

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

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

Attorneys for Plaintiff  
 BRYAN PRINGLE

**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)

**PLAINTIFF'S OPPOSITION TO  
 DEFENDANTS' MOTION FOR  
 SANCTIONS AGAINST  
 PLAINTIFF AND HIS COUNSEL  
 PURSUANT TO FED. R. CIV. P. 11**

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1 **I. INTRODUCTION**

2 According to the Defendants' own expert, Paul Geluso, it is unavoidable that  
3 copying took place here. Even so, and even though the evidence to date shows that it  
4 is more probable than not that Defendants copied from Plaintiff, Defendants moved  
5 for Rule 11 sanctions, coincidentally two days before the hearing on their motion for  
6 summary judgment.

7 Defendants' motion is based upon the incorrect notion that to avoid Rule 11  
8 sanctions, a plaintiff must be in a position to prove his case before ever filing a  
9 complaint. Defendants resort to the use of inflammatory language, emotional  
10 rhetoric, sensational allegations, and old fashioned name-calling, but nowhere  
11 establish through competent, admissible evidence that Plaintiff's counsel failed to  
12 perform adequate legal research to confirm that the theoretical underpinnings of the  
13 complaint are warranted either by existing law, or a good faith argument for an  
14 extension, modification, or reversal of existing law. *Christian v. Mattel, Inc.*, 286  
15 F.3d 1118, 1127 (9th Cir. 2002). This is an abusive litigation tactic presented to chill  
16 legitimate advocacy, which should be denied.

17 Plaintiff has submitted admissible evidence that he wrote and recorded both  
18 the original and derivative version of "Take a Dive" and that one or more of the  
19 Defendants copied it. In addition to Defendants' own expert's admission that the  
20 song *must have been* copied, Plaintiff offers the following evidence:

21 1. Plaintiff created "Take a Dive" in 1999 and copyrighted it. Shortly after  
22 that, he created its derivative version.

23 2. Plaintiff backed up the file containing "Take a Dive" onto an .NRG  
24 image in 1999. That file has not been changed or altered since it was created in 1999,  
25 ten years before "I Gotta Feeling" was released. The disc that the song was burned to  
26 was manufactured in 1999 and has not been sold since 2003.

27 3. Plaintiff's brother, Jeffrey Pringle, a deejay, played the derivative  
28 version of "Take a Dive" on the radio between 1999 and 2002.

1           4.     Plaintiff’s expert, Dr. Alexander Norris, has opined that “Take a Dive  
2 (Dance Version)” was indeed derived from the copyrighted version of “Take a  
3 Dive.” Dr. Alexander Stewart has further opined that Defendants sampled the  
4 derivative version of “Take a Dive.”

5           Plaintiff sought discovery in good faith with an eye towards proving that his  
6 song was copied. Based on the evidence, including the evidence offered in  
7 opposition to Defendants’ motion for summary judgment, a reasonable trier of fact  
8 could find Plaintiff’s claim has merit. As such, Defendants’ motion for Rule 11  
9 sanctions smacks of gamesmanship. Defendants appear to have filed the motion as a  
10 tactic to aid their summary judgment arguments, rather than based on any legitimate  
11 argument that sanctions are warranted here. The motion should be denied and  
12 Defendants should be cautioned against further misuse of the Rules.

13 **II.   FACTS**

14           Bryan Pringle wrote and recorded “Take a Dive” in 1998 using a stand alone  
15 Ensoniq ASR-10 keyboard. Plaintiff’s Statement of Additional Facts In Opposition  
16 to Motion for Summary Judgment, at ¶ 115, Dckt. No. 196. “Take a Dive” was  
17 registered with the United States Copyright Office along with the other songs on his  
18 album *DeadBeat Club:1998*. *Id.* at ¶ 117. The Register of Copyrights issued  
19 Certificate of Registration number SRu 387-433 for *Deadbeat Club:1998* on  
20 April 29, 1998. *Id.* Plaintiff provided a sealed copy of the CD to the Court on  
21 December 19, 2011 in opposition to Defendants’ Motion for Summary Judgment. *Id.*

22 **A.   Creation of the Derivative Version of “Take a Dive.”**

23           After he wrote and recorded “Take a Dive,” Plaintiff created several derivative  
24 versions including “Take a Dive (Dance Version).” *Id.* at ¶ 119. He created the  
25 derivative by removing the vocals and replacing them with a repeating eight-bar  
26 melody using a “guitar twang” sequence he previously recorded in or about 1997 for  
27 his song “Faith,” another track on *Deadbeat Club*. *Id.* at ¶ 120. Faith is Track No. 8  
28

1 on the CD previously provided to the Court. Other than that change, the songs are  
2 identical:

- 3 • The original and derivative have the same ambient sounds at the  
4 beginning of both versions. Norris Decl., Dckt. No. 192 at ¶ 6.
- 5 • The original and derivative have identical keyboard motifs at :09  
6 seconds, identical bass parts and identical chord progression. *Id.*
- 7 • The original and derivative have identical sonic sweeps and changes  
8 in the bass parts at similar points in time of both tracks. *Id.*
- 9 • The original and derivative have identical key, temp, and timbre with  
10 respect to the above-identified similarities. *Id.*

11 Mr. Pringle sent the derivative dance version of “Take a Dive” to UMG,  
12 Interscope, and EMI. Plaintiff’s Statement of Additional Facts In Opposition to  
13 Motion for Summary Judgment, at ¶ 130. He also sent it to Gum Productions, and  
14 received an acknowledgement from them. *Id.* at ¶¶ 131, 149, 150. These  
15 communications occurred over ten years ago, and not surprisingly, he lost track of  
16 them over the following decade. Pringle Decl., Dckt. 189 No. at ¶ 5. Mr. Pringle’s  
17 brother, Jeffrey Pringle, will testify at trial that he played the derivative version of  
18 “Take a Dive” on the radio. Jeffrey Pringle Decl., Dckt. No. 190. Additionally,  
19 Jeffrey Pringle’s friend, Scott Brown, received Mr. Pringle’s music, liked it and  
20 played it on the radio, a fact to which he will also testify to at trial. *See*, Decl. of  
21 Scott Brown at ¶ 4, filed concurrently herewith and incorporated by reference.

22 **B. Preservation of Evidence Regarding the Creation of the**  
23 **Derivative Version of “Take a Dive.”**

24 After Mr. Pringle created the derivative of “Take a Dive,” he saved it on an  
25 external disc drive using an NRG image file, which he titled “DISK05.NRG” 2.  
26 Dckt. No. 196 at ¶ 128. He did this by backing up the creation file for the derivative  
27 of “Take a Dive” onto a small computer serial interface (SCSI) hard drive, which he  
28 connected to a Windows 98 computer. *Id.*, at ¶¶ 191, 192. Using the Ensoniq Disk



1 Manager (EDM) software, he created the .NRG image files which he then burned  
2 onto a CD bearing Serial Number 9E24F221861. *Id.* at ¶ 192, Gallant Decl. ¶ 4,  
3 Dckt. No. 193. In doing this, Mr. Pringle preserved the evidence of the creation of  
4 the derivative of “Take a Dive,” even after his audio and computer equipment were  
5 stolen in October 2000. Dckt. No. 196, ¶ 193. Mr. Pringle has offered two expert  
6 opinions affirming that the DISK05.NRG2 disk contains “Take a Dive,” that it was  
7 created, modified, and last accessed in 1999, and that no evidence exists to support  
8 Defendants’ theory that the disk was back dated. *See*, Gallant Decl. at ¶ 4; Barbara  
9 Frederiksen-Cross Decl., Dckt. No. 189, and March 2, 2012 Barbara Frederiksen-  
10 Cross Supplemental Decl. (“March 2 Cross Decl.”), filed concurrently herewith and  
11 incorporated by reference at ¶21.

12 Additionally, forensic expert Barbara Frederiksen-Cross provided additional  
13 analysis that shows that the other files included on the .NRG disc, including  
14 photographs, contain metadata that confirms they date back to 1998 and 1999.  
15 Specifically, the dates of the photos themselves date to 1999, and they were taken on  
16 the Olympus C900Z, which was released in 1998. Frederiksen-Cross Decl. ¶ 20,  
17 Dckt. No. 189. The CD-Rom that the DISK05.NRG2 disk was burned to was a  
18 Verbatim CD-Rom, product number 94328, with a specific serial number of  
19 9E24F221861. Product 94328 has been out of production since 1999. The specific  
20 CD-Rom used by Mr. Pringle to preserve the derivative of “Take a Dive” was  
21 produced on February 24, 1999. *See*, Exhibit B to Decl. of Kathleen E.  
22 Koppenhoefer filed concurrently herewith and incorporated by reference.

23 On July 10, 2010, Defendants sent Plaintiff a Rule 408 Confidential  
24 Settlement letter, which they have subsequently attempted to enter as evidence in the  
25 record. In the letter, Ms. Cenar requests “preservation of evidence” without  
26 specifying what she meant by “evidence” and even suggested that Mr. Gould should  
27 not explain to Mr. Pringle the specifics behind her request. *See* Exhibit J to  
28 Dickstein Decl., Dckt. No. 161. Subsequently, Mr. Pringle provided forensic expert

1 David Gallant with the disc containing all evidence of the original creation of the  
2 derivative version of “Take a Dive,” specifically the CD-Rom with the serial number  
3 of 9E24F221861 that contained the derived version of “Take a Dive.” Gallant Decl.  
4 at ¶ 4, Dckt. No. 193. Because Mr. Pringle wrote and created the derivative over a  
5 decade earlier, he no longer had the specific equipment used in creating the  
6 derivative, but did have the .NRG file which had been preserved. Mr. Pringle did  
7 what was requested. He preserved, through a professional, all of the “evidence” he  
8 had of his work.

9 **C. Plaintiff’s Counsel Adequately Investigated The Allegations in the**  
10 **Complaint.**

11 Bryan Pringle initially retained attorneys Ira Gould and Ryan Greely. *See*  
12 Declarations of Ira Gould and Ryan Greely. Prior to agreeing to represent  
13 Mr. Pringle, Mr. Gould and Mr. Greely investigated the merits of the claim, as set  
14 forth in their declarations. In October 2010, Dean Dickie, a principal with Miller,  
15 Canfield, Paddock and Stone, P.L.C., formally joined in the representation. Prior to  
16 agreeing to represent Mr. Pringle, Mr. Dickie also investigated the merits of the  
17 claims. Dickie Decl. at ¶¶5-12. Prior to filing the original complaint, George  
18 Hampton and Colin Holley of HamptonHolley LLC were retained as local counsel.  
19 They, too, engaged in an investigation of Pringle’s allegations. Declaration of  
20 George Hampton at ¶¶ 4-14; Declaration of Colin Holley at ¶¶ 4-13.

21 The original complaint as filed did not contain a claim for sampling.  
22 Subsequent to its filing, Plaintiff’s counsel was put in touch with an expert in sound  
23 engineering, Mark Rubel. Rubel Decl., Dckt. No. 71a. Plaintiff’s counsel learned that  
24 Mr. Rubel would be able to determine whether or not the Black Eyed Peas  
25 Defendants sampled the derivative of “Take a Dive.” *Id.* Mr. Rubel analyzed the  
26 tracks and concluded that “Take a Dive” was sampled by “I Gotta Feeling.” Rubel  
27 Decl. at ¶ 3, Dckt. No. 71a; he provided the Plaintiff’s counsel with an expert report  
28

1 with his conclusion that the Black Eyed Peas sampled the derivative version of “Take  
2 a Dive” in creating “I Gotta Feeling.” *Id.*

3 Plaintiff’s counsel amended the complaint to include a count for sampling.  
4 Later, Defendants’ own expert, Paul Geluso, agreed that it is obvious that either  
5 “Take a Dive” or “I Gotta Feeling” was copied. (*See*, Paul Geluso Decl. at ¶ 31,  
6 Dckt. No. 162). Plaintiff’s expert, Dr. Stewart, agrees with Mr. Geluso, concluding  
7 that the musical notes of the two songs are identical and that Defendants sampled the  
8 derivative version of “Take a Dive.” *See*, Report of Dr. Alexander Stewart, attached  
9 as Exhibit D to Koppenhoefer Decl.

10 **D. Defendants’ Purported Independent Creation of the “David Pop**  
11 **Guitar” Files.**

12 In their motion for summary judgment, Defendants argue that they have  
13 offered irrefutable evidence that Defendant Riesterer created the music files that  
14 became “I Gotta Feeling,” but the evidence actually shows that Defendants offered as  
15 their “creation files” music files that were not created until 2011. Defendants  
16 produced the “David Pop Guitar” files produced as Riesterer0000001,  
17 Riesterer0000002 and Reisterer0000038, which they claim date to 2008. Dckt. No.  
18 196 at 176. The files were created using Logic Pro, software from Apple Computers  
19 used to write, record and mix music. March 2 Frederiksen-Cross Decl. at ¶ 52, n. 18.  
20 The Logic Pro metadata includes reference to the MOTU 828MK3 Hybrid, which is  
21 a hybrid audio interface device manufactured by MOTU, a developer of computer  
22 based audio and visual production hardware and software. *Id.* at ¶ 52, n. 19. The  
23 MOTU 828mk3 Hybrid is a sound device that was released in January 2011. MOTU  
24 has confirmed that the MOTU 828MK3 Hybrid was first shipped to customers in  
25 February/March 2011, with simultaneous releases in the United States and other  
26 countries. *Id.* at ¶ 53. The device was not made available to “beta” testers before its  
27 public release date; all development testing was done internally. *Id.* at ¶ 53, n.24.  
28

1           Additionally, substantial evidence exists that “I Gotta Feeling” was never  
2 created using Logic Pro at all, but rather was created using Pro Tools. In May 2010,  
3 Kara Cenar sent Mr. Pringle’s prior attorneys a communication requesting that they  
4 provide the individual tracks of “Take a Dive” to her in a Pro Tools format: “If what  
5 you are now saying is that the claim is a sample, which it appears you are, please  
6 provide us with your client’s Pro Tools mix of their track, so that we can determine if  
7 anything was sampled.” *See* Exhibit C to Declaration of Ryan Greely. Both  
8 Defendant Adams and Defendant Guetta have provided numerous interviews  
9 regarding their use of Pro Tools to create music. Before “I Gotta Feeling” was  
10 allegedly created by Defendants, Defendant Adams stated in an interview that he  
11 uses Pro Tools exclusively. After “I Gotta Feeling” was released, Defendant Guetta  
12 also stated in separate interviews that he records music using Pro Tools - not Logic  
13 Pro. *See*, Exhibit A to Koppenhoefer Decl.

### 14   **III.   STANDARD FOR RULE 11 SANCTIONS**

15           “Rule 11 ‘is targeted at situations’ where it is patently clear that a claim has  
16 absolutely no chance of success under the existing precedents, and where no  
17 reasonable argument can be advanced to extend, modify or reverse the law as it  
18 stands.”” *Associated Indem. Corp. v. Fairchild Indus.*, 961 F.2d 32, 34 (2nd Cir.  
19 1992) (internal citations omitted). When considering Rule 11 motions, the Ninth  
20 Circuit undertakes a two-pronged inquiry. A party seeking sanctions must prove  
21 both (1) the complaint is legally or factually “baseless” from an objective  
22 perspective, and (2) that the attorney failed to conduct “a reasonable and competent  
23 inquiry” before signing and filing it. *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127  
24 (9th Cir. 2002).

25           Sanctions under Rule 11 are only imposed in “the exceptional circumstance,”  
26 where a claim or motion is clearly unmeritorious or frivolous. *Single Chip Sys. Corp.*  
27 *v. Intermec IP Corp.*, 2007 WL 2012610 at \*6 (S.D. Cal. June 29, 2007) (citing  
28 *Riverhead Sav. Bank v. Nat’l Mortgage Equity Corp.*, 893 F.2d 1109, 1115 (9th Cir.

1990)). A frivolous claim or pleading is one that is both “legally or factually baseless from an objective perspective” and brought without a “reasonable and competent inquiry.” *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1299 (Fed. Cir. 2004) (internal citations omitted). “This is a difficult standard to meet.” *In re Hayes Microcomputer Products, Inc. Patent Litigation*, 766 F. Supp. 818, 828 (N.D. Cal. 1991). “The key question is whether a pleading states an arguable claim.” *Stewart v. American Intern. Oil & Gas Co.*, 845 F.2d 196, 201 (9th Cir. 1988) (emphasis added).

Defendants cannot meet their burden and have failed to show that *any* violation of Rule 11 has occurred. Plaintiff and his counsel have prosecuted the claim in good faith and have done so after making an appropriate inquiry into the basis for the claim, including obtaining reports by reputable experts.

#### IV. ARGUMENT

##### A. Rule 11 Sanctions Are Improper Where They Are Intentionally Used to Chill Advocacy and Not For A Legitimate Purpose.

The Ninth Circuit recognizes that “[a]n award of Rule 11 sanctions raises two competing concerns: the desire to avoid abusive use of the judicial process and to avoid chilling zealous advocacy.” *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1160 (9th Cir. 1987)(emphasis added) (citing *In re Yagman*, 796 F.2d 1165, 1182, amended, 803 F.2d 1085 (9th Cir. 1986)). A district court should not grant sanctions lightly. *Truesdell v. Southern California Permanente Medical Group*, 209 F.R.D. 169, 176 (C.D. Cal. 2002). “Because the rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual and legal theories, courts have interpreted Rule 11’s language to prescribe sanctions, including fees, only in the exceptional circumstance, where a claim or motion is patently unmeritorious or frivolous.” *Riverhead Sav. Bank. v. National Mortgage Equity Corp.*, 893 F.2d 1109, 1115 (9th Cir. 1990) (internal citations omitted). The key question in assessing frivolousness is whether a complaint states an arguable claim – *not* whether the

1 pleader is correct in his perception of the law.” *Riverhead Sav. Bank*, 893 F.2d 1109,  
2 1115 (9th Cir. 1990) (quoting *Hudson v. Moore Business Forms, Inc.*, 827 F.3d 450,  
3 453 (9th Cir. 1987)).

4 Here, Defendants cannot legitimately point to evidence warranting sanctions.  
5 Instead, Defendants grossly misconstrue the record and the dealings between the  
6 parties and do so intentionally to distort the facts and paint the Plaintiff and his  
7 counsel in a bad light. The allegations contained in Defendants’ Rule 11 motion are  
8 scathing, and exceed the scope of even the most zealous of advocacy. Simply put,  
9 they are either (1) untrue or (2) irrelevant to the inquiry. The complaints of the  
10 Defendants range from the extremely serious, yet wholly unmeritorious, allegations  
11 of spoliation, to trivial complaints that Plaintiff should be sanctioned under Rule 11  
12 because he cancelled a deposition 9 days in advance. Defendants’ overreaching in  
13 their motion is voluminous, repetitive and presented simply as a litigation tactic  
14 meant to chill effective, legitimate advocacy:

- 15 • Defendants argue that Rule 11 sanctions are warranted because Plaintiff  
16 spoiled evidence of the creation of “Take a Dive” even though Plaintiff  
17 has provided (1) sworn testimony, (2) physical evidence, (3) expert  
18 confirmation that “Take a Dive” was created in 1999 and electronically  
19 preserved at that time, and (4) through the retention of a forensic expert.
- 20 • Defendants argue without any authority that Rule 11 sanctions are  
21 warranted because of the aforementioned cancelling of a deposition 9  
22 days before the deposition, and fail to explain how or why this even  
23 implicates Rule 11.
- 24 • Defendants argue that Rule 11 sanctions are warranted because they  
25 disagree with an argument offered by Plaintiff in his response to their  
26 motion for summary judgment.
- 27 • Defendants argue that Rule 11 sanctions are warranted because although  
28 Plaintiff has testified under oath that he distributed copies of the

1 derivative version of “Take a Dive” to Defendants, he did not keep  
2 evidence of his distribution for ten years. According to Defendants,  
3 Plaintiff should be sanctioned because at his deposition, he allegedly  
4 identified the wrong address—Burbank Drive—for materials sent a  
5 decade earlier.

- 6 • Defendants complain bitterly that Mr. Pringle should be sanctioned  
7 because he has stated (partly in response to specific interrogatories from  
8 Defendants asking this very question) that Defendants have violated  
9 other copyrights of his.
- 10 • Defendants argue that the similarities identified between “Take a Dive”  
11 and “I Gotta Feeling” as set forth in the complaint are not actionable and  
12 therefore Plaintiff should be sanctioned, ignoring the opinions set forth  
13 by Dr. Norris and Dr. Stewart which detail the similarities between the  
14 two songs.
- 15 • Defendants argue that Rule 11 sanctions are warranted because when  
16 Jeffrey Pringle stated in a sworn Declaration that he heard the derivative  
17 version of “Take a Dive” in 1999 and played it on the radio, he did not  
18 provide supporting documentation for his sworn testimony.

19 And so on. Defendants spend a great deal of time engaging in name calling.  
20 They characterize Mr. Pringle as (1) a “serial plaintiff” without support for the  
21 accusation; (2) a fraud as a musician because he has never had a record deal; (3) a  
22 fabricator of a sound recording when in reality, what Mr. Pringle did was the  
23 equivalent of making a digital copy of what he previously created; and (4) a liar.  
24 They use words like “fantasy” and “fairytale” and make these malicious allegations  
25 without a shred of “evidence,” only bluster and innuendo. They misstate testimony,  
26 such as the “Burbank Drive” testimony, to paint Mr. Pringle as a liar who is not  
27 credible. (*See*, Def. Mot. for Sanctions, p. 18). In that instance, when asked the  
28 address of Interscope Records, Mr. Pringle testified “I know it was in California. I

1 believe it was- and this is just from what I recall. It was Bur- --Burbank Drive? I  
2 don't recall specifically. I could look at the records I have to refresh that." Dckt.  
3 No. 239-6. Defendants justify their request for sanctions under Rule 11 in part based  
4 on this testimony.

5 Defendants moved for Rule 11 sanctions not because there is any evidence that  
6 the claims proffered by Plaintiff are frivolous, but because Defendants are taking  
7 every opportunity to distort the record in the desperate hope that this Court will  
8 ignore that any untrained ear can tell the songs at issue are virtually identical.

9 Defendants have offered "evidence" of the independent creation of "I Gotta  
10 Feeling" in the form of what they represent to be "original" creation files from 2008  
11 that were made using a sound device that was not released until January 2011.  
12 Defendants' motion for sanctions is devoid of merit. They have not and cannot show  
13 that Plaintiff's claims are frivolous or that Plaintiff or his counsel have acted in bad  
14 faith in this litigation.

15 **B. Neither Plaintiff Nor His Counsel Violated Rule 11 In Any**  
16 **Assertions Set Forth In the First Amended Complaint.**

17 Defendants suggest that Plaintiff lacks evidentiary support to win his claims  
18 and therefore is liable for Rule 11 sanctions. While Plaintiff certainly disagrees, that  
19 position is not a basis for Rule 11 sanctions. The United States Supreme Court has  
20 stated that the imposition of Rule 11 sanctions against a party is only proper when  
21 the party has failed to make a "reasonable inquiry" into pertinent facts or law.  
22 *Business Guides, Inc. v. Chromatic Communications Ent., Inc.*, 111 S.Ct. 922, 933  
23 (1991). Rule 11 requires only that a signatory to a complaint make a reasonable  
24 inquiry to determine the facts of the case and believe that the position asserted is  
25 "well [-] grounded in fact." *See, e.g., Greenberg v. Sala*, 822 F.2d 882, 886 (9th Cir.  
26 1987); *see also Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1986). "[A] cause of  
27 action is 'well [-] grounded in fact' if an independent examination reveals 'some  
28 credible evidence' in support of a party's statements." *Himaka v. Buddhist Churches*



1 of America, 917 F. Supp. 698, 710 (N.D. Cal. 1995); citing *Kendrick v. Zanides*, 609  
2 F.Supp. 1162, 1172 (N.D. Cal. 1985). In determining whether there is “some credible  
3 evidence” in support of a claim, courts use an objective test. *Zaldivar v. City of Los*  
4 *Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) (abrogated on other grounds in *Cooter*,  
5 *supra*, 496 U.S. 384 (1990)).

6 **1. Plaintiff Should Be Able to Pursue His Sampling Claim,**  
7 **Particularly Where Defendants’ Own Expert Agrees That**  
8 **Copying Is The Only Explanation For the Similarities**  
9 **between “I Gotta Feeling” and “Take a Dive.”**

10 The elements of proving infringement via copying or sampling are no different  
11 than what is required generally to prove infringement of a musical composition. 26  
12 Am. Jur. 3d Proof of Facts § 537. To prove his sampling or digital copying, a  
13 plaintiff must prove copying, which copying is typically established by showing that  
14 the defendant had access to the plaintiff’s work and there is substantial similarity of  
15 defendants’ work to the original work. *See Id.* at Sec. 18 (citing *Baxter v. MCA, Inc.*,  
16 812 F.2d 421 (9th Cir. 1987). In light of the similarities between the two songs,  
17 similarities conceded by Defendants’ own expert and established by note-by-note  
18 scores done by an accomplished musicologist expert, Plaintiff should be permitted to  
19 pursue all of his claims, including sampling.

20 Defendants cite a multitude of cases in support of their claim for Rule 11  
21 sanctions with respect to Plaintiff’s copyright claim over the sound recording of the  
22 derivative of “Take a Dive.” None of the cases cited by Defendants, however,  
23 support an award of sanctions. First, Defendants rely on *Herron v. Jupiter Transp.*  
24 *Co.*, 858 F.2d 332, 336 (6th Cir. 1988), which stands for the basic conclusion that  
25 attorneys have a duty to inquire into the facts and the law supporting a claim before  
26 filing. *Herron*, 858 F.2d at 335. Nothing set forth in *Herron* supports Defendants’  
27 argument that Plaintiff violated Rule 11. Defendants also rely on *ICU Medical, Inc.*  
28 *v. Alaris Medical Systems, Inc.*, No. SACV 04-00689 MRP (VBKx), 2007 WL  
6137003 (C.D. Cal. Apr. 16, 2007), which likewise does not support an award of

1 sanctions here. In *ICU*, the court awarded Rule 11 sanctions because of the plaintiff's  
2 factual mischaracterization of what the court ultimately found to be frivolous claims.  
3 *Id.* at \*14-15. Although the court in *ICU* stated that a reasonable inquiry would have  
4 revealed that the claims were frivolous, the court's decision rested on the fact that  
5 plaintiff mischaracterized the protected material. No such argument is available  
6 here.

7 Defendants next cite to *Silberman v. Innovation Luggage, Inc.*, 2003 WL  
8 1787123, at \*15 (S.D.N.Y. Apr. 3, 2003) in support of their position that Plaintiff's  
9 counsel was obligated to withdraw the sampling claim because it had no evidentiary  
10 support. (Def. Mot. for Sanctions, Dckt. No. 239 at p. 17.) But the cited portion  
11 *Silberman* deals with Rule 11 sanctions for a claim brought without any legal basis.  
12 (*See id.*, p. 17, citing *Silberman*). In *Silberman*, one of the plaintiffs in a copyright  
13 suit raised a claim for relief under Swiss law arising out of the same factual  
14 background. *Id. Silberman*, 2003 WL 1787123 at \*11-12. Like the plaintiff's claims  
15 arising under U.S. copyright laws, the Swiss law claim was frivolous for want of  
16 standing. *Id.* at \*11-12 (finding that as holder of an exclusive license to reproduce  
17 plaintiff *Silberman*'s work, plaintiff *Wizard* lacked standing to sue under 17 U.S.C.  
18 §501(b)). The court also noted that plaintiff's counsel had already been previously  
19 sanctioned by other courts in the Second Circuit and in the State of New York, so he  
20 was well aware of the requirements of Rule 11. *Silberman*, 2003 WL 1787123 at \*15.

21 Finally, Defendants cite to *In re Girardi*, 611 F.3d 1027, 1036 (9th Cir. 2010)  
22 as support for the position that Plaintiff's counsel's assertion of a claim that lacks  
23 "evidentiary support" is an "unmistakable violation of Rule 11." (Def. Mot. for  
24 Sanctions, p. 18, citing *In re Girardi*, 611 F.3d 1027, 1036 (9th Cir. 2010)). The  
25 court in *Girardi* considered the appropriateness of monetary and other disciplinary  
26 sanctions (including suspension and disbarment) under the Federal Rules of  
27 Appellate Procedure for filing a frivolous appeal and making false statements  
28 regarding a writ of execution issued by a Nicaraguan court. *Id.* at 1034. The case

1 itself only mentions Rule 11 in citations to other cases. *See id.* at 1036, 1062. The  
2 underlying case law requires that a party show more than a lack of evidentiary  
3 support for a claim in order to warrant Rule 11 sanctions. *See Hogate v. Baldwin*,  
4 425 F.3d 671 (9th Cir. 2005). (“When, as here, a “complaint is the primary focus of  
5 Rule 11 proceedings, a district court must conduct a two-prong inquiry to determine  
6 (1) whether the complaint is legally or factually baseless from an objective  
7 perspective, and (2) if the attorney has conducted a reasonable and competent inquiry  
8 before signing and filing it.”).

9 None of these cases support entering sanctions against the Plaintiff. Should  
10 the Court accept Defendants’ contention, it would mean that every losing litigant  
11 would be subject to sanctions. Such a result would have a chilling effect on litigants,  
12 which is contrary to the purpose and intent of the rule. Further, Plaintiff has offered  
13 evidence that note for note, the two songs are identical. *See*, Declaration of Dr.  
14 Alexander Stewart. Dr. Stewart concludes that this is evidence of sampling. Even if  
15 a finder of fact ultimately concludes that there is no sampling, there is no evidence to  
16 show that the allegation in the complaint was frivolous.

17 **2. Defendants’ Argument That Plaintiff’s Evidence of Access is**  
18 **Somehow Sanctionable Is Wholly Unsupported by Any Case**  
**Law.**

19 Defendants claim that Plaintiff and his attorney have violated Rule 11 because  
20 although Plaintiff has testified under oath and provided a sworn Declaration that he  
21 provided copies of the derivative of “Take a Dive” to various individuals in the  
22 recording industry—including the Defendants—he has no has copies of what he  
23 mailed out or received in return. Defendants seek Rule 11 sanctions on the grounds  
24 that because Plaintiff did not retain copies of what he sent or received ten years ago,  
25 he has violated the rule.

26 In support of this argument, Defendants cite *Smith v. Ricks*, 31 F.3d 1478,  
27 1488 (9th Cir. 1994) for the positions that: (1) Plaintiff’s counsel could not “merely  
28 rely on Pringle’s say-so” and were required to investigate the veracity of Pringle’s

1 allegations and (2) Plaintiff's counsel's assertions regarding Defendant Guetta  
2 affirming the existence of correspondence with Pringle is misleading and in violation  
3 of Rule 11's objective reasonableness standard. (Def. Mot. for Sanctions, pp. 18, 19,  
4 citing *Smith*, 31 F.3d at 1488.) In *Smith*, the court found that the defendant hospital  
5 and physicians, the plaintiff's former employer and colleagues, were entitled to Rule  
6 11 sanctions against a cardiologist who brought antitrust claims against the  
7 defendants after being removed through a peer review process. *Smith*, 31 F.3d. 1481-  
8 1484. The district court based its sanctions on the attorney's "pattern of misconduct"  
9 during the course of the litigation. *Id.* at 1488. The attorney's misconduct culminated  
10 in his filing a re-notice of a motion that the court had already denied. *Id.* at 1488. The  
11 attorney claimed that he meant to file a motion for appeal, admitted that he did not  
12 read the motion before filing it, and admitted that the motion was baseless. *Id.* at  
13 1488. Despite the fact the attorney claimed it was a mistake, the Court of Appeals  
14 upheld the district court's decision to grant sanctions, stating that "counsel can no  
15 longer avoid the sting of Rule 11 sanctions by operating under the guise of a pure  
16 heart and empty head." *Id.* While *Smith* offers a succinct yet thorough summary of  
17 Rule 11 sanctions, it does not address any of the positions for which Defendants cite  
18 it and it does not provide support for an award of sanctions here.

19 Defendants also cite *Estate of Blue v. County of Los Angeles*, 120 F.3d 982, in  
20 support of the position that Plaintiff's counsel cannot "merely rely on Pringle's say-  
21 so." (Def. Mot. for Sanctions, p. 19.) But *Estate of Blue* does not support an award of  
22 sanctions here. The *Estate of Blue* court found the estate's claim was frivolous and  
23 warranted Rule 11 sanctions because it was time-barred by the statute of limitations.  
24 *Id.* In *Estate of Blue*, the plaintiff estate brought §1983 claims in federal district  
25 court against the Los Angeles Police for the shooting death of an innocent bystander  
26 at a liquor store robbery. *Id.* at 983. Simultaneously, the estate brought state law  
27 claims in parallel litigation in California Superior Court. *Id.* After voluntarily  
28 dismissing the federal case, the plaintiff amended the state court complaint to add the

§1983 claims against the same defendants. Because the claims had since become time-barred, the court found that the claims were frivolous. *Id.* at 984-85. The court’s discussion of Rule 11 was brief, stating “Frivolous filings are ‘those that are both baseless and made without a reasonable and competent inquiry.’” *Id.* at 985 (citing *Buster v. Greisen*, 104 F.3d 1186, 1190 (9th Cir. 1997), abrogated on other grounds by *Fossen v. Blue Cross and Blue Shield of Montana, Inc.*, 2011 WL 4926006 (9th Cir. Oct. 18, 2011)). This principle is sound, but the facts of both *Estate of Blue* and *Buster v. Greisen*, which the court in *Estate of Blue* quoted, involve claims that have become frivolous through *res judicata*, collateral estoppel, or periods of limitation. These are simply not applicable here.

The principle for which Defendants cite *Smith* and *Estate of Blue* is applied in *Christian v. Mattel*, 286 F.3d 1118, 1128-19 (9th Cir. 2002), which Defendants cite as an example of courts “routinely” imposing Rule 11 sanctions on claims brought with no evidence of access. (Def. Mot. for Sanctions, p. 19.) *Christian* does not stand for that proposition. The attorney in *Christian* had previously represented the plaintiff’s daughter in an earlier action against Mattel arising out of the same facts. The earlier suit, alleging Mattel infringed on the daughter’s design of college cheerleading dolls, resulted in a settlement agreement. As a means of circumventing the settlement agreement, the plaintiff brought a second suit against Mattel for infringement on the sculpture and painting design of the heads of several dolls. The court found that these claims were frivolous, because Mattel’s sculpture designs predated the development of plaintiff’s designs, a fact easily known since the copyright date was printed on each doll’s head. *Id.* at 1124. The court found that by simply looking at the doll, the plaintiff and his counsel would have discovered that the copyright predated their own claim. This failure to do even the most minimal inquiry warranted sanctions.

Next, Defendants claim that Plaintiff made a misleading assertion in response to Defendants’ motion for summary judgment and this single assertion subjects

Plaintiff to Rule 11 sanctions. In support of this argument, Defendants cite *Jimenez v. Madison and Smith v. Hicks*. In *Jimenez*, the Seventh Circuit issued Rule 11 sanctions against a plaintiff and the plaintiff's attorney for bringing a frivolous appeal based on frivolous claims supported by falsified documents. *Jimenez*, 321 F.3d 652, 656-657 (7th Cir. 2003). In *Jimenez*, the plaintiff supported her claims that her former employer discriminated against her by producing falsified emails and letters. *Id.* at 656-57. The trial court found the documents to be "obviously fraudulent" and issued sanctions against the plaintiff and the plaintiff's attorney for relying on the documents without conducting a reasonable inquiry into their veracity. *Id.* at 655-56.

Unlike the *Jimenez* plaintiff, and, possibly these Defendants, Plaintiff has not falsified any documents or files. Nothing in Plaintiff's opposition to Defendants' summary judgment motion is remotely improper, let alone so flagrant as to warrant Rule 11 sanctions. That Defendants disagree with Plaintiff's characterization of Guetta's testimony simply is not the stuff of Rule 11 sanctions, and is an example of the improper use of these sanctions as a tool of intimidation. Defendants seem to suggest that the Court should not only accept the credibility of its witnesses over the credibility of Plaintiff, but it should sanction Plaintiff for disagreeing with Defendants' version of the facts and remaining true to the integrity of his version of the underlying facts. No plaintiff is obligated to accept the defendants' lawyer's story of what happened for fear of being sanctioned under Rule 11. Credibility is within the exclusive province of the trier of fact, not the lawyers bullying a plaintiff and his counsel with the threat of Rule 11 sanctions.

**C. Plaintiff's Claim for Infringement Is Legally Sufficient and Should Be Decided by a Jury; Sanctions Are In No Way Appropriate Here.**

**1. Defendants Ignore Their Infringement of the Musical Composition of "Take a Dive."**

Defendants ignore that Plaintiff's complaint also alleges copyright

1 infringement of the musical composition for the derivative version of “Take a Dive.”  
2 Defendants have erroneously claimed that they are legally entitled to copy Plaintiff’s  
3 song because the Copyright Office rejected the separate registration of the derivative  
4 version of “Take a Dive.” Their position is incorrect as a matter of law. Although  
5 Section 411(a) of the Copyright Act states that registration is required, according to  
6 the Ninth Circuit, the term “register” as used in § 411(a) means a copyright is  
7 “registered” at the time the copyright holder’s application is received by the  
8 Copyright Office. *Cosmetic Ideas, Inc. v. IAC/Interactive Corp.*, 606 F.3d 612, 619  
9 (9th Cir. 2010). The Ninth Circuit has determined that the Register’s decision to  
10 grant a registration certificate is largely perfunctory and is ultimately reviewable by  
11 the courts. The Ninth Circuit noted that the courts are “empowered to review any  
12 denial of a certificate, and approval by the Register gives an applicant only prima  
13 facie evidence of copyright, leaving the courts to make the ultimate determination in  
14 either instance. *See* §§ 411(a), 410(c).” *Id.* A lack of a registration certificate simply  
15 means that a plaintiff has a greater evidentiary burden of proving the validity of the  
16 copyright. *Id.* Given the concession by Defendants’ expert that copying in this case is  
17 unavoidable, it cannot be said as a matter of law that Plaintiff’s claim is frivolous or  
18 that Plaintiff will not be able to meet this evidentiary burden.

19 **2. Defendants’ Argument That Plaintiff’s Own Expert “Rejects”**  
20 **the Infringement of “Take a Dive” is Without Merit.**

21 Defendants complain that Plaintiff “mislead” the Court in his characterization  
22 of Defendant Guetta’s testimony in Plaintiff’s opposition to summary judgment. And  
23 although Defendants’ argument is fraught with mock outrage over this  
24 “misrepresentation,” Defendants do exactly what they complain of with respect to  
25 their own characterization of Dr. Norris’ opinions and testimony. Playing fast and  
26 loose with the deposition testimony and ignoring key provisions of his expert report,  
27 Defendants claim that Plaintiff’s own expert actually rejects infringement.  
28

1 First, Defendants' Motion asserts "When Pringle's experts were subjected to  
2 deposition, however, they conceded that any similarities between 'Take a Dive' and  
3 'I Gotta Feeling' are not original to 'Take a Dive' and are therefore not a valid basis  
4 for an infringement claim." (Def. Mot. for Sanctions, p. 11.) Contrary to  
5 Defendants' characterization, in his deposition, Dr. Norris acknowledged only that  
6 individual elements of "Take a Dive," such as its tempo, length, or drumbeat were  
7 not on their own original. (See Norris Tr. [Dckt. 221-4] pp. 249-251.) It is hardly  
8 novel to state that a song is not the first song of a given length or a given tempo, and  
9 no credible expert would offer an opinion that individually, such elements are  
10 protectable. But when directly asked if the similarities between the original version  
11 of "Take a Dive" and "I Gotta Feeling" were limited to generic musical building  
12 blocks, Dr. Norris responded that he did not agree with that characterization of the  
13 songs' similarities. (Norris Tr. [Dckt. 221-4] p.81, "I don't think I'd agree with  
14 that.") Dr. Norris went on to state that although he could not be sure, he believed  
15 that combination of "Take a Dive's" individually non-protectable elements could  
16 constitute a protectable original work. (Norris Tr. [Dckt. 221-4] p. 250.) In this  
17 respect, Defendants' characterization of Dr. Norris' testimony is misleading at best.

18 Next, Defendants' Motion asserts, "Neither of Pringle's experts were willing  
19 to testify that the combination of non-protectable elements in 'Take a Dive' were  
20 somehow protectable in the aggregate." (Def. Mot. for Sanctions, p. 12, citing Norris  
21 Tr. 250-251; citing Stewart Tr. 284-285.) This assertion is also based on Dr. Norris'  
22 testimony. After repeatedly responding to Defendants' counsel that he could not at  
23 that time answer whether the combination of non-protectable elements of "Take a  
24 Dive" (i.e., tempo, length, orchestration, drum patter, 8-bar structure, and key center  
25 of G Mixolydian) is legally protectable (Norris Tr. 250), Dr. Norris stated, "I believe  
26 the combination of these elements could be original, but I could not say for sure."  
27 (Norris Tr. 251.) Dr. Norris stated that the same was true for the derivative version of  
28 "Take a Dive." (*Id.*) Neither of Defendants' mischaracterizations support



1 Defendants' claim that there are no protectable similarities between "Take a Dive"  
2 and "I Gotta Feeling."

3 In *Metcalf v. Bochco*, the Ninth Circuit reversed entry of summary judgment  
4 on a copyright claim, holding that even if individual elements do not rise to protected  
5 expressions of thought, "the presence of so many generic similarities and the  
6 common patterns in which they arise [can] satisfy the extrinsic test." *Metcalf v.*  
7 *Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002). The *Metcalf* court noted:

8 Each note in a scale, for example, is not protectable but a pattern of  
9 notes in a tune may earn copyright protection. The particular sequence  
10 in which an author strings a significant number of unprotectable elements  
11 can itself be a protectable element. Each note in a scale, for example, is not  
12 protectable, but a pattern of notes in a tune may earn copyright  
13 protection. A common 'pattern [that] is sufficiently concrete . . .  
14 warrant[s] a finding of substantial similarity.' *Shaw [v. Lindheim]*, 919  
15 F.2d [1353], 1363 [(9th Cir. 1990)]; *see id.* ("Even if none of these  
16 [common] plot elements is remarkably unusual in and of itself, the fact  
17 that both [works] contain all of these similar events gives rise to a  
18 triable question of substantial similarity of protected expression.") *Id.*  
19 (where main characters are both well dressed, wealthy, self-assured  
20 and have expensive tastes, "the totality of these] similarities . . . goes  
21 beyond the necessities of [defendants' work's] theme and belies any  
22 claim of literary accident."). *Id.* at 1074.

23 Defendants fail to show that it was objectively unreasonable for Plaintiff to  
24 pursue his claim against the Defendants against this backdrop.

25 While Defendants would require Pringle to accept their expert report as  
26 gospel, the "colorable basis" and "well-grounded" standard does not require an  
27 attorney to simply accept his opponent's evidence as true and concede his own  
28 position, even if his opponent's position is ultimately accepted by the court. *See Card*  
*v. State Farm Fire & Cas. Co.*, 126 F.R.D. 654 (N.D. Miss. 1989). Indeed:

29 Federal Rule of Civil Procedure 11 does not require an  
30 attorney to disbelieve his own [claims] merely on the  
31 strength of contrary assertions by opposing counsel, nor is  
32 that rule violated merely because plaintiff's attorney is not  
33 yet in possession of all of the facts which full-scale  
34 discovery might disclose.

35 *Henderson v. Weatherly*, 116 F.R.D. 147, 148 (E.D. Pa. 1987); *see also*  
36 *Kravetz v. Park La Brea Associates*, 862 F.2d 875, \*2 (9th Cir. 1988) ("Rule 11

1 must not be used to chill zealous advocacy; creativity in legal thinking is  
2 encouraged.”)

3 According to Defendants, Plaintiff cannot show that the original version of  
4 “Take a Dive” is substantially similar to “I Gotta Feeling” and for Plaintiff’s failure  
5 to do nothing other than (allegedly) fail to meet his burden of proof, he and his  
6 counsel should be sanctioned under either Rule 11, or the Court’s inherent authority,  
7 citing *Historical Truth Productions, Inc. v. Sony Pictures Entertainment*, 1995 WL  
8 693189 at \*15 (S.D.N.Y. Nov. 22, 1995). Should this argument be accepted, the  
9 chilling effect on litigation would be extreme and any unsuccessful plaintiff would  
10 risk Rule 11 sanctions for merely not winning. But even so, Defendants’ reliance on  
11 *Historical Truth Productions* is misplaced. There, the court found plaintiff’s  
12 complaint contained significant misrepresentations. No case in the Ninth Circuit cites  
13 this 1995 unpublished decision as authoritative and Defendants’ reliance on it is  
14 unpersuasive.

15 Alternatively, Defendants suggest that the Court should sanction Plaintiff  
16 under its inherent authority for a host of manufactured sins, citing *Leon v. IDX Sys.*  
17 *Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (citing *Anheuser-Busch, Inc. v. Natural*  
18 *Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995). But as discussed throughout the  
19 course of this brief, neither Plaintiff nor his counsel has engaged in sanctionable  
20 conduct despite Defendants’ gross mischaracterizations to the contrary.

21 **D. Defendants Continue to Make Bogus Claims of Spoliation to**  
22 **Poison the Well, Despite A Plethora of Evidence to the Contrary.**

23 **1. Defendants’ Motion is Untimely.**

24 When determining whether spoliation sanctions appropriately brought under  
25 Rule 37 are warranted, courts consider the timing of the motion. Specifically, courts  
26 look at when the motion was brought relative to (1) the discovery of the alleged  
27 spoliation and (2) the close of discovery; (3) motions for summary judgment and  
28 (4) trial. *American National Property & Casualty Co. v. Campbell Insurance, Inc.*

No. 3:08-cv-00604 2011 WL 3021399 at \* 1-2, (M.D. Tenn. July 22, 2011). A spoliation argument used to defend summary judgment is improper where the concerns were never raised during discovery. *Id.* citing *Morse Diesel Int'l Inc. v. United States*, 81 Fed. Cl. 220, 222 (2008). Further, courts are wary of spoliation motions filed on the eve of trial. *Id.* citing *Permasteelisa CS Corp. v. Airolite Co., LLC*, No. 2:06-cv-569 2008 WL 2491747 at \*2-3 (S.D. Ohio June 18, 2008).

Here, there is ample evidence from the record that Defendants made (unfounded) allegations of spoliation against Plaintiff in August 2011. The parties exchanged numerous emails on the subject at that time, and Plaintiff made all evidence in his possession available to Defendants' forensic expert. Plaintiff has offered a consistent explanation regarding the fact that his hard drive became inoperable and was replaced as a warranty repair. Even though the issue has been debated since August 2011, Defendants never raised it until after the close of discovery. And the instant motion seeking Rule 11 sanctions is not the proper forum to litigate a motion for spoliation. *Glenn v. Scott Paper Co.*, Civ. A. No. 92-1873, 1993 WL 431161 at \*17 (D.N.J. Oct. 20, 1993) n. 3 (motion for spoliation claim improper where moving party failed to make motion under Rule 37). The fact that Defendants have included unfounded spoliation allegations in a motion for Rule 11 sanctions at all is further evidence that they have an improper motive and seek only to sling mud, and not to raise legitimate concerns.

**2. Defendants Rely on Authority that Does not Support an Award of Sanctions Here.**

As an alternative to Rule 11 sanctions, Defendants argue that the Court should award sanctions under its inherent authority, citing *Leon v. IDX* as support. (Def. Mot. for Sanctions, p. 21, n.9.) In *Leon*, the court sanctioned the plaintiff for violating explicit court orders. In doing so, the court determined that courts should consider the following factors in deciding whether to sanction conduct: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage

1 its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public  
2 policy favoring disposition of cases on their merits; and (5) the availability of less  
3 drastic sanctions.” *Id.* The Defendants casually suggest that the Court should dismiss  
4 the case as a sanction, in a footnote, without any analysis of the factors implicated in  
5 this extreme and wholly unwarranted remedy.

6 Defendants cite *Qualcomm v. Broadcom*, No. 05cv1958-B (BLM), 2008 WL  
7 66932 at \*31 (S.D.Cal. Jan. 7, 2008) vacated in part by *Qualcomm, Inc. v. Broadcom*  
8 *Corp.*, 2008 WL 638108 (S.D.Cal. Mar. 5, 2008) in support of their argument that  
9 Plaintiff’s counsel’s failure to preserve “evidence” is a sanctionable ethical violation.  
10 (Def. Mot. for Sanctions, p. 22.) But the *Qualcomm* court stated explicitly that its  
11 review was limited to applicable discovery rules and remedies and that Rule 11 did  
12 not apply. *Qualcomm*, 2008 WL 66932 \*9 n. 5.

13 Defendants also cite *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432  
14 (S.D.N.Y. 2004) as support for the position that the failure to preserve evidence is  
15 sanctionable conduct. But like *Qualcomm*, *Zubulake* deals with discovery  
16 requirements under Federal Rule of Civil Procedure 26. There is no mention of Rule  
17 11 sanctions. The issue in *Zubulake* was the attorney’s duty to locate discoverable  
18 evidence. 229 F.R.D. at 432. In *Zubulake*, the court addressed the attorney’s  
19 responsibility to do more than notify a client and its employees of a litigation hold  
20 (requiring them to retain documents once litigation began), but the counsel must  
21 monitor the retention and “take some reasonable steps to see that sources of relevant  
22 information are located.” *Id.* Putting aside the fact that *Zubulake* does not involve  
23 Rule 11 sanctions, its discussion of Rule 26 sanctions do not apply to the present  
24 case. *Zubulake* involved a company-wide document retention system which was  
25 required to be monitored as of the onset of litigation. Despite Defendants’ suggestion  
26 to the contrary, the duty to preserve evidence does not relate back forever. Courts  
27 have held that when the duty does trigger before litigation, it commences when  
28 litigation is reasonably anticipated or contemplated. *See Silvestri v. General Motors*,

1 271 F.3d 583, 590 (4th Cir. 2001); *Kronisch v. United States*, 150 F.3d 112, 126 (2nd  
2 Cir. 1998).

3 As argued at length in Plaintiff's Opposition to Defendants' Motion for  
4 Summary Judgment, the evidence before the Court establishes that Pringle replaced  
5 his 2009 hard drive before he contemplated litigation and before Defendants sent  
6 notice to preserve the drive. Additionally, the uncontroverted facts and evidence  
7 before the Court is that the 2011 hard drive did not contain a copy of "I Gotta  
8 Feeling." Because "I Gotta Feeling" was not present on the 2011 hard drive, Pringle  
9 did not have "some notice that the [hard drive was] potentially relevant to the  
10 litigation before [it was] destroyed." *See United States v. Kitsap Physicians Serv.*,  
11 314 F.3d 995, 1001 (9th Cir. 2002). If the 2011 hard drive was not potentially  
12 relevant, spoliation could not occur and, consequently, Defendants could not have  
13 been harmed by Pringle's warranty replacement of the defective, inoperable 2011  
14 drive. And though Defendants point to a communication from May 2010 which  
15 requests "preservation of evidence," as of that time, all evidence had been preserved  
16 in the form of the .NRG file.

17 Even if this Court concludes that Pringle was under a duty to preserve his later  
18 hard drives which were not used in the creation of the derivative of "Take a Dive,"  
19 the drastic sanction of case dismissal is not warranted. The imposition of the drastic  
20 sanction of dismissal requires a finding of "willfulness, fault, or bad faith." *Leon*, 464  
21 F.3d at 958 (quoting *Anheuser-Busch, Inc.*, 69 F.3d at 348 (citation omitted)). The  
22 Court should consider the following factors: (1) the existence of certain extraordinary  
23 circumstances; (2) the presence of willfulness, bad faith, or fault by the offending  
24 party; (3) the efficacy of lesser sanctions; (4) the relationship or nexus between the  
25 misconduct and the matters in controversy; and, as an optional consideration where  
26 appropriate, (5) the prejudice to the party victim of the misconduct. *Halaco*  
27 *Engineering Co. v. Costle*, 843 F.2d 376, 380 (9th Cir. 1988). Public policy favoring  
28

1 disposition of cases on their merits counsels against a sanction in the form of a  
2 default. *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997) (citation omitted).

3       There is no evidence that Pringle destroyed “evidence.” Instead, the  
4 evidence—in the form of testimony, physical evidence, and expert forensic  
5 analysis—shows that the derivative of “Take a Dive” was created and electronically  
6 preserved in 1999, ten years before “I Gotta Feeling” was released. In good faith,  
7 Pringle submitted this evidence to Mr. Gallant and made it available to opposing  
8 counsel without question. This evidence shows that Defendants’ claims of spoliation  
9 are a smoke screen.

10 **V. CONCLUSION**

11       For each of these reasons, Defendants’ motion for Rule 11 sanctions should be  
12 denied, and Plaintiff should be awarded his costs and fees incurred in having to  
13 defend against the motion.

14 Dated: March 26, 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

19 By: /s/ Dean A. Dickie  
20 Attorneys for Plaintiff Bryan Pringle

## **CERTIFICATE OF SERVICE**

On March 26, 2012, I electronically filed the foregoing PLAINTIFF'S  
OPPOSITION TO DEFENDANTS' MOTION FOR SANCTIONS AGAINST  
PLAINTIFF AND HIS COUNSEL PURSUANT TO FED. R. CIV. P. 11 using the  
CM/ECF system which will send notification of such filing to the following  
registered CM/ECF Users:

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

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 26, 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