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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

**DEFENDANTS' REPLY  
 MEMORANDUM OF LAW IN  
 FURTHER SUPPORT OF MOTION  
 FOR SANCTIONS AGAINST  
 PLAINTIFF AND HIS COUNSEL  
 PURSUANT TO FED. R. CIV. P. 11**

Complaint Filed: October 28, 2010  
 Motion Hearing Date: April 16, 2012  
 10:00 AM  
 Courtroom 10A

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## SUMMARY OF ARGUMENT

1  
2 Plaintiff's counsel submits a voluminous opposition to justify the  
3 unjustifiable. But nowhere do they refer to Pringle's own admission that "I Gotta  
4 Feeling" was not and could not have been copied from "Take a Dive" (Dance  
5 Version). It seems that counsel remain enamored with Pringle's story that the  
6 authors of "I Gotta Feeling" copied the "guitar twang sequence" from a song Pringle  
7 claimed he created in 1999. This led counsel to file sweeping allegations that  
8 Pringle "regularly" submitted his music to everyone in the industry including  
9 Defendants and had received "numerous" letters in response, that Defendants  
10 sampled the guitar twang sequence from "Take a Dive" (Dance Version), and that "I  
11 Gotta Feeling" infringed the original version of "Take a Dive" which did not contain  
12 the guitar twang. Had counsel scratched beneath the surface of Pringle's story,  
13 however, they would have discovered it was just that—a story.

14 Defendants do not contend that Pringle was required to "prove his case before  
15 ever filing a complaint", but Rule 11 requires counsel to do more than satisfy  
16 themselves as to the "plausibility" of Pringle's claim and conduct "adequate legal  
17 research"—it requires counsel to conduct a reasonable, independent investigation  
18 that yields actual "evidentiary support" for each of Pringle allegations. Fed. R. Civ.  
19 P. 11(b). Had counsel conducted such an investigation, rather than simply take  
20 Pringle's word at face value, they would have learned that Pringle's allegations  
21 lacked evidentiary support.

22 Counsel's reliance on Pringle's self-serving assertions was particularly  
23 unreasonable given his prior litigation history. As counsel knew or should have  
24 known, **Pringle has brought more than a dozen other lawsuits**, including an  
25 insurance coverage suit for \$25,000 worth of "personal property" that was allegedly  
26 stolen from Pringle's garage, in which **Pringle was accused of insurance fraud**  
27 **and of instructing witnesses not to cooperate with an investigation of the**  
28

1 **alleged theft.** (Dickstein Decl., Exs. 23 & 24) Although that case settled out of  
2 court, the allegations of insurance fraud and witness tampering should have  
3 prompted counsel to at least demand concrete evidence supporting Pringle’s claim.

4 Not only did Pringle’s counsel fail to independently investigate Pringle’s  
5 allegations before bringing suit, they also continued to press Pringle’s claims  
6 throughout the litigation even after they were shown to be baseless, and after  
7 counsel themselves were sanctioned for “recklessness, and unreasonably and  
8 vexatiously multipl[y]ing the proceedings” (Apr. 12, 2011 Order [Doc. 126] at 3).

9 For example:

- 10 • Counsel continued to press Pringle’s sampling claim even after  
11 uncontroverted expert testimony showed it would have been  
12 technologically impossible for Defendants to have sampled the guitar  
13 twang sequence from “Take a Dive” (Dance Version), and even after  
14 Pringle himself admitted that sampling was impossible;
- 15 • Counsel represented in their Rule 26(a) Initial Disclosures that Pringle had  
16 copies of “communications with Defendants” and continued to press  
17 Pringle’s allegations of access, even after discovery showed that there is  
18 no evidence Pringle ever communicated with any of the Defendants, much  
19 less sent them a copy of “Take a Dive” or “Take a Dive” (Dance  
20 Version);
- 21 • Counsel represented to the Court in the Joint Rule 26 Report that they  
22 would participate in electronic discovery in good faith after allowing  
23 Pringle to destroy his computer hard drive which Defendants had been  
24 demanding for months and which would likely show that Pringle  
25 backdated his music files;
- 26 • Counsel continued to assert infringement of the original version of “Take a  
27 Dive” even after their own experts admitted that the alleged similarities  
28 with “I Gotta Feeling” were commonplace and non-protectable musical  
elements and “could not say for sure” that the combination of these non-  
protectable elements was somehow protectable;

Counsel try to cover up these violations with declarations designed to show  
their alleged investigation of Pringle’s claims. But counsel’s declarations mostly

1 just repeat the same unsubstantiated or immaterial facts that Pringle offered in  
2 opposition to summary judgment, or fall back on Pringle’s own self-serving  
3 representations. Counsel’s declarations are most notable for what they *do not*  
4 contain: any mention of the fact that Pringle himself admits Defendants could not  
5 have sampled the guitar twang from his song; any evidentiary support for Pringle’s  
6 allegations that his music was widely distributed or sent directly to Defendants; any  
7 justification for failing to preserve Pringle’s hard drives after Defendants  
8 specifically demanded that they be preserved; or any basis on which to assert  
9 infringement of the original version of “Take a Dive”. Any one of these omissions  
10 would support a violation of Rule 11. In combination, they warrant a full award of  
11 Defendants’ attorneys’ fees and expenses.

12 **ARGUMENT**

13 **I. COUNSEL CONTINUE TO PURSUE PRINGLE’S FACTUALLY**  
14 **IMPOSSIBLE SAMPLING CLAIM**

15 **A. Counsel Stubbornly Ignore Their Own Client’s Admission That**  
16 **Defendants Could Not Possibly Have Sampled His Song**

17 As early as January 2011, Defendants’ sound recording expert, Paul Geluso,  
18 established that Defendants could not possibly have sampled the guitar twang  
19 sequence from “Take a Dive” (Dance Version) because it is layered with other  
20 sounds that are not present in “I Gotta Feeling”. (Def. Br. 4-7.) After nearly a year  
21 of costly discovery and motion practice, Pringle finally conceded in his December  
22 2011 summary judgment declaration that his sampling claim was technologically  
23 impossible. (Pringle Decl. [Doc. 198] ¶¶ 125, 142.)

24 But there is still one group of people who refuse to concede the obvious—  
25 Pringle’s counsel. Despite the admission of their own client, the absence of any  
26 supporting evidence, and counsel’s representation that they would withdraw the  
27  
28



1 sampling claim,<sup>1</sup> Pringle’s counsel continue to urge the Court to accept the  
2 impossible. Counsel have thereby violated Rule 11. *See Bus. Guides, Inc. v.*  
3 *Chromatic Comm. Enters., Inc.*, 498 U.S. 533, 537, 550 (1991) (affirming Rule 11  
4 sanctions where counsel could not support their copyright infringement claims at a  
5 TRO hearing and nevertheless pursued two years of costly litigation).

6 **B. Pringle’s Sampling Claim is Refuted By the Expert Testimony**

7 Counsel try to find support for Pringle’s sampling claim in the report of their  
8 former sound recording expert, Mark Rubel. (Pl. Br. 5.) However, as Defendants  
9 demonstrated in January 2011, Rubel’s report does not support Pringle’s sampling  
10 claim at all. That is because Rubel did not analyze “Take a Dive” (Dance Version)  
11 itself, but rather an isolated guitar twang sequence that was given to him by  
12 Pringle’s counsel. (Jan. 3, 2011 Rubel Decl. [Doc. 73-1] ¶ 4.)<sup>2</sup> Rubel himself  
13

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14  
15 <sup>1</sup> Tellingly, one of the attorneys who represented that Pringle would withdraw his  
16 sampling claim, Ira Gould, later sought to withdraw as counsel when attorneys from  
17 the Miller Canfield firm refused to withdraw the claim. (Docs. 180-181; Nov. 17,  
18 2011 Dickstein Decl. [Doc. 161] ¶¶ 16-17); *cf. Herron v. Jupiter Transp. Co.*, 858  
19 F.2d 332, 333 (6th Cir. 1988) (imposing Rule 11 sanctions where counsel indicated  
20 willingness to dismiss claims but refused to execute formal dismissal). Mr. Gould  
21 and his associate, Ryan Greely, are still counsel of record, however, as the Court’s  
22 Local Rules provide that “[a]n attorney may not withdraw as counsel except by  
23 leave of court,” and no such leave has been granted. L.R. 83-2.9.2.1. Moreover,  
24 even if they had obtained court permission to withdraw as counsel, that would not  
25 have insulated them from sanctions for conduct prior to their withdrawal. *See*  
26 *Holgate v. Baldwin*, 425 F.3d 671, 677 (9th Cir. 2005) (“The fact that Levinson was  
27 allowed to withdraw as counsel due to a conflict of interest does not protect him  
28 from sanctions based on a filing that he made before that withdrawal.”)

24 <sup>2</sup> Defendants served an interrogatory asking Pringle to identify the source of the  
25 mysterious isolated guitar twang that counsel gave to Rubel. Incredibly, Pringle  
26 responded that he could not identify the source of the guitar twang as he never  
27 examined it. (Dickstein Decl., Ex. 25 at 3-4) (“[Pringle] is unable to answer this  
28 interrogatory . . . [w]ithout reviewing the specific sound recording that was attached  
to the Declaration of Mark Rubel as Audio Exhibit 3 . . . Plaintiff cannot accurately  
provide any further information as he has not compared that which was attached to

1 acknowledged that the guitar twang sequence in “Take a Dive” (Dance Version) is  
2 layered with other sound elements, and that it was not possible to isolate a clean  
3 guitar twang sample from “Take a Dive” (Dance Version) (*Id.* at ¶ 4; Rubel Report  
4 at 17)—yet that is precisely what Pringle claimed Defendants had done.

5 Pringle’s counsel had no response to this flaw in Rubel’s analysis at the  
6 preliminary injunction hearing, and they have none now. Thus, even if Pringle’s  
7 sampling claim had some support when the First Amended Complaint was first  
8 filed, that support vanished when Geluso demonstrated that sampling was not  
9 possible. Counsel’s insistence on pursuing the sampling claim throughout fact  
10 discovery, expert discovery, and summary judgment—even after their *own client*  
11 admitted that the claim was factually impossible—violated Rule 11.

12 Counsel next try to resuscitate their sampling claim with a new declaration  
13 from one of their musicologists, Alexander Stewart. Counsel claim that Stewart has  
14 “opined that Defendants sampled the derivative version of ‘Take a Dive’” (Pl.’s Br.  
15 2; Dickie Decl. [Doc. 249-1] ¶ 17.)<sup>3</sup> However, Stewart merely states that the  
16 “twangy guitar passage heard in ‘David Pop’ [an earlier version of ‘I Gotta Feeling’  
17 before the vocals were added], is identical to that heard in [the] derivative version of  
18 ‘Dive’ and in ‘Feeling’. The similarities are so profound and detailed as to indicate  
19 sampling (digital copying) of the sound recording.” (Feb. 15, 2012 Stewart Decl.  
20 [Doc. 249-2, Ex. D] at 13.) Nowhere does Stewart state that *Defendants* sampled  
21 the guitar twang from *Pringle*, rather than the other way around. Nor does Stewart  
22 explain how it would even have been possible for Defendants to have sampled from  
23 Pringle’s song, given that the guitar twang in “Take a Dive” (Dance Version) is  
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25 the declaration of Mark Rubel as Audio Exhibit 3 to the data and image files which  
26 have been maintained by Dave Gallant. Plaintiff did not prepare any Mark Rubel  
27 Exhibits.”).

28 <sup>3</sup> Stewart’s report is dated February 15, 2012 and thus could not have been relied  
upon by counsel in their pre-suit investigation.

1 layered with other sound elements not present in “I Gotta Feeling.” Nor could  
2 Stewart provide such an explanation, since he is a musicologist not a sound  
3 recording expert.<sup>4</sup>

4 Unable to rely on any of their own experts, counsel claim that Defendants’  
5 expert, Paul Geluso, somehow supports their sampling claim. They seize on  
6 Geluso’s statement that the guitar twang sequence in “Take a Dive” (Dance  
7 Version) is the same as the isolated “I Gotta Feeling” guitar twang stem that  
8 Defendants posted to the Internet in September 2009. (Pl. Br. 1, 18.) But nowhere  
9 in Geluso’s report or testimony does he state that *Defendants* sampled from *Pringle*.  
10 To the contrary, Gelsuo has reaffirmed his analysis from the preliminary injunction  
11 proceeding that it would have been technologically impossible for Defendants to  
12 have sampled from “Take a Dive” (Dance Version). Geluso therefore concluded  
13 that the only explanation for the similarity is that Pringle sampled the isolated guitar  
14 twang from Defendants, not the other way around. (Nov. 17, 2011 Geluso Decl.  
15 [Doc. 162] ¶¶ 12-13, 22-23.)

16 **C. Counsel Misrepresent The Copyright Act and Rule 11 Itself**

17 Recognizing that there is no factual support for the claim that Defendants  
18 sampled the “Take a Dive” (Dance Version) sound recording, counsel resort to  
19 misrepresenting the law. First, they assert that “[t]he underlying case law requires  
20 that a party show more than a lack of evidentiary support for a claim in order to  
21 warrant Rule 11 sanctions.” (Pl. Br. 14) (citing *Holgate v. Baldwin*, 425 F.3d 671  
22 (9th Cir. 2005). But that is exactly what Rule 11 requires. *See* Fed. R. Civ. P.  
23 11(b)(3) (requiring that “factual contentions have evidentiary support”).<sup>5</sup> Further,  
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25 <sup>4</sup> Tellingly, Pringle’s sound recording expert, Mark Rubel, has not been heard from  
26 in this action since the January 2011 preliminary injunction briefing.

27 <sup>5</sup> Rule 11(b)(3) also provides that a party can avoid having actual evidentiary  
28 support for allegations that are “specifically so identified [as] likely to have  
evidentiary support after a reasonable opportunity for further investigation or

1 because counsel’s violation is not limited to the sampling claim in Pringle’s First  
2 Amended Complaint, but also their preliminary injunction reply and summary  
3 judgment opposition papers, the two-prong inquiry in *Holgate* does not apply.

4 Second, counsel assert that sound recording infringement can be established  
5 without any showing of sampling. (Pl. Br. 12) (citing 26 Am. Jur. 3d Proof of Facts  
6 § 537 for the proposition that “[t]he elements of proving infringement via copying  
7 or sampling are no different than what is required generally to prove infringement of  
8 a musical composition” ). That is not correct. As counsel well knows, in order to  
9 establish infringement of a sound recording, the plaintiff must show that the sound  
10 recording was physically appropriated (i.e., “sampled”). (Feb. 7, 2011 Order  
11 Denying PI Motion [Doc. 99] at 8-9) (citing 17 U.S.C. § 114(b)); *Midler v. Ford*  
12 *Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (“Mere imitation of a recorded  
13 performance would not constitute a copyright infringement”); *Griffin v. J-Records*,  
14 398 F. Supp. 2d 1137, 1143 (E.D. Wash. 2005) (sound recording not infringed  
15 where there was no sampling or similar conduct).<sup>6</sup>

16 Indeed, the authority cited by counsel recognizes that sound recording  
17 infringement requires copying of the sound recording itself: “In most copyright  
18 actions, the issue is whether the infringing work is substantially similar to the  
19 original work; the scope of inquiry is much narrower when the work in question is a  
20 sound recording, the only issue being whether the actual sound recording has been  
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22 discovery[.]” However, none of the allegations at issue in this motion were so  
23 identified in Pringle’s pleadings. Moreover, as discussed above, counsel continued  
24 to assert Pringle’s sampling claim even after it was shown during the PI briefing and  
25 discovery to be factually impossible.

26 <sup>6</sup> The Copyright Act itself provides that “The exclusive rights of the owner of  
27 copyright in a sound recording under clauses (1) and (2) of section 106 do not  
28 extend to the making or duplication of another sound recording that consists entirely  
of an independent fixation of other sounds, even though such sounds imitate or  
simulate those in the copyrighted sound recording.” 17 U.S.C § 114(b).

1 used without authorization.” 26 Am. Jur. 3d Proof of Facts § 537 at Sec. 24 (citing  
2 *Pharmacy Records v. Nassar*, 248 F.R.D. 507 (E.D. Mich. 2008)).

3 **II. COUNSEL FAILED TO INDEPENDENTLY INVESTIGATE**  
4 **PRINGLE’S ALLEGATIONS OF ACCESS**

5 **A. Counsel Were Required to Do More Than Accept Pringle’s**  
6 **Unsubstantiated Allegations of Widespread Dissemination**

7 Pringle’s counsel acknowledge that “counsel can no longer avoid the sting of  
8 Rule 11 sanctions by operating under the guise of a pure heart and empty head” (Pl.  
9 Br. 15) (quoting *Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994)) and that Rule  
10 11 prohibits an attorney from filing a pleading or paper unless an “**independent**  
11 **examination** reveals some credible evidence in support of a party’s statements”  
12 (Pl. Br. 11) (quoting *Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 710  
13 (N.D. Cal. 1995)) (emphasis added); *see also Bus. Guides, Inc. v. Chromatic Comm.*  
14 *Enters., Inc.*, 498 U.S. 533 (1991) (“the meaning of the Rule seems plain: A party  
15 who signs a pleading or other paper without first conducting a reasonable inquiry  
16 shall be sanctioned.”)<sup>7</sup>

17 Each of Pringle’s counsel state conclusorily that they “investigated the merits  
18 of the claim.” (Pl. Br. 5.) But that investigation apparently consisted of nothing  
19 more than accepting on face value Pringle’s wild allegations, including that he  
20 “regularly” submitted his demo CDs “all of which contained ‘Take a Dive’” to  
21 essentially everyone in the music business, and that he had received “numerous  
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24  
25 <sup>7</sup> Pringle’s counsel go to great lengths to show that *Smith v. Ricks* and *Estate of Blue*  
26 *v. County of Los Angeles*, 120 F.3d 982 (9th Cir. 1997) involved different factual  
27 circumstances than those present here. (Pl. Br. 14-16.) Yet they do not dispute the  
28 principle underlying those cases—that counsel’s failure to conduct a reasonable,  
independent investigation before filing suit, or their refusal to withdraw claims that  
have become frivolous after filing suit, warrant sanctions.

1 response letters, one of which was handwritten, from multiple A&R representatives  
2 at [Defendants] Interscope, UMG and EMI.” (Compl. ¶ 33; FAC ¶ 33.)<sup>8,9</sup>

3 Given Pringle’s prolific litigation history and the insurance fraud claims  
4 against him, a reasonable attorney would have investigated his claims before filing  
5 suit, including:

- 6 • Requesting documents from TAXI Music, Pringle’s music promotion  
7 company, supporting Pringle’s alleged distribution of “Take a Dive” and  
8 “Take a Dive” (Dance Version);
- 9 • Requesting documents from BMI, the performing rights organization with  
10 which Pringle registered as an artist, supporting Pringle’s allegation that he  
11 “continually” advertised his music on websites and the radio;
- 12 • Asking Pringle to identify the websites where he supposedly sold his  
13 music, and determining whether “Take a Dive” or “Take a Dive” (Dance  
14 Version) were ever sold on those websites;
- 15 • Demanding that Pringle provide some documentary evidence that “Take a  
16 Dive” or “Take a Dive” (Dance Version) was ever sent to anybody prior to  
17 the release of “I Gotta Feeling”.

18 Pringle had three separate law firms representing him in this action, and those  
19 firms had over nine months to prepare their pleadings after Pringle first approached  
20

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21 <sup>8</sup> Counsel claim that they reviewed the declaration of Pringle’s brother (Dickie Decl.  
22 [Doc. 249-1] ¶ 20), but as explained in Defendants’ summary judgment reply  
23 papers, Jeffrey Pringle’s declaration does not provide facts supporting Pringle’s  
24 claim that Guetta and Riesterer actually received copies of “Take a Dive” or “Take a  
25 Dive” (Dance Version) in France. Moreover, because Jeffrey Pringle’s declaration  
26 is dated December 15, 2011, it could not have aided counsel’s pre-suit investigation.

27 <sup>9</sup> One of Pringle’s counsel claims Pringle had “corroborative evidence establishing  
28 that he had been writing and submitting his music demos on a massive scale to  
major record labels, DJs, publishing companies and famous music artists, for  
approximately nine years”—but he does not identify what “corroborative evidence”  
he refers to. (Gould Decl. [Doc. 249-5] ¶ 3.d.) If this is a reference to the postal  
receipts Pringle produced during discovery, that “evidence” establishes nothing, as  
counsel concede that “neither the content of the packages sent nor specific addresses  
that the packages were sent to are indicated on the receipts[.]” (Greely Decl. [Doc.  
249-6] ¶ 27.)

1 them in February 2010. Had any one of Pringle’s attorneys taken these steps, they  
2 would have either learned that Pringle’s allegations of access were baseless and  
3 would either omitted Pringle’s trumped up allegations of access or not filed suit at  
4 all. Indeed, this Court has recognized that “[w]ith respect to ‘Take a Dive,’ Plaintiff  
5 has failed to provide *any* evidence of access.” (Apr. 2, 2012 Order [Doc. 252] at 10)  
6 (emphasis added).

7 Just as the plaintiff’s attorney in *Christian v. Mattel*, 286 F.3d 1118 (9th Cir.  
8 2002) could have discovered that his copyright claim lacked support by closely  
9 examining the defendant’s copyrighted doll, Pringle’s counsel could have  
10 discovered that Pringle’s allegations of widespread dissemination were baseless by  
11 investigating the channels through which Pringle allegedly distributed his music.  
12 (*See* Pl. Br. 16) (acknowledging that a “failure to do even the most minimal inquiry  
13 warranted sanctions” citing *Christian*); *Herron v. Jupiter Transp. Co.*, 858 F.2d 332,  
14 337 (6th Cir. 1988) (affirming sanctions where “minimal inquiry into the facts of  
15 this case . . . would have disclosed that the complaint was without factual or legal  
16 support.”).

17 Indeed, it was those unsupported allegations of access through widespread  
18 distribution and submissions to Defendants that enabled Pringle to survive motions  
19 to dismiss in January 2011. (Doc. 95 at 8-10) (relying on Pringle’s allegations of  
20 widespread distribution in concluding that “Based on the foregoing allegations,  
21 Plaintiff has sufficiently alleged both access and substantial similarity.”) Now that  
22 discovery has shown Pringle’s allegations of widespread distribution and  
23 communications with Defendants to be wholly unsupported, counsel no longer  
24 attempt to justify Pringle’s sweeping allegations, but only that the creators of “I  
25 Gotta Feeling” must have “had access of *some kind* to Pringle’s music.” (Greely  
26 Decl. [Doc. 249-6] ¶ 10) (emphasis added). Had counsel not asserted the allegations  
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28

1 of access in Pringle’s pleadings, Defendants would likely have avoided more than a  
2 year of burdensome litigation.<sup>10</sup>

3 **B. Counsel Cannot Justify Their Misrepresentation of David Guetta’s**  
4 **Testimony in Their Summary Judgment Opposition Papers**

5 After it became clear during discovery that Pringle’s allegations of access had  
6 no evidentiary support, counsel tried to cover up their unsupported allegations by  
7 misrepresenting the record. In their summary judgment opposition, counsel cited  
8 Guetta’s deposition testimony for the proposition that he had actually received a  
9 copy of Pringle’s song in France, when in fact he said nothing of the sort. (*See* Def.  
10 Br. 9-10.) Even in their opposition to this motion, Pringle’s counsel continue to  
11 assert that Pringle “also sent [‘Take a Dive’ (Dance Version)] to Gum Productions,  
12 and received an acknowledgement from them”, again citing Guetta’s deposition  
13 testimony. (Pl. Br. 3) (citing Pl. MSJ Stmt. of Facts ¶ 131, which in turn cites  
14 Guetta Dep. 20-22); (Koppenhoefer Decl. [Doc. 249-2] ¶ 4.j.) (same); (Pl. Br. 15)  
15 (suggesting that “Guetta affirm[ed] the existence of correspondence with Pringle”).  
16 Yet Guetta testified only that it was *possible* that he had received unsolicited  
17 submissions from *unidentified* artists, and categorically denied having ever  
18 communicated with or received any submissions from Pringle. (Guetta Tr. 20-22,  
19 66-69 [Doc. 197-2]; Guetta Decl [Doc. 167] ¶¶ 4-5.)

20 This is not simply a “disagree[ment] with Plaintiff’s characterization of  
21 Guetta’s testimony” or of a choice between two “version[s] of the facts” (Pl. Br. 17)

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23 <sup>10</sup> To the extent counsel now suggest that access to the guitar twang sequence can be  
24 established through the alleged distribution of Pringle’s earlier song “Faith” (Pl.’s  
25 Br. 2), that suggestion is belied by the fact that “Faith” does not contain the guitar  
26 twang sequence—a fact that Geluso confirms (Jan. 9, 2012 Geluso Decl. [Doc. 217]  
27 ¶ 31) and which the Court can easily determine by simply listening to “Faith” on the  
28 1998 deposit copy of Pringle’s *Deadbeat Club* album. Indeed, when Pringle later  
inserted the guitar twang sequence into “Faith” during the summary judgment  
briefing, he had to change both the tempo and pitch. (*Id.*)



1 but rather a blatant misrepresentation of the record evidence. It is precisely the type  
2 of conduct for which Rule 11 sanctions are appropriate. *See Christian v. Mattel,*  
3 *Inc.*, 286 F.3d at 1131 (attorney sanctioned for misrepresentations in briefing);  
4 Advisory Committee Notes to Rule 11 (1983) (objectiveness standard intended to  
5 “discourage dilatory or abusive tactics and help to streamline the litigation  
6 process”).

7 Counsel’s misrepresentations of the record continue even in opposition to this  
8 motion. Pringle’s lead counsel tries to justify Pringle’s claims by stating “I also  
9 reviewed court dockets that show that The Black Eyed Peas and David Guetta have  
10 stolen others’ music multiple times in the past.” (Dickie Decl. [Doc. 249-1] ¶ 12.)  
11 Even assuming mere *allegations* in other lawsuits could provide evidentiary support  
12 for Pringle’s claims here (which they cannot), counsel had no basis to believe that  
13 Guetta—who, along with Riesterer, created the music to “I Gotta Feeling”—had  
14 ever been sued for copyright infringement. Counsel does not identify the “court  
15 dockets” he supposedly reviewed, and as he well knows, Guetta testified that this is  
16 the first time he has been sued for copyright infringement. (Guetta Tr. 15 [Doc.  
17 197-2].) Indeed, when co-counsel discuss the infringement suits against The Black  
18 Eyed Peas, they do not mention a single suit involving Guetta. (Greely Decl. [Doc.  
19 249-6] ¶¶ 19-20; Gould Decl. [Doc. 249-5] ¶¶ 19-20.)

20 **C. The Newfound Declaration of Michael Scott Brown Underscores**  
21 **the Absence of Evidence Supporting Pringle’s Allegations of Access**

22 Recognizing that neither their pre-suit “investigation” nor discovery  
23 uncovered any evidence supporting Pringle’s allegations of access, counsel have  
24 again tried to dig up some evidence to support their allegations.<sup>11</sup> Pringle’s counsel  
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26 <sup>11</sup> The deficiencies in Pringle’s other “evidence” of access, including the declaration  
27 of his brother Jeffrey Pringle and his postal receipts, is thoroughly discussed in  
28 Defendants’ summary judgment papers and opening brief on the instant motion  
[Doc. 238], and are incorporated herein by reference.

1 now submit the declaration of an individual named Michael Scott Brown who  
2 claims to be “acquainted” with Pringle and his brother. (Doc. 249-8.) If that  
3 declaration is supposed to be the missing link in Pringle’s theory of access, it falls  
4 far short. The majority of Brown’s declaration relates to events that took place  
5 *before* either “Take a Dive” or “Take a Dive” (Dance Version) were allegedly  
6 created in 1998 and 1999. (*Id.* at ¶¶ 4-6.) Similarly, Brown states that Pringle  
7 provided copies of unidentified music to unidentified DJs in Paris “prior to the year  
8 1999” and thus *before* “Take a Dive” (Dance Version) was created. (*Id.* at ¶ 11.)

9       The remainder of Brown’s declaration states merely that, sometime in 1998 or  
10 1999, he sent a copy of one of Pringle’s CDs to an unidentified former co-worker at  
11 an unidentified radio station. (*Id.* at ¶ 7.) Brown admits that “**I do not have a copy**  
12 **of any daily ‘play list’ which I created and do not recall specifically which of**  
13 **the many tracks on that CD were played on the air[.]”** (*Id.*) (emphasis added).  
14 He thus lacks any personal knowledge of whether Pringle’s music, much less the  
15 specific song “Take a Dive” or “Take a Dive” (Dance Version), was actually played  
16 on the radio. Indeed, Pringle himself testified that he would sometimes distribute  
17 CDs containing songs that had no relation to the songs listed on the CD liner notes  
18 or packaging. (Pringle Tr. 349-352 [Doc. 197-1]). Brown also states that Pringle  
19 and his brother were in Europe in 1997 and 1999 to distribute Pringle’s music, but  
20 he does not identify what songs were distributed, where they were distributed, or to  
21 whom. (*Id.* at ¶ 9.)<sup>12</sup>

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25 <sup>12</sup> Brown’s declaration cannot be considered on the pending summary judgment  
26 motion both because it was not provided with Pringle’s opposition papers and  
27 because Pringle never identified Brown in his Rule 26 Initial Disclosures and  
28 testified he had no contact information for Brown at his deposition. (Jan. 9, 2012  
Dickstein Decl., Ex. W [Doc. 221-6].)

1 **III. COUNSEL CONTINUE TO ASSERT INFRINGEMENT OF**  
2 **ELEMENTS OF “TAKE A DIVE” THAT THEIR OWN EXPERTS**  
3 **ADMIT ARE NOT PROTECTABLE**

4 Counsel now concede, as they must, that their experts have admitted that the  
5 alleged similarities between “I Gotta Feeling” and the original version of “Take a  
6 Dive” are not protectable. (Pl. Br. 19 (“It is hardly novel to state that a song is not  
7 the first song of a given length or a given tempo, and no credible expert would offer  
8 an opinion that individually, such elements are protectable.”); FAC ¶ 43 (asserting  
9 infringement of the original version of “Take a Dive” based on, among other things,  
10 “an almost identical tempo”). In discussing their pre-suit investigation of Pringle’s  
11 claims, they cite expert reports discussing only the *derivative* version of “Take a  
12 Dive”. (Dickie Decl. [Doc. 249-1] ¶ 6 (mentioning a “preliminary oral opinion that  
13 the *derivative* version of ‘Take a Dive’ was identical to ‘I Gotta Feeling’ in several  
14 key respects.”) (emphasis added); Hampton Decl. [Doc. 249-3] ¶ 8 (noting that  
15 counsel reviewed expert reports comparing “I Gotta Feeling” to the *derivative*  
16 version of “Take a Dive”); Holley Decl. [249-4] ¶¶ 7-8 (same); Gould Decl. [Doc.  
17 249-5] ¶ 3.b. (Pringle’s experts believed that songs were similar “by way of the  
18 guitar twang sequence”); Greely Decl. [Doc. 249-6] ¶ 22 (“Mr. Gould and I  
19 concluded that the similarity of the two songs was so obvious and strong, given the  
20 identity of the guitar twang sequence in both songs[.]”).) Indeed, this Court has  
21 recognized that Pringle “fails to provide *any* evidence of substantial similarity  
22 between the protectable elements of ‘I Gotta Feeling’ and ‘Take a Dive’” (Apr. 2,  
23 2012 Order [Doc. 252] at 10) (emphasis added).

24 Counsel now instead try to justify Pringle’s infringement claim for the  
25 original version of “Take a Dive” by arguing that the combination of generic music  
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1 building blocks is somehow protectable.<sup>13</sup> In doing so, they criticize Defendants for  
2 pointing out that neither of Pringle’s experts were willing to testify that this  
3 combination of commonplace elements is protectable. (Pl. Br. 18-19.) But that is  
4 exactly what Pringle’s experts testified. Counsel themselves cite Norris’ testimony  
5 that “I believe the combination of these elements *could* be original, *but I can’t say*  
6 *for sure.*” (Pl. Br. 19) (quoting Norris Tr. 251) (emphasis added); *see also* Stewart  
7 Tr. 284:20-285:16, Jan. 9, 2012 Dickstein Decl. [Doc. 221] Ex. V.)<sup>14,15</sup> If Pringle’s  
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10 <sup>13</sup> Counsel also try to blur the distinction between the original and derivative  
11 versions of “Take a Dive”, several times referring to “Take a Dive” in their papers  
12 when the context makes clear that they are discussing the Dance Version. *See, e.g.*,  
13 (Pl. Br. p.4 ln.6, p.5 ln.26, p.9 ln.16-18; Greely Decl. ¶ 31 ln.25, ¶ 33 ln.11,14.)

14 <sup>14</sup> Counsel quote a passage from *Metcalf v. Bochco*, 294 F.3d 1069, 1073 (9th Cir.  
15 2002) stating that “a pattern of notes in a tune may earn copyright protection.” (Pl.  
16 Br. 20.) But the alleged similarities between “I Gotta Feeling” and the original  
17 version of “Take a Dive” are not patterns of notes (otherwise known as melodies),  
18 but rather generic musical building blocks such as tempo, length and a “dance”  
19 drumbeat. *Metcalf* is thus inapposite. Counsel also cite *Card v. State Farm Fire &*  
20 *Cas. Co.*, 126 F.R.D. 654 (N.D. Miss. 1989) for the proposition that Rule 11 is not  
21 violated “merely because plaintiff’s attorney is not yet in possession of all of the  
22 facts which full-scale discovery might disclose.” (Pl. Br. 20). That case is  
23 inapposite not only because counsel already had all the evidence they needed to  
24 determine that “I Gotta Feeling” did not infringe the original version of “Take a  
25 Dive” before filing suit, but also because they continued to assert infringement of  
26 the original version of “Take a Dive” even after their own experts refused to support  
27 the claim at their depositions.

28 <sup>15</sup> Counsel argue that, aside from the addition of the guitar twang sequence and  
removal of the vocals, the “Dance Version” is identical to the original “Take a  
Dive”. (Pl.’s Br. 3.) To the extent counsel suggest that this supports a claim of  
infringement of the original “Take a Dive”, they are far off base. The fact that both  
“Take a Dive” (Dance Version) and “I Gotta Feeling” contain a guitar twang  
sequence obviously does not mean that “Take a Dive” original—which does *not*  
contain the guitar twang—bears any similarity with “I Gotta Feeling” *See Johnson*  
*v. Gordon*, 409 F.3d 12, 20 (1st Cir. 2005) (“copyright protection [extends] to those  
elements of the plaintiff’s long version [of his song] that are derived directly from  
the registered short version, but not to those elements contained exclusively in the

1 own musicologists will not affirmatively testify that the combination of generic  
2 elements in the original version of “Take a Dive” is, in fact, protectable, what basis  
3 could there possibly be for Pringle’s attorneys to claim infringement of that song?

4       Indeed, Pringle’s counsel were well aware that a combination of  
5 nonprotectable musical elements is not protectable unless the method of selection  
6 and arrangement of those elements is itself original. Just one month before  
7 Defendants moved for summary judgment in this action, summary judgment was  
8 entered dismissing claims in another infringement action brought by Pringle’s  
9 counsel against The Black Eyed Peas. *See Batts v. Adams*, CV 10-8123-JFW (RZx)  
10 (C.D. Cal. Oct. 21, 2011 Order at 4, Jan. 9, 2012 Dickstein Decl. [Doc. 221] Ex.  
11 BB.) The court in that case, in which Pringle’s counsel used the same musicologist  
12 as they did here, rejected the same arguments counsel advance here, noting that “[i]n  
13 his deposition testimony, Dr. Stewart was unable to identify the criteria Plaintiffs  
14 employed in selecting and arranging the constituent elements of [their song].” (*Id.* at  
15 7-8.)

16       This is thus not a matter of requiring Pringle to “simply accept his opponent’s  
17 evidence as true” or of sanctioning Pringle’s counsel “for merely not winning.” (Pl.  
18 Br. 20-21.) It is a matter of requiring Pringle and his counsel to have some actual  
19 musicological and legal support for their claim of infringement. Because counsel  
20 have neither, Rule 11 sanctions are appropriate.

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27 unregistered long version.”); *Well-Made Toy Mfg. Corp. v. Goffa Int’l Corp.*, 210 F.  
28 Supp. 2d 147, 158 (E.D.N.Y. 2002), *aff’d*, 354 F.3d 112 (2d Cir. 2003).

1 **IV. COUNSEL FALSELY REPRESENTED THAT THEY WOULD**  
2 **PRESERVE PRINGLE’S COMPUTERS AND PARTICIPATE IN**  
3 **ELECTRONIC DISCOVERY IN GOOD FAITH**

4 **A. Counsel Offer No Justification For Their Summary Judgment**  
5 **Opposition on Spoliation or For Their Misrepresentations in the**  
6 **Joint Rule 26 Report**

7 Defendants’ opening brief explained that Pringle’s counsel violated Rule 11  
8 by falsely representing to the Court in the February 2011 Joint Rule 26 Report (Doc.  
9 110) that they would cooperate in electronic discovery in good faith—even though  
10 they had allowed Pringle to destroy his 2010 hard drive just a month earlier—and by  
11 arguing in opposition to summary judgment, without any legal basis, that they had  
12 no duty to preserve Pringle’s hard drives. (Def.’s Br. [Doc. 238] 12-13, 20-22.)

13 Pringle’s counsel completely ignore their misrepresentations in the February  
14 2011 Joint Rule 26 Report as well as their frivolous summary judgment opposition.  
15 Indeed, while they contend that neither Pringle’s 2009 nor 2011 hard drive  
16 contained any relevant evidence, they once again fail to address the hard drive  
17 Pringle used in 2010. (Pl. Br. 24.) Yet it was that 2010 hard drive that Pringle used  
18 between the time he claims to have learned of “I Gotta Feeling” and the sudden  
19 appearance of the guitar twang sequence in “Take a Dive” (Dance Version).

20 Similarly, as in their summary judgment opposition, counsel again argue that  
21 “the duty to preserve evidence does not relate back forever” (Pl. Br. 23), but they  
22 again fail to explain how the duty to preserve could possibly not have been in place  
23 when Pringle destroyed his hard drives *during the litigation*. Indeed, this Court has  
24 already found that “Pringle was under a duty to preserve beginning July 23, 2010,  
25 when Defendants’ counsel explained her concern that the creation date of the NRG  
26 file had been altered and formally requested that Pringle’s counsel preserve  
27 evidence.” (Apr. 2, 2012 Order [Doc. 252] at 13.)  
28

1 Counsel have thus failed to provide support for their statements in the Joint  
2 Rule 26 Report that they would participate in discovery in good faith, or their  
3 arguments in opposition to summary judgment that they had no duty to preserve  
4 Pringle’s hard drives. Rule 11 sanctions are therefore warranted.

5 **B. Counsel Unquestionably Knew That Pringle’s Computers Were**  
6 **Potentially Relevant and Thus Had to Be Preserved**

7 Pringle’s counsel try to avoid responsibility for the spoliation of Pringle’s  
8 computer hard drives by claiming that one of Defendants’ preservation demands,  
9 dated July 10, 2010, “requests ‘preservation of evidence’ without specifying what  
10 she meant by ‘evidence[.]’” (Pl.’s Br. 4, 24) Counsel even claim that “Defendants  
11 first raised issues regarding Mr. Pringle’s computer in August 2011[.]”  
12 (Koppenhoefer Decl. [Doc. 249-2] ¶ 6.) In doing so, counsel suggest that they had  
13 no notice that Pringle’s computer hard drives were even potentially relevant, and  
14 thus no duty to preserve them. That suggestion is belied by the record, which shows  
15 that Pringle’s counsel were fully aware of the possibility that Pringle had backdated  
16 his computer files and that his computer systems therefore needed to be preserved.

17 For example, in a letter dated July 24, 2010—long before Pringle destroyed  
18 his hard drives in January 2011 and August 2011—Defendants questioned the  
19 authenticity of the dates of Pringle’s NRG file because they could easily have been  
20 backdated. Defendants therefore demanded that Pringle “**preserve all computer**  
21 **records [and] have an independent forensic computer person image his entire**  
22 **hard drive etc. to capture and preserve everything on his system . . .”**

23 (November 17, 2011, Dickstein Decl., Ex. J [Doc. 161-10]) (emphasis added).<sup>16</sup>

24 Pringle’s own computer expert, Barbara Frederiksen-Cross, understood that  
25 Defendants’ July 24, 2010 letter called for preservation of Pringle’s current

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26 <sup>16</sup> Defendants’ other preservation demands are chronicled in their summary  
27 judgment papers (Doc. 159-2 at 13-14 and 24-25, Doc. 161 at Exs. J-O, Doc. 223 at  
28 18-19) and are incorporated herein by reference.

1 computer hard drives. In her most recent declaration, she acknowledges that: “**In**  
2 **correspondence dated July 24<sup>th</sup>, 2010 counsel for defendants advised Mr.**  
3 **Pringle’s former counsel, Ira Gould that they would like to have an**  
4 **independent examiner image Mr. Pringle’s hard drive in order to preserve**  
5 **evidence.”** (March 2, 2012 Frederiksen-Cross Decl. [Doc. 249-7] at 17 n.12)  
6 (emphasis added). She goes on to state that “[i]t is my understanding, based on  
7 discussions with Mr. Pringle’s current counsel, that the preservation requests for Mr.  
8 Pringle’s computer was not communicated to Mr. Pringle until some point on or  
9 after August 8, 2011 [after Pringle had disposed of his computer hard drives].” (*Id.*)

10 Counsel got the message loud and clear that the dates of Pringle’s computer  
11 files were hotly disputed. Even before filing suit, counsel “focused on being able to  
12 prove that Mr. Pringle had in fact created the derivative version of ‘Take a Dive’  
13 and thus the guitar twang sequence . . . prior to the creation of ‘I Gotta Feeling’ in  
14 2008” (Greely Decl. [Doc. 249-6] ¶ 7) and they retained a computer forensic expert  
15 to “determine the creation date of the files at issue[.]” (Dickie Decl. [Doc. 249-1] ¶  
16 11.) When Pringle’s expert began investigating whether Pringle’s music files could  
17 have been backdated, he was told that “[l]inked files and metadata entries on the  
18 system originally creating the CD are . . . obvious choices to [] consider.” (Gallant  
19 Tr. [Doc. 221-8, Ex. Y] 219:19-21.)<sup>17</sup>

20 Finally, there can be no question that counsel knew Pringle’s computers were  
21 at least potentially relevant, because **counsel actually offered up Pringle’s**  
22 **computer for inspection.** (July 8, 2011 Letter from Miller Canfield law firm to  
23 Defendants, November 17, 2011 Dickstein Decl., Ex. M [Doc. 161-13] at 21) (“To  
24

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25 <sup>17</sup> The fact that Pringle registered a dozen different albums for copyright over the  
26 1995 to 2007 period yet *none* of them included “Take a Dive” (Dance Version),  
27 should have raised suspicions that Pringle created “Take a Dive” (Dance Version)  
28 after the “I Gotta Feeling” guitar twang stem became widely available in 2009.  
(Greely Decl. [Doc. 249-6] ¶ 8.)



1 the extent that you seek metadata associated with the creation of any sound  
2 recording by Mr. Pringle, that would require an inspection of Mr. Pringle's  
3 computer hard drive, which we have offered to provide for inspection at the offices  
4 of our computer expert.")<sup>18</sup> Moreover, as this Court has found, "it is *abundantly*  
5 *clear* from the allegation of back-dating and the suggestion that a forensic expert  
6 image his entire computer before confronting Pringle about the back-dating issue  
7 that the request referred to Pringle's current computer and Hard Drives." (Apr. 2,  
8 2012 Order [Doc. 252] at 13) (emphasis added).

9 Despite the obvious relevance of Pringle's computers, counsel allowed  
10 Pringle to dispose of his computer hard drives in January 2011 and August 2011.  
11 Thus, counsel's representations in the Joint Rule 26 Report that they would  
12 participate in electronic discovery in good faith were, at best, unsupported and  
13 therefore a violation of Rule 11.

#### 14 **C. The Instant Motion is Timely**

15 Counsel argue that Defendants' motion is "appropriately brought under Rule  
16 37" and that Defendants motion is thus somehow untimely because it was made  
17 after the close of discovery. (Pl. Br. 22.) In doing so, they cite to a footnote in a  
18 1993 case from the District of New Jersey, *Glenn v. Scott Paper Co.*, 1993 WL  
19 431161, at \*17 n.3 (D.N.J. Oct. 20, 1993) (cited in Pl. Br. 22). Counsel's reliance  
20 on that case is misplaced for several reasons.

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21  
22 <sup>18</sup> Counsel attempt to distinguish *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422  
23 (S.D.N.Y. 2004) and *Qualcomm Inc. v. Broadcom*, 2008 WL 66932 at \*31 (S.D.  
24 Cal. Jan. 7 2008), *vacated*, 2008 WL 63108 (S.D. Cal. 2008) on the grounds that  
25 those decisions did not involve Rule 11 sanctions. However, Defendants merely  
26 cited those cases for the proposition that "counsel themselves have an obligation to  
27 preserve potentially relevant evidence" (Def.'s Br. 22.) Counsel do not dispute that  
28 proposition. Nor could they. Their own computer expert testified that "I do firmly  
believe that [Pringle's] counsel should have advised him on first contact to maintain  
and preserve everything he had." (Jan. 9, 2012 Dickstein Decl., Ex. Z [Doc. 221-9]  
at 298.)

1        First, in *Scott Paper Co.*, the plaintiff did not raise any concern of spoliation  
2 until he was faced with a motion for summary judgment. *Id.* Here, as counsel  
3 readily acknowledge, “there is ample evidence from the record that Defendants  
4 made [] allegations of spoliation against Plaintiff in August 2011 [and that] [t]he  
5 parties exchanged numerous emails on the subject at that time[.]” (Pl. Br. 22.)

6        In addition, Defendants filed their motion for summary judgment on  
7 spoliation grounds on November 17, 2011—just **three days** after discovery closed  
8 on November 14, 2011. (*See* Docs. 115, 159) Defendants’ spoliation motion was  
9 thus timely even under the cases cited by Pringle’s counsel. *See Am. Nat. Prop. and*  
10 *Cas. Co. v. Campbell Ins., Inc.*, 2011 WL 3021399, at \*2 (M.D. Tenn. July 22,  
11 2011) (relying on cases where spoliation motion was timely even though motion was  
12 made two months after close of discovery).

13        Moreover, Defendants *did* raise the spoliation issue with the Court prior to the  
14 deadline for discovery motions. In November 2011, the Adams Defendants moved  
15 to compel responses to, among other things, interrogatories asking Pringle to  
16 identify the information that was on the hard drives he had destroyed. (Doc. 157 at  
17 1-3.) At the motion hearing before Magistrate Judge Zarefsky, Pringle’s counsel  
18 noted that Defendants had moved for summary judgment on spoliation grounds, and  
19 asked Judge Zarefsky to defer deciding the spoliation issue until the Court had  
20 decided the summary judgment motion. (March 1, 2012 Dickstein Decl., Ex. 9,  
21 Hrg. Tr. 4:21-5:9 [Doc. 239-9]) Having argued before Judge Zarefsky that  
22 spoliation should *not* be decided in the context of a discovery motion and instead be  
23 deferred until after a decision on summary judgment, counsel cannot now argue that  
24 spoliation *should* have been decided on a discovery motion.

25        Second, courts in this Circuit *have* granted motions to dismiss based on  
26 spoliation brought after the close of discovery. For example, in *U.S. ex rel.*  
27 *Berglund v. Boeing Co.*, 2011 WL 6182109 (D. Or. Dec. 13, 2011), the defendant  
28

1 moved after the close of discovery for summary judgment and to dismiss the claim  
2 based on spoliation of evidence—including destruction of personal hard drives after  
3 commencement of litigation. Although the court denied the summary judgment  
4 motion, it granted the spoliation motion and dismissed the claim. *Id.* at \*30 (citing  
5 *Leon v. IDX Systems Corp.*, 464 F.3d 951 (9th Cir. 2006)).

6 Third, the instant motion is not brought under not Rule 37 but under Rule 11  
7 for counsel’s misrepresentations in the Joint Rule 26 Report. *Scott Paper Co.* makes  
8 no mention of Rule 11 and is thus inapplicable. A Rule 11 motion may be brought  
9 at any time during the litigation, so long as the non-movant has at least 21 days to  
10 withdraw the offending pleading or paper.<sup>19</sup> Indeed, courts have granted Rule 11  
11 sanctions even after trial. *See, e.g., Union Planters Bank v. L & J Dev. Co.*, 115  
12 F.3d 378, 384-6 (6th Cir. 1997) (affirming Rule 11 sanctions granted after trial,  
13 when testimony that led the court to deny summary judgment before trial was later  
14 determined to be false).

15 **V. COUNSEL’S LATEST ATTEMPT TO DISCREDIT DEFENDANTS’**  
16 **EVIDENCE OF INDEPENDENT CREATION HAS NO MERIT AND**  
17 **IS LEGALLY IRRELEVANT**

18 Recognizing that Defendants have shown that they, not Pringle,  
19 independently created the guitar twang sequence, in Pringle’s summary judgment  
20 opposition, counsel tried to discredit Defendants’ evidence of independent creation.  
21 On reply, Geluso thoroughly addressed each and every one of Pringle’s attacks. For  
22 example, both Riesterer and Geluso explained that the reference in Riesterer’s “I  
23 Gotta Feeling” creation files to an audio interface device that was not available until  
24 2011 was simply the result of Riesterer having connected his computer to that

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25  
26 <sup>19</sup> Counsel do not dispute that the instant motion was properly served at least 21  
27 days before it was filed with the Court under Rule 11(c)(2). Indeed, after Pringle’s  
28 counsel were served with Defendants’ motion papers, they refused to even discuss  
the motion with Defendants as required by Local Rule 7-3.

1 device in the spring of 2011 when he checked to make sure that he had the right file  
2 before producing it in the litigation. Moreover, nothing in Pringle’s summary  
3 judgment opposition disputed Geluso’s conclusion that Riesterer’s creation files  
4 contain the separate unprocessed guitar sounds that make up the guitar twang  
5 sequence, while Pringle’s NRG “creation” file contains only the fully processed,  
6 fused guitar twang chords, which indicates that Pringle sampled them from another  
7 source.<sup>20</sup>

8 Pringle’s counsel recite many of the same attacks on Defendants evidence,  
9 without so much as acknowledging the explanations in Defendants’ summary  
10 judgment reply papers. (Pl. Br. 6-7, 11.)<sup>21</sup> Counsel have submitted a “new”  
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12 <sup>20</sup> Counsel now concede that, in order to convert the separate instrumental tracks in  
13 Pringle’s NRG file to a mixed sound recording, “one could not simply click on the  
14 NRG file on a computer, or copy the file to a disc and then insert it into a CD player  
15 and hear the song play.” (Greely Dec. [Doc. 249-6] ¶ 13.) This demonstrates that,  
16 contrary to counsel’s arguments at the summary judgment hearing, the NRG file is  
17 not the equivalent of a “reel-to-reel tape” which can be listened to by simply loading  
18 it into a tape machine and pressing play. Rather, as Pringle testified, he had to  
19 manipulate the NRG file through a process of “trial and error” in order to create the  
20 “Dance Version” that he submitted to the Copyright Office in November 2010.  
21 Indeed, this Court has recognized that constructing “Take a Dive” (Dance Version)  
22 from the NRG file involved “a series of choices that one who wishes to hear the  
23 song has to make in order to correctly hear the song as it allegedly existed  
24 originally.” (Apr. 2, 2012 Order [Doc. 252] at 9-10.)

25 <sup>21</sup> Similarly, counsel inexplicably repeat their assertions that the isolated “I Gotta  
26 Feeling” guitar twang stem was available online only while the Beatport re-mix  
27 competition was active in August and September 2009. Putting aside the fact that  
28 Pringle could have easily downloaded the guitar twang stem during that time frame  
using a fictitious name, counsel completely ignore the fact that the guitar twang  
stem continued to be available on the Internet for free well after the Beatport  
competition closed. Pringle himself testified in August 2011 that the guitar twang  
sequence was “available everywhere” (Pringle Tr. 185:11-16 [Doc. 197-1]) and  
Professor Geluso downloaded a copy from another website for free in January 2012.  
(Geluso Decl. [Doc. 217] ¶ 35.) This Court has therefore recognized that the “I  
Gotta Feeling” stems “continued to be available on various Internet websites even

1 declaration from their computer expert, Ms. Frederiksen-Cross, which is essentially  
2 identical to the declaration they submitted in their summary judgment opposition  
3 and which Defendants have already rebutted in their summary judgment reply.  
4 (Compare Doc. 189 with Doc. 249-7).

5 Pringle’s counsel do make one new attack on Defendants’ evidence of  
6 independent creation. They claim that the fact that Frederic Riesterer used Apple  
7 Computer’s Logic Pro music creation software, rather than Pro Tools software,  
8 somehow shows that Riesterer’s evidence is not in keeping with his regular practice  
9 as a professional musician and producer. This is a complete non-issue. The only  
10 evidence counsel points to are news articles and interviews showing that in 2007  
11 (before “I Gotta Feeling” was created) William Adams used Pro Tools music  
12 creation software, that Adams’ counsel request a copy of Pringle’s song in Pro  
13 Tools, and that Guetta used *both* Pro Tools and Logic. (Koppenhoefer Decl. [Doc.  
14 249-2] Ex. A; Greely Decl. [Doc. 249-6] Ex. C.) None of counsel’s “evidence” is  
15 relevant because none of it relates to the software used by *Riesterer*, the individual  
16 who actually created the music for “I Gotta Feeling.” And while David Guetta  
17 collaborated with Riesterer on the music for “I Gotta Feeling”, the evidence counsel  
18 cites shows that Guetta uses *both* Pro Tools and Logic. Counsel’s latest attack on  
19 Defendants’ evidence is once again far off base.<sup>22</sup>  
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21

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22 after they were no longer available on Beatportal.com.” (Apr. 2, 2012 Order [Doc.  
23 252] at 14.)

24 <sup>22</sup> Counsel do not even understand their own argument. They claim that  
25 “Defendants produced creation files that were created using Logic Pro, not Univers  
26 Sons[.]” (Koppenhoefer Decl. [Doc. 249-2] ¶ 4.y.) Univers Sons is merely the  
27 name of the company that produces the PlugSound sound bank, which can be used  
28 *in conjunction with* Logic software, not *instead* of it. (Geluso Decl. [Doc. 162] ¶  
18) (explaining that he used Logic software along with the guitar twang preset from  
the PlugSound sound bank).

1 **CONCLUSION**

2 Plaintiff's counsel's *modus operandi* has been to refuse to concede anything,  
3 despite overwhelming evidence to the contrary, no evidence of their own, and their  
4 client's own admissions. Counsel continue to assert claims based on nothing more  
5 than bluster and bravado rather than facts, logic and diligent investigation.

6 Defendants do not take lightly the prospect of sanctioning counsel, but given  
7 the complete absence of support for Pringle's wild and admittedly impossible  
8 allegations, counsel's misrepresentations to the Court and Defendants, and the  
9 enormous cost Defendants have been forced to incur as a result of counsel's  
10 violations, an award of Defendants' attorneys' fees and expenses is more than  
11 justified here.

12 For all of the above reasons, Defendants Shapiro Bernstein, Riesterer and  
13 Guetta respectfully request that the Court grant their motion for an award of  
14 attorney's fees and expenses, in full, against Bryan Pringle and his counsel as a  
15 sanction under Rule 11.

16  
17 Dated: April 2, 2012

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