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13 group THE BLACK EYED PEAS; will.i.am music, llc; TAB MAGNETIC
PUBLISHING; CHERRY RIVER MUSIC CO.; HEADPHONE JUNKIE
PUBLISHING, LLC; JEEPNEY MUSIC, INC.; EMI APRIL MUSIC, INC.

14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

16 BRYAN PRINGLE, an individual,
17
18 Plaintiff,
19
20 v.

Case No. SACV10-1656 JST (RZx)
Hon. Josephine Staton Tucker
Courtroom 10A

19 WILLIAM ADAMS, JR.; STACY
20 FERGUSON; ALLAN PINEDA; and
21 JAIME GOMEZ, all individually and
collectively as the music group the
22 Black Eyed Peas; DAVID GUETTA;
23 FREDERICK RIESTERER; UMG
RECORDINGS, INC.; INTERSCOPE
24 RECORDS; EMI APRIL MUSIC,
INC.; HEADPHONE JUNKIE
25 PUBLISHING, LLC; WILL.I.AM.
MUSIC, LLC; JEEPNEY MUSIC,
26 INC.; TAB MAGNETIC
PUBLISHING; CHERRY RIVER
MUSIC CO.; SQUARE RIVOLI
27 PUBLISHING; RISTER EDITIONS;
and SHAPIRO, BERNSTEIN & CO.,

**NOTICE OF JOINDER OF ADAMS
DEFENDANTS TO REPLY IN
SUPPORT OF MOTION FOR
SANCTIONS AGAINST PLAINTIFF
AND HIS COUNSEL PURSUANT
TO FED. R. CIV. P. 11 BY
DEFENDANTS SHAPIRO,
BERNSTEIN & CO, INC.,
FREDERIC RIESTERER AND
DAVID GUETTA**

Date: April 16, 2012
Time: 10:00 A.M.
Dept.: 10A

Complaint Filed: October 28, 2010
Trial date: August 7, 2012

28 Defendants.

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TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Defendants WILLIAM ADAMS; STACY FERGUSON; ALLAN PINEDA; and JAIME GOMEZ, all individually and collectively as the music group THE BLACK EYED PEAS; will.i.am music, llc; TAB MAGNETIC PUBLISHING; CHERRY RIVER MUSIC CO.; HEADPHONE JUNKIE PUBLISHING, LLC; JEEPNEY MUSIC, INC.; and EMI APRIL MUSIC, INC. (“Adams Defendants”) have previously joined in the Motion for Sanctions against Plaintiff and his Counsel Pursuant to Fed. R. Civ. P. 11 by Defendants Shapiro, Bernstein & Co, Inc., Frederic Riesterer and David Guetta. The Adams Defendants hereby also join in the reply brief submitted in support of that motion because the same relevant circumstances underlying the motion apply to the Adams Defendants, and the arguments made therein apply with equal force to the Adams Defendants.

Dated: April 2, 2012

BRYAN CAVE LLP

By: /s/ Justin Righettini

Justin Righettini

Attorneys for Defendants

WILLIAM ADAMS; STACY FERGUSON; ALLAN PINEDA; and JAIME GOMEZ, all individually and collectively as the music group THE BLACK EYED PEAS; will.i.am music, llc; TAB MAGNETIC PUBLISHING; CHERRY RIVER MUSIC CO.; HEADPHONE JUNKIE PUBLISHING, LLC; JEEPNEY MUSIC, INC.; EMI APRIL MUSIC, INC.

TABLE OF CONTENTS

Page

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I.	PLAINTIFF AND HIS ATTORNEYS DO NOT RESPOND TO MOST OF WHAT IS CONTAINED IN THE ADAMS DEFENDANTS’ NOTICE OF JOINDER	1
II.	SIMILARITY OF A PORTION OF THE WORKS IS NOT DISPUTED	4
III.	PRINGLE’S LAWYERS’ REFERENCE TO OTHER ALLEGATIONS OF INFRINGEMENT BROUGHT AGAINST THE BLACK EYED PEAS IS HOLLOW	8
IV.	<i>I GOTTA FEELING</i> AND THE ORIGINAL VERSION OF <i>TAKE A DIVE</i> ARE NOT SUBSTANTIALLY SIMILAR.....	10
V.	PRINGLE’S ADDITIONAL DISCLOSURES BEYOND DISCOVERY CUTOFF IS IMPROPER	14
VI.	CONCLUSION	14

BRYAN CAVE LLP
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TABLE OF AUTHORITIES

Page

Cases

1

2

3

4 *Anderson v. Stallone*,

1989 WL 206431 (C.D. Cal. Apr. 25, 1989) 5

5 *Batts et al. v. Adams et al.*,

6 CV 10-8123-JFW (RZx) (C.D. Cal. 2010) 4, 9, 12

7 *Burkhart v. Washington Metro. Area Transit Auth.*,

112 F.3d 1207 (D.C. Cir. 1997)..... 11

8 *CFM Communications, LLC v. Mitts Telecasting Co.*,

424 F. Supp. 2d 1229 (E.D. Cal. 2005) 11

9 *Clinton v. Adams et al.*,

CV 10-9476 ODW (PLAx) (C.D. Cal. 2010) 9

10 *Coston v. Product Movers*,

11 1990 WL 56516 (E.D. Pa., May 2, 1990)..... 12

12 *Danjaq LLC v. Sony Corp.*,

263 F.3d 942 (9th Cir. 2001) 3

13 *Eden v. Washington State Patrol*,

2006 WL 2927703 (W.D. Wash. Oct. 11, 2006)..... 14

14 *Ets-Hokin v. Skyy Spirits, Inc.*,

225 F.3d 1068 (9th Cir. 2000) 5

15 *Feist Publications, Inc. v. Rural Telephone Service Co.*,

16 499 U.S. 340 (1991)..... 12, 13

17 *Frank Music Corp., v. MGM, Inc.*,

772 F.2d 505 ((9th Cir. 1985)..... 3

18 *Idema v. Dreamworks, Inc.*,

90 Fed. Appx. 496 (9th Cir. 2003)..... 11

19 *In re Girardi*,

611 F.3d 1027 (9th Cir. 2010) 4

20 *Kouf v. Walt Disney Pictures & Television*,

21 16 F.3d 1041 (9th Cir. 1994) 11

22 *Lamb’s Chapel v. Center Moriches Union Free School Dist.*,

508 U.S. 384 (1993)..... 14

23 *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*,

345 F.3d 1140 (9th Cir. 2003) 8

24 *Merchant Transaction Systems, Inc. v. Nelcela, Inc.*,

2007 WL 2422052 (D. Ariz. Aug. 22, 2007)..... 12

25 *Metcalf v. Bocho*,

26 294 F.3d 1069 (9th Cir. 2002) 12

27 *Milton H. Greene Archives, Inc. v. Julien’s Auction House, LLC*,

345 Fed. Appx. 244 (9th Cir. 2009)..... 3

28

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IRVINE, CALIFORNIA 92612-4414

1	<i>Newton v. Diamond</i> ,	12
	204 F. Supp. 1244 (C.D. Cal. 2002)	
2	<i>Onofrio v. Reznor</i> ,	13
	208 F.3d 222, 2000 WL 206576 (9th Cir. Feb. 23, 2000)	
3	<i>Pickett v. Prince</i> ,	5
	207 F.3d 402 (7th Cir. 2000)	
4	<i>Pivot Point Int'l, Inc. v. Charlene Prods., Inc.</i> ,	12
	932 F. Supp. 220 (N.D. Ill 1996)	
5	<i>Quevedo v. Trans-Pacific Shipping, Inc.</i> ,	14
	143 F.3d 1225 (9th Cir. 1998)	
6	<i>Smith v. Ricks</i> ,	4
	31 F.3d 1478 (9th Cir. 1994)	
7	<i>Stillman v. Leo Burnett Co., Inc.</i> ,	12
	720 F. Supp. 1353 (N.D. Ill. 1989)	
8	<i>Three Boys Music Corp. v. Bolton</i> ,	6
	212 F.3d 477 (9th Cir. 2000)	
9	<i>U.S. v. Sinclair</i> ,	11
	74 F.3d 753 (7th Cir. 1996)	
10	<i>Webloyalty.com, Inc. v. Consumer Innovations, LLC</i> ,	12
	2005 WL 468496 (D. Del. Feb. 17, 2005)	
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

Statutes

17 U.S.C. § 103(b)	5, 13
CAL. BUS. & PROF. CODE § 17200 et seq.	3

Other Authorities

Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT §13.03 [B][1][a] (2011).....	11
PATRY ON COPYRIGHT § 9:39	8
PATRY ON COPYRIGHT § 9:42 (2012).	7

Rules

Fed. R. Civ. P. 11	passim
Fed. R. Civ. P. 37(c)(1)	14
FED. R. EVID. 404	9
Fed. R. Evid. 406.....	9

1
2
3
4
5
6
7
8
9
10
11
12
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14
15
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Additional Argument

I. PLAINTIFF AND HIS ATTORNEYS DO NOT RESPOND TO MOST OF WHAT IS CONTAINED IN THE ADAMS DEFENDANTS’ NOTICE OF JOINDER

Plaintiff Bryan Pringle (“Pringle”) and his attorneys do not dispute most, if not all of, the points that were specifically raised by the Adams Defendants in their Notice of Joinder to the Guetta Defendants’ Rule 11 Motion. Normally, one would expect the party opposing a motion to join issue and respond to the moving parties’ arguments, especially when they relate to whether the party and his attorneys had a good faith basis to assert and maintain (for more than a year) certain allegations in the operative complaint. This, Pringle and his attorneys have failed to do, thus tacitly admitting that for several of the positions they advanced in this litigation, they had no basis and continue to have no basis.

Factual Copying. In the Notice of Joinder, the Adams Defendants argued that sanctions were appropriate, in part, because Pringle alleged that the members of The Black Eyed Peas factually copied a portion (the vamping 8-bar chord progression that Pringle has termed “the guitar twang sequence)¹ of *Take a Dive (Dance Version)*. Pringle and his attorneys are fully aware that it was David Guetta and Frederic Riesterer who wrote the instrumental portion of *I Gotta Feeling* and not The Black Eyed Peas (or any of the remaining Adams Defendants), and as explained repeatedly, The Black Eyed Peas contributed to the work by providing lyrics and vocal melodies. In addition, Pringle and his attorneys are well aware that only the instrumental portions of *Take a Dive (Dance Version)* and *I Gotta Feeling* are relevant to this case and not the vocals in the latter work. Despite being given an

¹ This chord progression is represented harmonically in Roman numerals as |: I I I I | IV IV vi vi | IV IV IV IV | IV IV IV IV | vi vi vi vi | vi vi vi vi | IV IV IV IV | IV IV IV IV :|. This 8-bar chord progression is not contained in Pringle’s song, *Faith*, though Pringle’s attorneys imply—but will not expressly say—is contained in that work. See Opp. at 2-3. The Court can hear for itself that this 8-bar repeated chord progression does not occur in *Faith*.

1 opportunity, Pringle and his attorneys have adduced no evidence that any one of the
2 Adams Defendants composed the instrumental portion of *I Gotta Feeling* (as
3 opposed to David Guetta or Frederic Riesterer) much less that they factually copied
4 any work created by Pringle.

5 As a Whole. Pringle and his attorneys also alleged that *I Gotta Feeling*, as a
6 whole, infringes *Take a Dive (Dance Version)*.² *I Gotta Feeling* includes lyrics and
7 concomitant vocal melodies) that *Take a Dive (Dance Version)* necessarily doesn't
8 because it does not have any vocal parts whatsoever. Thus, it is abundantly clear
9 that even assuming infringement, a substantial—and quite possibly the most
10 memorable—portion of *I Gotta Feeling* cannot be infringing, and again, this is the
11 portion represents the creative contribution of The Black Eyed Peas. Despite this,
12 Pringle and his attorneys persist in claiming that the totality of *I Gotta Feeling* is
13 infringing. It is telling that none of the three musicologists that Pringle and his
14 attorneys hired ever discussed the lyrics and vocal melodies of *I Gotta Feeling* as an
15 aspect of infringement in their respective analyses. Again, the position asserted by
16 Pringle and his attorneys is baseless.

17 Willfulness. Pringle and his attorneys also included allegations in the
18 pleadings accusing the Adams Defendants: (1) of committing multiple acts of
19 willful or intentional copyright infringement; (2) of being conspirators; (3) of
20 adopting a “pattern and practice” of copyright infringement and (4) creating music
21 in a way that constitutes “essentially the engaging in unfair business practices under
22 California law.”³ In the Notice of Joinder, the Adams Defendants explained, and as
23 Pringle and his attorneys are well aware, that the Adams Defendants acquired the
24 instrumental portion of *I Gotta Feeling* from David Guetta and Frederic Riesterer
25

26 ² First Amended Complaint for Copyright Infringement (“FAC”) [Dkt. No. 9-2],
27 dated Nov. 18, 2010, at ¶ 40.

28 ³ See FAC, at ¶¶ 47-48, 51, 53-55, 58, 60.

1 via written agreement, and that they did same under color of title. This defeats a
2 claim of willfulness. *See Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 959 (9th Cir.
3 2001); *Frank Music Corp., v. MGM, Inc.*, 772 F.2d 505, 515 ((9th Cir. 1985);
4 *Milton H. Greene Archives, Inc. v. Julien’s Auction House, LLC*, 345 Fed. Appx.
5 244, 247 (9th Cir. 2009). Neither Pringle nor his attorneys provide a justification in
6 the Opposition for such heavy-handed accusations in light of this rudimentary
7 authority, much less adduce any evidence of a conspiracy or any violations of CAL.
8 BUS. & PROF. CODE § 17200 et seq. (if that is indeed the import of Paragraphs 53-54
9 of the FAC).

10 Alleged correspondence with William Adams and “Access” to the Wrong
11 Party. Pringle claims that he mailed his music to William Adams c/o Interscope
12 Records. Of course, he has no documentary evidence of this, and when asked to
13 state the address where he sent the supposed materials, Pringle stated “on Bur- --
14 Burbank Drive?” Pringle Depo. Tr. at 64:17-18. As pointed out in the Notice of
15 Joinder, Interscope Records is located on Colorado Boulevard in Santa Monica,
16 California. While Pringle’s lawyers responded that he (Pringle) should not be
17 sanctioned because he “identified the wrong address—Burbank Drive—for
18 materials sent a decade earlier” (Opp. at 10), they miss the point. First, Pringle
19 testified that this purported mailing occurred sometime in 2006 or 2007—*i.e.*, two to
20 three years before the release of *I Gotta Feeling*—not a decade earlier from then or
21 even when Pringle was deposed in August of 2011. Pringle Depo. Tr. at 66 (“But
22 the specific one that I recollect was around 2006, 2007 time period.”).⁴

23 Second, given the complete dearth of documentary evidence that Pringle has
24 to connect him or his works to any of the Defendants in this action, one would
25

26 ⁴ *See* Portions of Deposition Transcript of Bryan Pringle, attached as Exhibit 1 to the
27 Declaration of Justin Righetini Re Adams Defendants’ Joinder to Motion for
28 Sanctions Against Plaintiff and His Counsel Pursuant to Fed. R. Civ. P. 11 [Dkt. No.
2401-1], dated Mar. 1, 2012.

1 expect Pringle’s lawyers to have independently verified the accuracy of Pringle’s
2 story, which is indeed their obligation under Rule 11. *See Smith v. Ricks*, 31 F.3d
3 1478, 1488 (9th Cir. 1994); *In re Girardi*, 611 F.3d 1027, 1036 (9th Cir. 2010). A
4 30-second Internet search is all that is required to discover Interscope’s address and
5 verify whether Pringle’s “recollection” was reasonable or accurate.⁵ All of this is
6 for naught anyway as it was David Guetta and Frederic Riesterer who wrote the
7 instrumental portion of *I Gotta Feeling*, and thus, Pringle needs to establish that it
8 was they—and not William Adams or any of the Adams Defendants—had access to
9 *Take a Dive (Dance Version)*.

10 **II. SIMILARITY OF A PORTION OF THE WORKS IS NOT DISPUTED**

11 Despite apparently disagreeing with their own client’s conclusion that
12 sampling by the Defendants was factual impossible, Pringle’s counsel spend pages
13 in the Opposition and supporting declarations stating that they had a good faith basis
14 for filing this lawsuit because a portion of the works at issue (the vamping 8-bar
15 chord progression) is identical in both works. They state that they relied on the
16 opinions of musicologists, played it for several lay persons (who apparently
17 confirmed the similarity of the chord progressions), and even used the popular
18 iPhone application, Shazam!⁶ Why Pringle’s attorneys spend so much time talking
19

20 ⁵ Notably, these same lawyers failed to vet their clients’ access theory in the other
21 music copyright case they brought against The Black Eyed Peas, *i.e.*, *Batts et al. v.*
22 *Adams et al.*, CV 10-8123-JFW (RZx) (C.D. Cal. 2010). When questioned during
23 deposition on the topic of access, Plaintiff Manfred Mohr also testified that he
24 mailed his song (which Judge Walter held was not infringed) to Interscope Records.
25 When asked where Interscope was, Mohr responded that it was in New York. *See*
26 Declaration of Justin Righettini Re Joinder of Adams Defendants to Reply in
27 Support of Motion for Sanctions Against Plaintiff and His Counsel Pursuant to Fed.
28 R. Civ. P. 11 (“Righettini Decl.”), ¶ 2, Exh. 1, Mohr Depo. Tr. at 118:24-119:01
29 (“Q. Where is Interscope located? A. It’s in New York City in Manhattan.”)

⁶ At Paragraph 6 of his Declaration, Pringle’s attorney, Mr. Hampton, states that he
used the iPhone application, Shazam, to test whether *Take a Dive (Dance Version)*
and *I Gotta Feeling* were substantially similar, and when he played a recording of
Take a Dive (Dance Version) before the microphone in his iPhone, the application
returned with *I Gotta Feeling* as a result. Declaration of George L. Hampton in
Opposition to Defendants’ Motion for Sanctions Against Plaintiff and His Counsel
Pursuant to Fed. R. Civ. P. 11 [Dkt. No. 249-3] (“Hampton Decl.”), dated Mar. 26,
2012, at ¶ 7. Not that such an exercise has ever been approved by a Court as

1 about this is unclear given that nobody disputes that a portion of the works is
2 identical. The Defendants agree that copying occurred; the only departure is that
3 they believe that Pringle copied them. The Adams Defendants do not find fault in
4 Pringle’s attorneys’ analysis and investigation as to the similarity of the 8-bar
5 vamping chord progression shared by *I Gotta Feeling* and *Take a Dive (Dance*
6 *Version)*, but find fault with the investigation they conducted with respect to: (1)
7 Pringle’s authorship of the 8-bar vamping chord progression in *Take a Dive (Dance*
8 *Version)* and his ownership of the copyright in that work⁷ and (2) whether any of the
9 Defendants in this action had access to *Take a Dive (Dance Version)*, the only work
10 that matters for purposes of Pringle’s copying claim.

11 As to the first element, all that Pringle has produced as evidence is a disc
12 containing a .nrg image file (supposedly representing a recording of *Take a Dive*
13

14 scientifically valid in a music copyright infringement action, but Mr. Hampton’s
15 findings merely confirm what is not in dispute: that copying occurred. Mr.
16 Hampton’s exercise does nothing to prove that it was Frederic Riesterer or David
17 Guetta who copied the vamping chord progression at issue here, as opposed to Mr.
18 Pringle.

19 ⁷ Pringle’s attorneys continually refer to Pringle’s copyright registration certificate
20 with respect to the original version of *Take a Dive* as evidence of his purported
21 ownership of a valid claim to copyright in *Take a Dive (Dance Version)*. See, e.g.,
22 Declaration of Colin C. Holly in Opposition to Defendants’ Motion for Sanctions
23 Against Plaintiff and His Counsel Pursuant to Fed. R. Civ. P. 11 [Dkt. No. 249-4]
24 (“Holly Decl.”), dated Mar. 26, 2012, at ¶ 6; Hampton Decl., at ¶ 7. What they fail
25 to appreciate is that: (1) Defendants do not dispute Pringle’s ownership of the
26 original version of *Take a Dive* and that *Take a Dive (Dance Version)* is a derivative
27 work based thereon, and more importantly and (2) a derivative work and the original
28 work it is based on are two discrete works, each subject to discrete copyrights. *Ets-
Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1078-79 (9th Cir. 2000) (derivative work
must be based on a preexisting work that is itself copyrightable); 17 U.S.C. § 103(b).
Proving ownership of the original work does nothing, by itself, to prove ownership
over a derivative work based thereon, especially when, as here, the derivative work
was created by copying *I Gotta Feeling*, and would not be subject to copyright
protection anyway. See *Pickett v. Prince*, 207 F.3d 402, 406 (7th Cir. 2000) (creator
of unauthorized guitar shaped like copyright protectable symbol associated with the
musical artist Prince had no claim to copyright); *Anderson v. Stallone*, 1989 WL
206431, at *5-11 (C.D. Cal. Apr. 25, 1989) (holding that infringing derivative work
is not entitled to copyright protection, thus denying creator of unauthorized
treatment based on popular *Rocky* movie franchise any copyright protection or
ability to enjoy any rights associated with copyright ownership).

1 (*Dance Version*) that replaced a prior disc that was filed with the Court previously
2 (in connection with Pringle’s TRO Application) and withdrawn as “incorrect.”⁸ The
3 creation date for the file cannot be confirmed due to Pringle’s disposal of his hard
4 drives, and Pringle’s own computer experts acknowledged the Pringle could have
5 backdated that file.⁹

6 As to the second element, Pringle has no adduced no meaningful physical
7 evidence whatsoever that any of the Defendants ever came into contact with either
8 him or his works. Given that *Take a Dive (Dance Version)* has not been widely
9 disseminated, Pringle’s attorneys should have satisfied themselves that Pringle could
10 produce evidence that established a chain of events between his work and
11 Defendants’ supposed access thereto. *See Three Boys Music Corp. v. Bolton*, 212
12 F.3d 477, 482 (9th Cir. 2000). All Pringle has adduced is his own uncorroborated
13 testimony of what purportedly happened years ago, and as Mr. Greely identifies in
14 his declaration,¹⁰ the following two items:

15 • two barely legible receipts indicating that, in 2006, several pieces of
16 mail were sent to various zip codes (including those in New York County and Los
17 Angeles County) from what appears to be a post office in San Antonio, Texas.
18 Notably absent from the receipts is information concerning: (a) what precisely was
19 sent and whether it included a sound recording embodying *Take a Dive (Dance*
20 *Version)*, (b) to whom the mailings were sent among the millions of residents and
21 entities found in the various zip codes appearing on the receipts, (c) whether the
22 mailings were received and opened by any of the intended recipients, and (d) the

23 _____
24 ⁸ See Notice of Motion and Motion of Plaintiff Bryan Pringle for Preliminary
Injunction [Dkt. No. 73-1], dated Jan. 3, 2011, at p. 18-19 n. 4.

25 ⁹ See Defendants Response to Plaintiff’s Unauthorized Sur-Reply on Defendants’
26 Motion for Summary Judgment [Dkt. No. 245-1], dated Mar. 7, 2011, at pp. 1-2.

27 ¹⁰ Declaration of Ryan L. Greely in Opposition to Defendants’ Motion for Sanctions
28 Against Plaintiff and His Counsel Pursuant to Fed. R. Civ. P. 11 [Dkt. No. 249-6]
 (“Greely Decl.”), dated Mar. 26, 2012, at ¶¶ 27-28.

1 identity of the sender (nothing on the receipt indicates that Pringle himself was the
2 sender or that the receipts reflect mailings that were sent on his behalf);¹¹ and

3 • an August 14, 2006 e-mail message that purports to have been sent on
4 behalf of the Artists & Repertoire Department of Columbia Records (not a
5 defendant) that expresses a lack of interest in a “demo recording.” Notably absent
6 from the e-mail message is any indication that *Take a Dive (Dance Version)* was in
7 fact the “demo recording” contemplated by message. Also absent is the identity of
8 the recipient, including whether it was the Pringle or any other person.¹²

9 The foregoing “evidence” is clearly insufficient to support a good faith belief
10 that any Defendant in this case had access to any of Pringle’s works. Discovery has
11 closed and damningly, Pringle has adduced no other evidence of access,¹³ and as
12 confirmed in the Declarations of Messrs. Gould and Greely,¹⁴ Pringle will simply
13 invoke the Ninth Circuit’s Inverse Ratio Rule (“IRR”) and blurt out the words
14 “striking similarity” to meet his burden on access. What Pringle and his lawyers fail
15 to appreciate is that Pringle currently has nothing more than a disc containing an
16 electronic file that cannot be authenticated as evidence of his supposed creation and
17 ownership of *Take a Dive (Dance Version)*. The IRR and any diminished proof of
18 access that it permits is irrelevant until Pringle first establishes his creation (anterior

19 _____
20 ¹¹ Righettini Decl., at ¶ 3, Exh. 2.

21 ¹² *Id.*, at ¶ 4, Exh. 3.

22 ¹³ As Professor Patry sharply notes: “A plaintiff’s lack of evidence is not a neutral
23 proposition, a sort of ‘well anything can happen, so maybe there was access’
24 situation. To the contrary; a plaintiff’s inability to develop facts supporting its
25 burden is compelling evidence that it can’t. Striking similarity is, has always been,
26 and always will be, the last refuge of scoundrels: failing at the liberal standard for
27 access, plaintiffs automatically claim striking similarity—not because the
28 similarities are striking (they rarely are), but as a legal ruse to get around meeting
the burden of proof via paid experts who are used to create a genuine issue of fact,
thereby avoiding summary judgment.” William F. Patry, PATRY ON COPYRIGHT §
9:42 (2012).

¹⁴ Declaration of Ira Gould in Opposition to Defendants’ Motion for Sanctions
Against Plaintiff and His Counsel Pursuant to Fed. R. Civ. P. 11 [Dkt. No. 249-5]
 (“Gould Decl.”), dated Mar. 26, 2012, at ¶ 3(c); Greely Decl., at ¶¶ 21, 29.

1 to *I Gotta Feeling*) and ownership of the work he claims was infringed. *See Lamps*
2 *Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1144 (9th Cir. 2003)
3 (“Ownership of the copyright is always a threshold question.”) (citation omitted).

4 **III. PRINGLE’S LAWYERS’ REFERENCE TO OTHER ALLEGATIONS**
5 **OF INFRINGEMENT BROUGHT AGAINST THE BLACK EYED**
6 **PEAS IS HOLLOW**

7 Messrs. Gould, Greely, and Dickie state that they had a good faith basis to
8 bring multiple suits for “intentional copyright infringement” against The Black Eyed
9 Peas (one of which they already lost) based on their research, including in court
10 dockets, and having found that individuals other than Pringle have accused The
11 Black Eyed Peas of copyright infringement.¹⁵ First, The Black Eyed Peas are a very
12 successful commercial musical group, and as such, it is no surprise that multiple
13 individuals would levy accusations of infringement, as has happened to several other
14 successful musical artists, and others in the film, television, and other creative
15 industries. As Professor Patry again cogently observes:

16
17 Litigation in which striking similarity is the sole basis for alleged
18 liability is almost always brought on behalf of plaintiffs who are
19 living under serious delusions about both the merits of their work and
20 about famous people stealing from “the little guy.” It may not be an
21 exaggeration to say that every successful movie or musical
22 composition will result in the filing of a complaint by such a plaintiff.

23 PATRY ON COPYRIGHT § 9:39. Notably, not one of Pringle’s lawyers can point to a
24 single instance in which any member of The Black Eyed Peas (or for that matter,
25 David Guetta and Frederic Riesterer) have been held liable for copyright
26 infringement. Simply put, an accusation of copyright infringement is just that: an
27 accusation. It does not mean that infringement occurred.

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¹⁵ Gould Decl., at ¶ 3(f); Greely Decl., at ¶¶ 19-20; Declaration of Dean A. Dickie in
Opposition to Defendants’ Motion for Sanctions Against Plaintiff and His Counsel
Pursuant to Fed. R. Civ. P. 11 [Dkt. No. 249-1], dated Mar. 26, 2012, at ¶ 12.

1 Second, even if Pringle’s lawyers searches for prior acts infringement were
2 somehow fruitful, they do not explain their leap in logic in how such occurrences
3 make it more likely than not that any member of The Black Eyed Peas infringed
4 here (especially given that they did not write the instrumental portion of *I Gotta*
5 *Feeling*), completely ignoring FED. R. EVID. 404 and its prohibition on propensity
6 character evidence due to its minimal relevance.¹⁶

7 With respect to the reference by Messrs. Gould, Greely, and Dickie to *Clinton*
8 *v. Adams et al.*, CV 10-9476 ODW (PLAx) (C.D. Cal. 2010) and forgery, they again
9 demonstrate their failure to appreciate the proverbial “rest of the story” and
10 certainly, the docket in that case. A defense motion for summary judgment is
11 currently pending,¹⁷ and no member of The Black Eyed Peas committed any act of
12 forgery. As is customary in the music industry, a third party, DMG Clearances (one
13 of the most widely used and reputable music clearance houses in the music
14 industry), was hired to handle the licensing of Mr. Clinton’s sound recording and
15 The Black Eyed Peas were not involved in any aspect of the drafting of the licensing
16 agreements that are at issue in that case.¹⁸ Mr. Clinton has already dismissed several
17 of the defendants in that case because he admitted that several of the parties he
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20 ¹⁶ Pringle’s same attorneys tried to get around FED. R. EVID. 404 in the *Batts* case by
21 arguing that The Black Eyed Peas had a “habit” of infringing copyrights under Fed.
22 R. Evid. 406 when they moved to compel documents related to other accusations of
23 infringement against The Black Eyed Peas. *See Batts et al. v. Adams et al.*, CV 10-
24 8123-JFW (RZx) (C.D. Cal. 2010), Joint Stipulation Re: Plaintiffs’ Motion to
25 Compel Production of Documents [Dkt. No. 173-14], dated Aug. 12, 2011, at pp. 5-
26 6). Judge Zarefsky, who was the magistrate in that case as he is here, of course,
27 rejected Pringle’s’s attorneys’ efforts there due to the fact that such documents were
28 irrelevant to a claim of copyright infringement. Righettoni Decl. at ¶ 5, Exh. 4
(transcript of hearing before the Honorable Ralph Zarefsky re Plaintiffs’ Motion to
Compel Production of Documents in the *Batts* case, at p. 8).

¹⁷ *See Clinton v. Adams et al.*, CV10-9476 (C.D. Cal. 2010), Memorandum of Points
and Authorities in Support of Defendants’ Motion for Partial Summary Judgment
[Dkt. No. 76], dated Mar. 7, 2012.

¹⁸ *Id.* at 3-4.

1 named in the complaint never should have been sued.¹⁹ Pringle’s attorneys’
2 reference to this case is yet another example of their irresponsibility and ineptitude
3 at fact checking.

4 **IV. I GOTTA FEELING AND THE ORIGINAL VERSION OF TAKE A**
5 **DIVE ARE NOT SUBSTANTIALLY SIMILAR**

6 As an initial matter, it is preposterous that any of the Defendants in this action
7 have to respond to anything related to the original version of *Take a Dive*,
8 considering Pringle’s own pleadings. In Paragraph 30 of the FAC, Pringle states
9 that “[a]ny and all further references to the song ‘Take a Dive’ shall hereafter refer
10 to the derivative version”—i.e., *Take a Dive (Dance Version)*. Pringle’s solitary
11 count for copyright infringement in the FAC comprises Paragraphs 61-69, and of
12 necessity based on Pringle’s own words, contemplates only *Take a Dive (Dance*
13 *Version)*. Despite that, Pringle and his attorneys have persisted in claiming that the
14 original version of the work has been infringed and that their pleadings are
15 sufficient.

16 Notably, in neither Pringle’s Opposition to the subject motion, nor in any of
17 the accompanying attorney declarations, is there mention of whether there was a
18 pre-suit investigation as to whether the original version of *Take a Dive* and *I Gotta*
19 *Feeling* were substantially similar.²⁰ This is unsurprising given that nobody can
20 seriously maintain that—putting aside the existence of *Take a Dive (Dance*
21

22 ¹⁹ *Id.* at 1.

23 ²⁰ Tellingly, even though Mr. Hampton apparently believes that the original *Take a*
24 *Dive*—which does not include the guitar twang sequence—was infringed by *I Gotta*
25 *Feeling*, Mr. Hampton does not bother to state whether he used Shazam to compare
26 the original *Take a Dive* with *I Gotta Feeling*. The undersigned writer did, and not
27 surprisingly, Shazam does not even recognize the original version of *Take a Dive*
28 (“Sorry, a match couldn’t be found for your music” is the exact language), much
less display *I Gotta Feeling* as a result. Rihettini Decl., ¶ 7. If Shazam is
somehow sufficient to prove that *Take a Dive (Dance Version)* and *I Gotta Feeling*
are similar, it is also sufficient to prove that the original version of *Take a Dive* and *I*
Gotta Feeling are not similar.

1 *Version*)—those two works share any similarities that are probative of copying.
2 None of the three musicologists that Pringle hired made the claim that the two works
3 are substantially similar (not that such would be proper),²¹ and one of them (Dr.
4 Alexander Norris) even acknowledged that the differences between those two works
5 outweighed any similarities they shared. *See* Norris Depo. Tr. at 80:22-81:3 (“Q
6 Would you not agree that the differences between the original version of Take A
7 Dive and I Gotta Feeling outweigh any similarities that those two works might
8 share? A Yes.”).²² This clearly detracts from a finding of substantial similarity.
9 *See Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1041, 1045 (9th Cir. 1994)
10 (courts have found the evidence to fail the extrinsic test where there have been
11 substantial differences between the plaintiff’s and the defendant’s works); *Idema v.*
12 *Dreamworks, Inc.*, 90 Fed. Appx. 496, 498 (9th Cir. 2003) (granting defense motion
13 for summary judgment in copyright action, in part, due to the extensive differences
14 between works at issue); Melville B. Nimmer & David Nimmer, NIMMER ON
15 COPYRIGHT §13.03 [B][1][a] (2011) (“If the points of dissimilarity not only exceed
16 the points of similarity, but indicate that the remaining points of similarity are,
17 within the context of plaintiff’s work, of minimal importance, either quantitatively or
18 qualitatively, then no infringement results.”).

19 In addition, Pringle and his attorneys attempt to mitigate Norris’s troubling
20 conclusion by pointing to another portion of his deposition testimony. There,

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22 ²¹ Whether two works are substantially similar is the ultimate issue in a copyright
23 infringement action for violation of the reproduction right. Expert witnesses are not
24 permitted to testify as to ultimate issues because it is not helpful to the trier of fact.
25 *See Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C.
26 Cir. 1997) (“Each courtroom comes equipped with a ‘legal expert,’ called a judge,
27 and it is his or her province alone to instruct the jury on the relevant legal
28 standards.”); *U.S. v. Sinclair*, 74 F.3d 753, 758 n. 1 (7th Cir. 1996) (FED. R. EVID.
702 and 704 “prohibit experts from offering opinions about legal issues that will
determine the outcome of a case.”); *CFM Communications, LLC v. Mitts*
Telecasting Co., 424 F. Supp. 2d 1229, 1238 (E.D. Cal. 2005) (expert’s opinions
concerning law as it applied to the facts of the case were “utterly unhelpful” to the
court.”).

²² Righettini Decl., ¶ 6, Exh. 5.

1 Pringle’s attorneys state that “although he (Dr. Norris) could not be sure,” Dr.
2 Noriss apparently concluded that it was possible that the combination of generic
3 elements in the original version of Take a Dive could “constitute a protectable
4 original work.”²³ Plaintiffs further cite to *Metcalf v. Bocho*, 294 F.3d 1069 (9th Cir.
5 2002) as support for the proposition that generic elements automatically become
6 protectable when they are combined. First, and as explained to these same lawyers
7 before in the other case they filed against The Black Eyed Peas, a musicologist’s
8 role in a music copyright action speaks to the issue of factual copying and not as to
9 which, if any, elements of a work—whether considered individually or in the
10 aggregate—are protected by copyright law. Protectability is a question of law for
11 the Court to decide, not an expert witness. *Newton v. Diamond*, 204 F. Supp. 1244,
12 1253 (C.D. Cal. 2002), citing *Feist Publications, Inc. v. Rural Telephone Service*
13 *Co.*, 499 U.S. 340, 348-51 (1991) (“The protectability of elements in a copyrighted
14 work is a question of law.”).²⁴

15 Second, this very same “combination” argument was rejected out of hand by
16 Judge Walter in the *Batts* case in October of 2011,²⁵ prior to the filing of both

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18 ²³ Opp. at 19.

19 ²⁴ See also *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 932 F. Supp. 220, 225
20 (N.D. Ill 1996) (whether a work is "copyrightable is a question of law"); *Coston v.*
21 *Product Movers*, 1990 WL 56516, at *3 (E.D. Pa., May 2, 1990) (“The question of
22 which aspects of plaintiffs' work are protectible expression as opposed to
23 unprotectible idea is an issue of law.”); *Stillman v. Leo Burnett Co., Inc.*, 720 F.
24 Supp. 1353, 1360-61 (N.D. Ill. 1989)
25 (“The extrinsic and intrinsic tests both involve findings of fact, but the issue of
26 protectibility/nonprotectibility is an issue of law. Thus, before a court may send a
27 copyright case to the jury, it must satisfy itself that, even assuming copying of an
28 idea and its expression, at least some of what the defendant copied falls into the area
of protectible expression.”); *Merchant Transaction Systems, Inc. v. Nelcela, Inc.*,
2007 WL 2422052, at *9 (D. Ariz. Aug. 22, 2007) (“The issue of whether the
software is subject to copyright protection must be addressed by the Court.”);
Webloyalty.com, Inc. v. Consumer Innovations, LLC, 2005 WL 468496, at *2 (D.
Del. Feb. 17, 2005) (holding that while a finding of copyright infringement may
involve questions of fact, the protectability of copyrighted material is a question of
law).

²⁵ See *Batts et al. v. Adams et al.*, CV 10-8123-JFW (RZx) (C.D. Cal. 2010), Order
Granting Defendants’ Motion for Summary Judgment [Dkt. No. 251], dated Oct. 21,
2011, at pp. 7-8; see also *Batts et al. v. Adams et al.*, CV 10-8123-JFW (RZx) (C.D.

1 Pringle’s opposition to the Guetta Defendants’ Motion for Summary Judgment and
2 the current opposition. The argument fails here for the same reasons it failed before:
3 a combination of unprotected elements can only be protected in the form of a
4 compilation, and Pringle and his attorneys don’t articulate any specific and
5 protectable selection, coordination, and arrangement of non-protected elements that
6 exist in the original version of *Take a Dive* and *I Gotta Feeling*.²⁶ This failure is
7 critical as Ninth Circuit (and Judge Walter) recognized in another music copyright
8 infringement case:

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10 Onofrio relies on the testimony of his expert, Dr. Erica Muhl, to show
11 such similarity. Although Dr. Muhl uses the appropriate legal phrases
12 throughout her report comparing the songs of Onofrio and Reznor, her
13 conclusions are not supported with fact or analysis. Her report
14 identifies and lists several unprotectable musical elements that she
15 found in both Onofrio's songs and the comparable songs by Reznor,
16 but she fails to explain how the arrangement or combination of those
17 unprotected elements in Onofrio's songs created an original,
18 protectable expression which was then copied by Reznor. Thus, the
19 district court did not err in finding that Onofrio failed to raise a
20 material issue of disputed fact concerning the similarity of the songs.

21 *Onofrio v. Reznor*, 208 F.3d 222, 2000 WL 206576, at *1 (9th Cir. Feb. 23, 2000).
22 Pringle and his counsels’ persistence in claiming that the original version of *Take a*

23 Cal. 2010), Plaintiffs’ Supplemental Opposition to Defendants’ Motion for
24 Summary Judgment [Dkt. No. 188], dated Sept. 6, 2011, at p. 22).

25 ²⁶ The copyright in a compilation does not protect the constituent elements of the
26 work themselves but rather, only the selection, coordination, and arrangement of
27 those elements, assuming sufficient originality. *Feist Publications, Inc. v. Rural*
28 *Telephone Service Co., Inc.*, 499 U.S. 340, 347-51 (1991). Nor does the mere
amalgamation of several unprotectable elements somehow revive them from the
public domain as Pringle and his lawyers suggest. *Id.* at 345 (“Common sense tells
us that 100 uncopyrightable facts do not magically change their status when
gathered together in one place.”); *see also id.* at 359 (the copyright in a compilation
“has no effect one way or the other on the copyright or public domain status of the
preexisting material”); 17 U.S.C. § 103(b) (“The copyright in [a compilation] is
independent of, and does not affect or enlarge the scope, duration, ownership, or
subsistence of, any copyright protection in the preexisting material.”).

1 *Dive* was infringed by *I Gotta Feeling* doesn't bear even the most minimal level of
2 scrutiny, as any lay person can confirm by listening to those two works side by side.

3 **V. PRINGLE'S ADDITIONAL DISCLOSURES BEYOND DISCOVERY**
4 **CUTOFF IS IMPROPER**

5 Finally, it bears mentioning that Pringle and his attorneys have again flouted
6 the rules (in addition to their multiple improper filings without leave of court), and
7 have submitted additional expert testimony by Dr. Alexander Stewart and Barbara
8 Federkisen-Cross well beyond the expert discovery cut-off. In addition, Pringle has
9 now apparently produced another fact witness (Michael Scott Brown), who, as was
10 the case with his brother, Jeffery Pringle, was never disclosed in the Initial
11 Disclosures, and makes his first appearance after the discovery cut-off. This
12 additional, late expert opinion and fact testimony is properly excluded. *See* Fed. R.
13 Civ. P. 37(c)(1); *Quevedo v. Trans-Pacific Shipping, Inc.*, 143 F.3d 1225, 1258 (9th
14 Cir. 1998) (affirming district court's exclusion of untimely expert report); *Eden v.*
15 *Washington State Patrol*, 2006 WL 2927703, at *1 (W.D. Wash. Oct. 11, 2006)
16 (excluding as untimely a witness produced by plaintiff after the discovery cut-off).

17 **VI. CONCLUSION**

18 Despite Pringle and his lawyers' overtures, the subject motion does nothing to
19 chill legitimate advocacy or the bringing of meritorious claims, neither of which
20 apply to this case. This motion is about seeking redress for a fraudulent and
21 objectively unreasonable copyright claim that has forced multiple defendants to
22 waste more than a year of their time and incur substantial fees and costs defending
23 what is nothing more than a seemingly non-ending sham—" [l]ike some ghoul in a
24 late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after
25 being repeatedly killed and buried." *Lamb's Chapel v. Center Moriches Union Free*
26 *School Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J. concurring). Quite literally, the
27 Defendants in this action have set forth a far more compelling case of copyright
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infringement as against Pringle than the converse. As such, not only is it finally time to lay this matter to rest, Rule 11 sanctions should be levied to the remedy the harm suffered by the Defendants and to serve as a deterrent to would be filers of similarly baseless claims. The Adams Defendants join the Guetta Defendants in their motion and respectfully submit that it be granted in its entirety.

Dated: April 2, 2012

BRYAN CAVE LLP

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