

1 Dean A. Dickie (appearing *Pro Hac Vice*)
Dickie@MillerCanfield.com
2 Kathleen E. Koppenhoefer (appearing *Pro Hac Vice*)
Koppenhoefer@MillerCanfield.com
3 MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
225 West Washington Street, Suite 2600
4 Chicago, IL 60606
Telephone: 312.460.4200
5 Facsimile: 312.460.4288

6 George L. Hampton IV (State Bar No. 144433)
ghampton@hamptonholley.com
7 Colin C. Holley (State Bar No. 191999)
cholley@hamptonholley.com
8 HAMPTONHOLLEY LLP
2101 East Coast Highway, Suite 260
9 Corona del Mar, California 92625
Telephone: 949.718.4550
10 Facsimile: 949.718.4580

11 Attorneys for Plaintiff
BRYAN PRINGLE

12
13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15 SOUTHERN DIVISION

16 BRYAN PRINGLE, an individual,

17 Plaintiff,

18 v.

19 WILLIAM ADAMS, JR.; STACY
FERGUSON; ALLAN PINEDA; and
20 JAIME GOMEZ, all individually and
collectively as the music group The
21 Black Eyed Peas, et al.,

22 Defendants.
23
24
25

Case No. SACV 10-1656 JST(RZx)

**PLAINTIFF'S SUPPLEMENTAL
RESPONSE TO MOTION FOR
SUMMARY JUDGMENT TO
CORRECT MISSTATEMENTS
MADE BY DEFENSE COUNSEL**

1 **I. Introduction**

2 On March 5, 2012, this Court held its hearing on Defendants' motion for
3 summary judgment. The Court gave Defendants' counsel the "last word" and he
4 took that opportunity to make several misrepresentations about the record to date.
5 The issue here, of course, is whether viewing the evidence in the light most
6 favorable to Plaintiff and drawing all justifiable inferences in his favor, there are
7 genuine issues of material fact. *Capitol Records, LLC v. BlueBeat, Inc.*, 765 F.
8 Supp. 2d 1198, 1201 (C.D. Cal. 2010). Notwithstanding that required focus,
9 counsel's misstatements must not go unaddressed.

10 **II. Barbara Frederikson-Cross and David Gallant Concluded That There**
11 **Was No Evidence That Plaintiff Backdated the Files**

12 Defendants' counsel represented to the Court that Mr. Pringle's expert
13 witnesses, Barbara Frederikson-Cross and David Gallant, concluded that the NRG
14 files "could have been backdated." Those statements were not accurate or fair.

15 Mr. Gallant actually concluded that "based on the analysis of the data
16 provided to [him], August 22, 1999, at 12:54 pm was the last time the
17 "DISK05.NRG" file ... was modified." *See* Gallant Decl. at ¶ 9. Gallant also
18 referenced the fact that Defendants' expert, Eric Laykin, admitted that after he
19 analyzed the CD-ROMs that contained the NRG files, he "had no evidence to
20 support his theory of backdating." *See* Gallant Decl. at ¶ 21.

21 Defense counsel's statement that Ms. Frederikson-Cross "concluded" that it
22 was "possible" that Plaintiff could have backdated the files was similarly
23 misleading. Ms. Frederikson-Cross said several times in her deposition that she had
24 seen "no evidence to suggest" that this was true. *See* Frederikson-Cross Dep.
25 Transcript, pp. 190, 191. She acknowledged that "from a purely hypothetical
26 computer science standpoint," a "hypothetical" could be "constructed" in which that
27 was the case. *Id.* at 191. But she was clear that the list of assumptions (none of
28

1 which were supported by any evidence in this case) that would have to be in play
2 was beyond plausible. *Id.* at 190.

3 **III. Plaintiff Did Not Have to Re-Create Anything When He Registered**
4 **“Take a Dive” (Dance Version)**

5 Defense counsel suggested to the Court that through some process of “trial
6 and error,” Plaintiff “re-created” the individual components on “DISK05.NRG”
7 when he registered the sound recording with the Copyright Office.

8 Counsel’s statements were not accurate. There is no evidence in the record
9 that Plaintiff had to “re-create” any of these components in order to play the sound
10 recording or that he engaged in any process of “trial and error.”

11 Plaintiff simply had to “re-load” the creation files from the “DISK05.NRG”
12 into the Ensoniq ASR-10 and push the “play” button. Pringle Decl. at ¶ 169. This
13 process did not involve any “re-creation” and the sound recording was not a
14 “manual approximation.” *Id.* at ¶¶ 167-178. Plaintiff simply had to submit the
15 sound recording in a format that the Copyright Office would accept. *Id.* The
16 Copyright Office does not accept NRG files.

17 Similarly, Mr. Pringle never testified that he engaged in any practice of trial
18 and error when he was “re-loading” the sound recording. Plaintiff was not referring
19 to himself or anything he had done. A complete reading of his testimony confirms
20 that he was referring to the questioner’s ability to load the sound recording having
21 limited experience with the equipment. *See* Pringle Dep. Transcript at p. 256.

22 Defense counsel’s characterization of Plaintiff’s testimony is incorrect. Like
23 a magnetic tape recording that may be played on different reels and subsequently
24 recorded, the actual sound recording Plaintiff created and submitted to the Copyright
25 Office remained the same at all times.

26 **IV. Plaintiff Could Not Have Copied From Beatport to NRG**

27 Defense counsel conceded that the samples the Black Eyed Peas made
28 available on www.beatportal.com were available only for a limited time and the

1 hard drive that Plaintiff discarded may have been inoperable at that time. He
2 represented to the Court, however, that Plaintiff “could have found” the mp3 files
3 “anywhere” on the internet and then converted them to the NRG files that were
4 preserved and placed in Mr. Gallant’s possession.

5 This statement was also not true and not supported by any evidence in the
6 record. The Ensoniq ASR-10, to which NRG files are proprietary, *cannot* recognize
7 or work with any audio file that is in mp3 format. Pringle Decl. at ¶ 114. It is
8 undisputed that the sound files the Black Eyes Peas made available on
9 www.beatportal.com were only available as mp3 files. *Id.* at ¶ 110. Plaintiff could
10 not have located orphaned mp3 files that were once available on
11 www.beatportal.com (close to 50 mb) and then worked with them in any capacity on
12 his ASR-10 keyboard. It was not possible for him to do that. *See id.* at ¶¶ 110-116.
13 Ms. Frederikson-Cross agreed that “the ASR-10 does not accept input from mp3s.”
14 *See* Frederikson-Cross Dep. at p. 192.

15 Defense counsel’s rhetoric and misstatements of the evidence cannot replace
16 scientific fact, especially when there is uncontroverted evidence that these creation
17 files were last accessed and modified in 1999.

18
19 Dated: March 6, 2012

Dean A. Dickie (appearing *Pro Hac Vice*)
Kathleen E. Koppenhoefer (appearing *Pro Hac Vice*)
MILLER, CANFIELD, PADDOCK AND STONE,
P.L.C.

George L. Hampton IV (State Bar No. 144433)
Colin C. Holley (State Bar No. 191999)
HAMPTONHOLLEY LLP

23
24
25 By: /s/ Dean Dickie
Attorneys for Plaintiff BRYAN PRINGLE

CERTIFICATE OF SERVICE

On March 6, 2012, I electronically filed the foregoing PLAINTIFF'S SUPPLEMENTAL RESPONSE TO MOTION FOR SUMMARY JUDGMENT TO CORRECT MISSTATEMENTS MADE BY DEFENSE COUNSEL using the CM/ECF system which will send notification of such filing to the following registered CM/ECF Users:

Barry I. Slotnick	bslotnick@loeb.com
Donald A. Miller	dmiller@loeb.com , vmanssourian@loeb.com
Tal Efriam Dickstein	tdickstein@loeb.com
Linda M. Burrow	wilson@caldwell-leslie.com , burrow@caldwell-leslie.com , popescu@caldwell-leslie.com , robinson@caldwell-leslie.com
Ryan Christopher Williams	williamsr@millercafield.com
Kara E. F. Cenar	kara.cenar@bryancave.com
Robert C. Levels	levels@millercafield.com
Kathleen E. Koppenhoefer	koppenhoefer@millercafield.com
Rachel Aleeza Rappaport	rrappaport@loeb.com
Jonathan S. Pink	jonathan.pink@bryancave.com , elaine.hellwig@bryancave.com
Dean A. Dickie	dickie@millercafield.com , smithkaa@millercafield.com , deuel@millercafield.com , christensen@millercafield.com , seaton@millercafield.com
Edwin F. McPherson	emcpherson@mcphersonrane.com , astephan@mcphersonrane.com
Joseph G. Vernon	vernon@millercafield.com
James W. McConkey	mcconkey@millercafield.com
Justin Michael Righettini	justin.righettini@bryancave.com , elaine.hellwig@bryancave.com
Tracy B. Rane	trane@mcphersonrane.com
Thomas D. Nolan	tnolan@loeb.com

1 I am unaware of any attorneys of record in this action who are not registered
2 for the CM/ECF system or who did not consent to electronic service.

3 I certify under penalty of perjury under the laws of the United States of
4 America that the foregoing statements are true and correct.

5 Dated: March 6, 2012 /s/Colin C. Holley

6 George L. Hampton IV (State Bar No. 144433)
7 Colin C. Holley (State Bar No. 191999)
8 HAMPTONHOLLEY LLP
9 2101 East Coast Highway, Suite 260
Corona del Mar, California 92625
Telephone: 949.718.4550
Facsimile: 949.718.4580