle's application sought registration for both the sound recording and musical composition embodied in the guitar twang sequence (the only new material allegedly added to "Take a Dive" (Dance Version)). (SMF ¶ 35-37; Dickstein Decl., Ex. H at 7.) The Copyright Office denied Pringle's application for musical composition copyright, stating:

> As you know from our previous correspondence, we have been reviewing your material because of a question concerning the copyrightability of the new musical authorship, which consists of a repeating guitar progression and rhythmic pattern. We have made the determination [that] we will not be able to complete a claim in the new musical authorship. . . . . Because this work does not contain enough original musical authorship to be copyrightable, we cannot register the claim in the new music. (Dickstein Decl., Ex. H at 33.)

Pringle's copyright registration for "Take a Dive" (Dance Version) is therefore limited to the sound recording of the guitar twang sequence, and expressly *excludes* the underlying musical composition. (*Id.* at 37-38.)

B. Pringle Provides the Copyright Office With a Manual Re-Creation of "Take a Dive" (Dance Version) that Did Not Exist in 1999

Pringle submitted to the Copyright Office an MP3 song file as a deposit copy with his November 2010 copyright registration application. This MP3 file did not date back to 1999, but was re-created using the various instrument sounds contained in his NRG file. (SMF ¶¶ 86-87; Dickstein Decl., Ex. E (Pringle Tr. 262:10-14, 267:14-268:9), Ex. I (Pl.'s Resp. to Pineda's RFA No. 41.)) Pringle did so by "manually" "load[ing] each individual instrument in the proper place, load[ing] up the sequence . . . [and l]oad[ing] the effect that's corresponding to that[.]" (SMF ¶ 90; *id.*, Ex. E (Pringle Tr. 254:21-255:13.)) This involved a process of "trial and error" and "switch[ing] things around until it finally played properly" based on Pringle's *recollection* of "what the song sounded like" when he allegedly created it in 1999. (SMF ¶¶ 90-91; *id.* at 254:21-256:18.) Thus, Pringle's registration application, ostensibly for a 1999 sound recording, was "evidenced" by an MP3 file that was not a copy of the original sound recording, but a manual approximation purportedly based on Pringle's recollection.

V. Expert Analysis Shows that Defendants Did Not Copy "Take a Dive" or "Take a Dive" (Dance Version)

A. Expert Sound Recording Analysis Confirms that Guetta and Riesterer Independently Created the Guitar Twang Sequence

Defendants' expert findings confirm that Riesterer and Guetta independently created both the sounds and underlying musical composition embodied in "I Gotta Feeling." Professor Geluso explains that Riesterer's creation files contain the foundational "building blocks" that were used to create the guitar twang sequence, whereas Pringle's NRG file contains only pre-processed guitar twang *samples* which Pringle obtained from other sources. (SMF ¶¶ 31-32; Geluso Decl. ¶¶ 15-21, 25-28.) He further explains that Pringle's guitar twang samples are an electronic copy of the isolated guitar twang stems that Defendants made publicly available on the Beatport.com website. (SMF ¶¶ 29-34; *id.* at ¶ 29-31.)[8]

B. Expert Musicology Analysis Confirms that there are No Substantial Similarities Between "Take a Dive" and "I Gotta Feeling"

Dr. Lawrence Ferrara has analyzed the musical compositions embodied in the original version of "Take a Dive" (which does not contain the guitar twang sequence) and in "I Gotta Feeling," and has determined that there are absolutely no similarities that would suggest copying. Indeed, there are significant differences in every element of the respective compositions – structure, harmony, rhythm, melody, and lyrics. (SMF ¶ 92-98; Ferrara Decl. ¶¶ 4-5, 65, 91-97.) Whatever minimal similarities may exist consist merely of basic, everyday musical building blocks that are common to countless works of popular music, and are not original to "Take a Dive." (*Id.*)

[8] Indeed, Professor Geluso's analysis shows that Pringle copied one of The Black Eyed Peas' "I Gotta Feeling" vocal tracks from the files that were available on the Beatport.com website, and inserted it into a version of his song which he posted to the Internet. (SMF ¶¶ 29-34; Geluso Decl. ¶¶ 32-36.) Thus, Pringle had both the ability and opportunity to copy portions of the separate "I Gotta Feeling" stems from Beatport.com (or a re-mix of those stems) and insert them into his own recordings.

VI. Pringle Destroys Critical Electronic Evidence That Would Confirm His Copying from "I Gotta Feeling"

As early as July 2010, The Black Eyed Peas' lawyer wrote to Pringle's counsel "question[ing] . . . the authenticity of Mr. Pringle's representations regarding the dates of his computer files" and demanding that all of Pringle's electronically stored information be preserved, because they would likely contain evidence of Pringle's copying of the guitar twang sequence and backdated the dates of his NRG file. (SMF ¶ 99; Dickstein Decl., Ex. J.) They further advised that Pringle's computer equipment would be "something we will necessarily request in discovery should this case ever reach a filed action," and Pringle's lawyer represented that he would preserve the equipment. (SMF ¶¶ 100, 102; Dickstein Decl., *id.*, Ex. K.)[9]

After Pringle filed suit, Defendants requested, and Pringle's counsel agreed to, a forensic inspection of Pringle's computer hardware and music equipment he used from 2009 to the present. (SMF ¶ 104; Dickstein Decl., Exs. L, M, N.) Just before the scheduled inspection was to take place on August 8, 2011, however, Pringle informed Defendants that he had returned the computer hard drive he had been using since January 2011 to its manufacturer, and that he disposed of the hard drive he used in 2009 and 2010, which was now "probably in a landfill." (SMF ¶¶ 105-107; Dickstein Decl., Ex. F at 9-10, Ex. E (Pringle Tr. 34:2-35:2, 341:21-342:20.)) Both hard drives were disposed of *after* Pringle retained litigation counsel in February 2010 and *after* he filed suit in October 2010. (SMF ¶ 106; Dickstein Decl., Exs. F, E at 30:16-38:13.))

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[9] Similarly, in the parties' February 18, 2011 Joint Rule 26 Report to the Court, Defendants advised that "Mr. Pringle's ESI will likely play a crucial role in discovery in this action, as it goes directly to the threshold issues of Plaintiff's ownership of a valid copyright, including the dates and manner of Plaintiff's alleged creation of 'Take a Dive' and 'Take a Dive' Derivative, and the validity of Plaintiff's asserted copyright registrations of those works." (Doc. 110 at 7:21-25; SMF ¶ 103.)

Pringle also acknowledged that he "did not make a full and complete copy of the entire drive from 2010" including "program-related files or Internet-related files[.]" (SMF ¶ 108; Pringle Tr. at 49:1-51:4, 286:3-15.)) Defendant's forensic computer expert explains that these and other system files would contain evidence of the true date of the NRG file. (Laykin Decl. ¶¶ 30-36; SMF ¶ 109.)

Pringle also testified that in July or August 2011, he returned the computer hard drive that he had been using since the January 2011 to the manufacturer. (SMF ¶ 110; Pringle Tr. 31:4-33:24.)) Pringle testified that the "I Gotta Feeling" re-mixes that he obtained which had the guitar twang sequence soloed-out were saved to either the 2009/2010 hard drive that he discarded in late 2010 or early 2011, or the 2011 drive that he returned to the manufacturer in July 2011. (SMF ¶ 111; Pringle Tr. 190:6-191:23) In either case, Pringle disposed of critical evidence while this action was pending. Professor Geluso states that examination of those files could have further confirmed that Pringle copied from Defendants, rather than been copied by them. (Geluso Decl. at ¶ 15 n.8; Laykin Decl. ¶¶ 30-36; SMF ¶¶ 101, 109.)

SUMMARY JUDGMENT STANDARD

Summary judgment is required if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To defeat a properly supported summary judgment motion, the non-movant cannot rest on his allegations alone, but must come forward with credible, admissible evidence showing a genuine issue of fact as to each element of his claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986). Accordingly, "'[u]ncorroborated and self-serving testimony,' without more, will not create a 'genuine issue' of material fact precluding summary judgment." *Baker v. Walker*, 2011 WL 1239826, at *1 (E.D. Cal. March 29, 2011) (quoting *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002)).

ARGUMENT

I. Pringle Cannot Establish Infringement of "Take a Dive" (Dance Version)

A plaintiff "must demonstrate (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Benay v. Warner Bros Entm't, Inc.*, 607 F.3d 620, 624 (9th Cir. 2010) (citation omitted). Because Pringle can show neither, his infringement claim fails.

A. Pringle Cannot Show That He Owns a Valid Copyright In "Take a Dive" (Dance Version)

Pringle cannot rely on his November 2010 registration to establish a *prima facie* case of copyright ownership of "Take a Dive" (Dance Version), because that registration was issued more than five years after Pringle claims the song was first published in 1999. *See* 17 U.S.C. § 410(c). Pringle therefore must prove that (i) he created the guitar twang sequence (the only allegedly new material in "Take a Dive" (Dance Version)), and (ii) the guitar twang sequence contains non-trivial amounts of artistic expression. *See Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003).

1. Pringle Cannot Prove That The Guitar Twang Sequence Was His Original Work of Authorship

(a) There is No Evidence That the Guitar Twang Sequence Was Pringle's Original Work of Authorship

In denying Pringle's preliminary injunction motion, the Court found that Pringle had produced no evidence "i.e., proof" that he created the guitar twang sequence. (Doc. 99 at 5-7.) As discussed above, *supra* at 5-6, Pringle has no records of his alleged creation of the guitar twang sequence, is unable to provide even the most basic facts as to how he allegedly created the guitar sequence, and even acknowledged that "as far as specifically how I constructed the song, I just don't recall." Indeed, Pringle acknowledged that he did not play any musical instrument to create the guitar twang sequence and simply copied it from a music sample library, *see supra* at 5-6, which directly contradicts his claim of authorship. *See Satava*, 323 F.3d at 810.

(b) Expert Analysis Confirms that Defendants Independently Created the Guitar Twang Sequence and That Pringle Sampled That Sequence From Another Source

Professor Geluso's analysis reveals that, while Defendants' electronic creation files for "I Gotta Feeling" contain each of the separate un-processed notes and chords that make up the guitar twang sequence, Pringle's NRG file contains only pre-processed *samples* of the guitar twang sequence. Each note and chord in Pringle's file is already "fused" together, with the sound processing already applied, which indicates that Pringle sampled the guitar twang from another source. (SMF ¶¶ 29-31; Geluso Decl. ¶¶ 15-28.) Indeed, Professor Geluso was able to re-create the guitar twang sequence from scratch using Defendants' creation files, something that could not be done with anything in Pringle's "creation" file. (SMF ¶ 32-34; Geluso Decl. ¶¶ 17-21.)

2. The Guitar Twang Sequence is Not Copyrightable as a Musical Composition

"Although the amount of creative input by the author required to meet the originality standard is low, it is not negligible. There must be something more than a 'merely trivial' variation." *Satava*, 323 F.3d at 810 (citing *Feist*, 499 U.S. at 362). This is especially true with respect to musical composition, where courts "must be 'mindful of the limited number of notes and chords available to composers and the resulting fact that common themes frequently appear in various compositions, especially in popular music.'" *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1253 (C.D. Cal. 2002) (quoting *Gaste v. Kaiserman*. 863 F.2d 1061, 1068 (2d Cir. 1988)), *aff'd*, 349 F.3d 591 (9th Cir. 2008). Brief musical sequences consisting of only a few notes or chords and unaccompanied by any lyrics – such as the guitar twang sequence – are therefore not copyrightable. *See, e.g., id.* at 1253-54 (three-note sequence with one background note not protectable); *McDonald v. Multimedia*

Entm't, Inc., 1991 WL 311921, at *4 (S.D.N.Y. July 19, 1991) (three-note sequence not protectable).

Indeed, that is why the Copyright Office denied a composition copyright for "Take a Dive" (Dance Version). (SMF ¶ 36; Dickstein Decl., Ex. H at 33.)) Because the Copyright Office has extensive experience reviewing copyright claims and the authority to interpret the Copyright Act, its decisions are entitled to judicial deference. *See Batjac Prods. Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223, 1230 (9th Cir. 1998) (deferring to Copyright Office's refusal of registration, stating "[t]he Register has the authority to interpret the copyright laws and [ ] its interpretations are entitled to judicial deference if reasonable") (citation omitted); *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286 (3d Cir. 2004) ("the Copyright Office's longstanding practice of denying registration to short phrases merits deference").[10]

B. Pringle Cannot Show That Any Defendant Copied "Take a Dive" (Dance Version)

Pringle's claim also fails because he cannot show that any Defendant had access to his demo and could have copied from it when creating "I Gotta Feeling." Access can be shown either by "(1) a particular chain of events . . . between the plaintiff's work and the defendant's access to that work . . . or (2) the plaintiff's work has been widely disseminated." *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1175 (C.D. Cal. 2001). "To prove access, a plaintiff must show a reasonable possibility, not merely a bare possibility, that an alleged infringer had the chance to view the protected work." *Art Attacks Ink, LLC v. MGA Entm't, Inc.*, 581 F.3d

[10] Pringle's claim must also be dismissed because he failed to notify the Copyright Office before suing based on his rejected composition claim. *See* 17 U.S.C. § 411(a) ("[W]here the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights."); *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 617 (9th Cir. 2010).

1138, 1143 (9th Cir. 2009). "In order to support a claim of access, a plaintiff must offer 'significant, affirmative and probative evidence.'" *Gable v. Nat'l Broad. Co.*, 727 F. Supp. 2d 815, 824 (C.D. Cal. 2010), *aff'd*, 2011 WL 2412410 (9th Cir. June 16, 2011) (quoting *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003). "Access may not be inferred through mere 'speculation or conjecture'" *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1297 (C.D. Cal. 1995) (quoting *Ferguson v. Nat'l Broad. Co.*, 584 F.2d 111, 113 (5th Cir. 1978)).

1. There Is No Evidence the Creators of "I Gotta Feeling" Had Access to "Take a Dive" (Dance Version)

Despite Pringle's sweeping allegations that he "regularly" sent copies of "Take a Dive" (Dance Version) to essentially everyone in the music industry over a nine-year period, and that he received "numerous letters" in response from UMG, Interscope and EMI, he has not produced even a single letter or response. Indeed, Pringle admits that he never had any contact with Guetta, Riesterer or any of The Black Eyed Peas. *Supra* at 8-9.

Recognizing that he has no evidence of access through UMG, Interscope or EMI, Pringle fabricated a new story whereby one of David Guetta's former co-producers, Joachim Garraud, wrote to Pringle after somehow obtaining a Pringle demo in a French club and asked him to send a copy of "Take a Dive" (Dance Version), and that Pringle then sent the song to Garraud. Pringle speculates that Garraud might have then shared the demo with Guetta or Riesterer, even though Garraud was not involved in the creation of "I Gotta Feeling." *Supra* at 8-9. Like the allegations in his complaint, Pringle's self-serving testimony is completely uncorroborated (not to mention far-fetched) by any objective evidence. Pringle does not have a copy of either the letter he claims to have received from Garraud, or of the music he claims to have sent to Garraud. (*Id.*) Indeed, Pringle's own testimony undermines this latest theory of access, as he does not recall anything about the

supposed letter from Garraud, including whether or not it actually included a request for music. (*Id.*)

Any speculation that this exchange with Garraud actually took place is erased by Garraud's sworn declaration that he never received any music from Pringle and never gave any such music to Guetta or Riesterer. (Garruad Decl. ¶¶ 2-3; *see also* Guetta Decl. ¶¶ 3-7; Riesterer Decl. ¶¶ 8-9; Carre Decl. ¶¶ 6-8; SMF ¶ 53); *see Meta-Film Assocs. v. MCA Inc.*, 586 F. Supp. 1346, 1355-56 (C.D. Cal. 1984) (plaintiff must show that alleged third party intermediary either "was a supervisor with responsibility for the defendant's project, was part of the same work unit as the copier, or contributed creative ideas or material to the defendant's work.").

2. There is No Evidence That "Take a Dive" (Dance Version) Received Widespread Distribution

Where a work has achieved "considerable commercial success" or is "readily available in the market," a court may presume that the defendants had access to the work. *Mestre v. Vivendi Universal U.S. Holding Co.*, 2005 WL 1959295, at *4 (D. Or. Aug. 15, 2005), *aff'd*, 273 F. App'x 631 (9th Cir. 2008). Pringle cannot come close to making such a showing. He cavalierly concedes that he made no more than "beer money" on sales of *all* of his music, and both U.S. and French performing rights organizations have no evidence whatsoever of any public performance of "Take a Dive" (Dance Version). *Supra* at 9-10.

Indeed, Pringle does not have a shred of evidence that "Take a Dive" (Dance Version) was ever so widely distributed that Defendants could be *presumed* to have had access. *See Art Attacks Ink, LLC v. MGA Entm't Inc.*, 581 F.3d 1138, 1144 (9th Cir. 2009) (no presumption of access even though plaintiff sold 2,000 T-shirts per year including at events attended by millions of people); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003) (no presumption of access even where video sold 19,000 copies over a thirteen-year period); *Jason v. Fonda*, 526 F. Supp. 774,

776 (C.D. Cal. 1981) (no more than "bare possibility" of access even where plaintiff's book sold 2,000 copies nationwide), *aff'd*, 698 F.2d 966 (9th Cir. 1982).

In sum, Pringle utterly fails to provide any "significant, affirmative and probative evidence" that Defendants had access to his song. *Gable*, 727 F. Supp. 2d at 824.

3. Pringle Cannot Prove that Any Defendant Sampled from the "Take a Dive" (Dance Version) Sound Recording

In order for Pringle to prevail on his sound recording infringement claim that Defendants unlawfully sampled the guitar twang sequence sound recording, he must show that Defendants had access to the actual sound recording of "Take a Dive" (Dance Version) and that they physically misappropriated (*i.e.*, "sampled") portions of it. (Doc. 99, Feb. 8, 2011 Order at 8-9) (citing 17 U.S.C. § 114(b)); *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) ("Mere imitation of a recorded performance would not constitute a copyright infringement").

As Professor Geluso has explained, it would have been technologically impossible for Defendants to have sampled the guitar twang sequence from Pringle's work, because the guitar twang sequence is layered with other sounds in "Take a Dive" (Dance Version), yet it is clear in "I Gotta Feeling." (Geluso Decl. ¶¶ 22-24; Doc. 99 at 7-10 (Order denying Pl.'s Motion for PI).)[11]

II. Pringle's Claim that Defendants Infringed "Take a Dive" (Dance Version) is Barred by His Failure to Submit a *Bona Fide* Deposit Copy

A court has no jurisdiction to hear a copyright infringement claim unless the plaintiff has fulfilled the registration requirement, which includes depositing a copy of his work with the Copyright Office. *See* 17 U.S.C. §§ 408(b)(1),(2), 411(a); *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1211 (9th Cir. 1998). The deposit

[11] Pringle's lawyers acknowledged that there is no legitimate basis for this claim when they expressly stated they would withdraw the sound recording infringement claim. (SMF ¶ 83; Dickstein Decl. ¶¶ 16-17.) But they then refused to dismiss this claim (while stating they would not pursue it "at this time") despite a total absence of supporting evidence. (SMF ¶ 84-85; Dickstein Decl., Exs. P, Q.)

copy requirement is not a mere formality. It serves an important evidentiary function of screening out fraudulent infringement claims based on a re-constructed work made only after the defendant's work has achieved commercial success. *See Tavory v. NTP, Inc.*, 495 F. Supp. 2d 531, 536 (E.D. Va. 2007); *Coles v. Wonder*, 283 F.3d 798, 802 (6th Cir. 2002). The deposit requirement therefore permits "'bona fide copies of the original work only.'" *Kodadek*, 152 F.3d at 1211 (quoting *Seiler*, 808 F.2d at 1322). A bona fide copy "must be virtually identical to the original and must have been produced by directly referring to the original." *Kodadek*, 152 F.3d at 1212. "[A] process of manual reconstruction from various separate sources in the absence of the original work will not suffice." *Nova Design Build, Inc. v. Grace Hotels, LLC*, 2010 WL 747896, at *4 (N.D. Ill. Feb. 26, 2010). Indeed, "the Copyright Act does not countenance the validity of any deposit copy that was made with even the slightest reference to recollection." *Tavory*, 495 F. Supp. 2d at 536.

Pringle's submission to the Copyright Office in November 2010 was conjured up long after he allegedly created the song in 1999. Pringle's manipulation of sounds was "created" through "trial and error" "until it finally played properly". *Supra* at 11. Pringle did not refer back to the original 1999 sound recording, but to the NRG file which contains fragmented instrument files, not a complete sound recording. (SMF ¶¶ 69, 70, 87; Geluso Decl. ¶ 27.) Pringle therefore cannot satisfy the deposit copy requirement, and the Court has no jurisdiction to hear his claim. *See Coles,* 283 F.3d at 800 (judgment as a matter of law for defendant where plaintiff "could not refer to the original version of the song when he made the [deposit copy] recording because he did not possess a copy of a recording that he made at the time of the song's creation"); *See Torres-Negron v. J&N Records, LLC*, 504 F.3d 151 (1st Cir. 2007) (reconstruction of song from memory not sufficient); *Cartier v. Jackson*, 59 F.3d 1046 (10th Cir. 1995).

III. Pringle Cannot Establish Infringement of "Take a Dive"

A. There is No Evidence That Any Defendant Had Access to "Take a Dive"

Pringle's claim of infringement of the original version of "Take a Dive" fails because he cannot show that Defendants had access to that song for the reasons discussed in Section I.B. above.

B. "Take a Dive" and "I Gotta Feeling" Are Not Substantially Similar

Pringle's infringement claim with respect to the original version of "Take a Dive" (which does not contain the guitar twang sequence) also fails because he cannot satisfy the "extrinsic" test of substantial similarity. *See Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir.1994) ("[a] plaintiff who cannot satisfy the extrinsic test necessarily loses on summary judgment")

Expert musicologist Dr. Lawrence Ferrara has concluded that there are no musicological grounds for any claim of substantial similarity. (SMF ¶¶ 92-98; Ferrara Decl. ¶ 4.) Dr. Ferrara identifies numerous major structural differences between the two works (*id.* at ¶¶ 9-11), finds that the basic chord progressions in the two works are completely different (*id.* at ¶¶ 14, 15), finds that there are no similarities at all in melody or lyrics (*id.* at ¶¶ 62-64) and explains that the two works have different "overall rhythmic feel and flow" (*id.* at ¶ 60).

Not only are the two works different in every musicological respect, but the minimal similarities that do exist—such as the mere fact that both songs happen to utilize 4/4 time, a "dance" tempo, a chorus with 8 bars, and a "1-4" chord progression—are nothing more than unprotectable "musical building blocks and commonplace expression and practices." (SMF ¶ 98; *id.* at ¶ 65); *See Batts v. Adams.*, Case No. 10-cv-8123-JFW (RZx) (C.D. Cal. Oct. 21, 2011) (Doc. 251 at *4, 8) (summary judgment for defendants, stating "the party claiming infringement may place '*no* reliance upon any similarity in expression resulting from' unprotectable elements"; no copyright protection for "drumbeats in both works

[that] are commonplace and widely used"); *O'Keefe v. Ogilvy & Mather Worldwide, Inc.*, 590 F. Supp. 2d 500, 517 (S.D.N.Y. 2008) (summary judgment for defendant, stating "the fact that two songs are similar in the sense that they both use 4/4 time ... is not ... a probative similarity, because it is so commonplace that it is not unlikely to arise [in] independently created works.") (citation omitted); *Currin v. Arista Records, Inc.*, 724 F. Supp. 2d 286, 294 (D. Conn. 2010) ("[T]he speed of the song is not, by itself, a protectible element."); *Goldberg v. Cameron*, 2011 WL 1299007, at *7 (N.D. Cal. Apr. 4, 2011) (summary judgment for defendant, stating "musical ideas, such as tremolo effects, or to the mood, effect, and feeling of the compositions" are unprotectable and irrelevant to a substantial similarity analysis); *Tisi v. Patrick*, 97 F. Supp. 2d 539, 548-49 (S.D.N.Y. 2000) (no infringement based on alleged copying of unprotectable elements, such as key of A, rock tempo, chord structure common in rock music, and chords in "root" position).

Both Pringle and his "experts" assert that an ordinary listener would believe that "I Gotta Feeling" was similar to "Take a Dive" (Dance Version) only because of the guitar twang sequence.[12] Because the guitar twang sequence is not present in the original version of "Take a Dive," Pringle essentially concedes that an ordinary listener would not consider it similar to "I Gotta Feeling," and summary judgment is therefore appropriate. *See Gable v. Nat'l Broad. Co.,* 2011 WL 2412410, at *1 (9th Cir. June 16, 2011) (affirming summary judgment where "no reasonable juror could find substantial similarity of ideas and expression"); *Berkic v. Crichton*, 761 F.2d 1289 (9th Cir. 1985); *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d

[12] *See* (Doc. 73-2, Stewart Decl. ¶ 6) ("As the most recognizable element, [the guitar twang sequence] enables a listener to instantly identify the song."); (Doc. 73-3, Byrnes Decl. ¶ 6(f)) ("[The guitar chord accompaniment] is the element that, if played alone, would allow a listener who was otherwise familiar with either song to say, upon hearing it, 'That is Take a Dive/I Gotta Feeling.'"); (Dickstein Decl., Ex. (FAC ¶ 4) (the "main instrumental 'hook line' sequences in both songs [are] the distinct, memorable parts of both songs to the hear[.]")

1072, 1077 (9th Cir. 2006) ("[A] plaintiff who cannot satisfy the extrinsic test necessarily loses on summary judgment . . . .") (citation omitted).

IV. Defendants are Entitled to Judgment Based on Plaintiff's Spoliation of Evidence

The duty to preserve evidence arises "as soon as the parties reasonably anticipate litigation." *Vieste, LLC v. Hill Redwood Dev.*, 2011 WL 2198257, at *3 (N.D. Cal. June 6, 2011). Courts have the inherent power to impose sanctions for spoliation of evidence, including dismissing a party's claim where the spoliation is willful or in bad faith. *See Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (citing *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995)) "A party's destruction of evidence qualifies as willful spoliation if the party has 'some notice that the documents were *potentially* relevant to the litigation before they were destroyed.'" *Leon*, 464 F.3d at 959 (quoting *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002) (emphasis in *Leon*). "Moreover, because 'the relevance of destroyed documents cannot be clearly ascertained because the documents no longer exist,' a party 'can hardly assert any presumption of irrelevance as to the destroyed documents.'" *Id.* (quoting *Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1205 (8th Cir. 1982)) (alteration omitted).

Pringle's bad faith disposal of two computer hard drives he used from 2009 to 2011 fully warrants dismissal of his claim. First, there is no question that Pringle disposed of his hard drives after he reasonably anticipated litigation. Indeed, he did so in late 2010 or early 2011 and in mid-2011—**while this litigation was pending**.

Second, when Pringle disposed of his computer hard drives, he was already on notice that the information on those drives was at least "potentially relevant." In July, 2010, Defendants demanded that he preserve "all computer records" since that would "be something we will necessarily request in discovery" and Pringle's lawyer agreed to do so. And in February 2011, Defendants advised that "Mr. Pringle's ESI will likely play a crucial role in discovery in this action." *Supra* at 13. Indeed,

Pringle's counsel recognized that his hard drives contained relevant information when they agreed to allow the drives to be inspected.

Third, Defendants have been severely prejudiced by Pringle's disposal of his computer hard drives. Pringle has acknowledged that those drives contained "I Gotta Feeling" re-mixes with the guitar twang sequence in the clear. Expert analysis of those files could further confirm that Pringle copied the guitar twang sequence from those re-mixes and inserted it into "Take a Dive" to create the phony "Take a Dive" (Dance Version). *Supra* at 13-14. Pringle's discarded hard drives also contained temporary files and system files that could show that Pringle back-dated the creation and modification dates of the NRG file. (*Id.*)

The Ninth Circuit's decision in *Leon v. IDX Systems Corp.* is instructive. There, the court dismissed plaintiff's employment discrimination suit after he intentionally deleted allegedly "personal" files from his computer after he filed suit, and after being advised by opposing counsel of his obligation to preserve data. *Leon*, 464 F.3d at 958. The Ninth Circuit affirmed the district court's finding of "willful spoliation" and prejudice to defendant, because the deleted files "*could* have helped [the defendant] with its case" even though the exact contents of the deleted files could never be known. *Id.* at 956, 959-60 (emphasis added).

Dismissal is even more appropriate here than in *Leon*. Pringle did not merely delete files from his computer, but he actually **discarded two entire hard drives**. Not only was Pringle repeatedly cautioned to preserve all electronic evidence, but his own lawyers agreed preserve and allow inspection of his computer hard drives, only to later inform Defendants that Pringle had gotten rid of them. And not only were the files on Pringle's computer hard drives "potentially" relevant to his claims, but Pringle testified that the hard drives contained "I Gotta Feeling" re-mix files that he admittedly used to copy Defendants' music. Such nefarious conduct and abuse of the judicial system mandates that Pringle's claim be dismissed.

CONCLUSION

For all of the above reasons, Defendants Shapiro Bernstein, Frederic Riesterer and David Guetta respectfully request that the Court grant their motion for summary judgment.

Dated: November 17, 2011

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