

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RALPH VARGAS and BLAND - RICKY
ROBERTS,

Plaintiffs,

- V. -

PFIZER INC., PUBLICIS, INC., FLUID
MUSIC, EAST WEST
COMMUNICATIONS, INC., and BRIAN
TRANSEAU p/k/a "BT",

Defendants.

Case No.: 04 CV 9772 (WHP)

ECF Case

[PROPOSED] JOINT PRETRIAL ORDER
EXHIBIT A

STIPULATED FACTS

The parties agree and stipulate to the following facts:

1. Plaintiff Ralph Vargas ("Vargas") is a professional musician and drum instructor who has performed with popular recording groups such as New Edition, Four By Four, CC Rogers and Atlantis. He does not read or write music.
2. Vargas created the composition *Bust Dat Groove (w/o ride)* ("*Bust Dat Groove*") and registered the copyright to the composition of *Bust Dat Groove*.
3. *Bust Dat Groove* is one-bar of live drumming that is looped and repeats.
4. Vargas recorded a performance of *Bust Dat Groove* some time in 1994 or early 1995. This recording of *Bust Dat Groove* was included on the album *Funky Drummer II*. Vargas has not recorded *Bust Dat Groove* for any album other than *Funky Drummer II*.
5. *Funky Drummer II* is a collection of short drum compositions for hip hop artist, DJ's, remixers, production companies and producers to sample and use in other recordings.

6. *Funky Drummer II* was released in February 1994 by JBR Music, Inc. (“JBR”), a company that is now defunct but was at the time owned by Bland-Ricky Roberts (“Roberts”).
7. Roberts is the registered owner of the copyrights to the sound recording *Funky Drummer II* and the performance of *Bust Dat Groove* contained on *Funky Drummer II*.
8. *Funky Drummer II* was only released on vinyl LP. It was never released on CD, or any other digital medium.
9. JBR manufactured and sold no more than 4000 copies of *Funky Drummer II* from February 1994 through April 1994. JBR did not sell any copies of *Funky Drummer II* after April 1994.
10. Vargas cannot say how many copies of *Funky Drummer II* were actually sold.
11. Defendant Brian Transeau (“BT”) is an accomplished professional musician, composer and producer. He has released five full-length albums since 1996, and has written scores for popular movies such as *Monster* and *The Fast And The Furious*.
12. In 2001, BT released a CD entitled *Breakz From The Nu Skool* (“*Breakz*”). It contains more than 400 tracks of “drum loops” – short drums pattern repeated several times. These drum loops are not meant to be listened to as music on their own; they are designed to be used as a background for other musical works.
13. BT sold *Breakz* through Defendant East West Communications under a distribution agreement. *Breakz* was sold primarily in music stores and retail websites aimed at musicians. Upon sale, purchasers of *Breakz* received permission to use any of the tracks on *Breakz* in their own recordings.
14. One of the tracks on *Breakz* is entitled *Aparthenonia*.
15. *Aparthenonia* is a one-bar drum pattern lasting approximately nine seconds, or two and one-quarter bars in length.
16. Publicis, Inc. (“Publicis”), an advertising agency, obtained a copy of *Breakz* through Fluid Music. Publicis then used *Aparthenonia* as part of a commercial for Celebrex, a

drug manufactured and distributed by Pfizer, Inc. (“Pfizer”). This commercial ran for several months on national television beginning in June 2003.

17. Plaintiffs contend that BT created *Aparthenonia* by sampling or copying *Bust Dat Groove* and digitally manipulating it, thus infringing Plaintiffs’ copyrights in both the composition and recording of *Bust Dat Groove*.

18. BT contends he had never heard *Bust Dat Groove* or any part of *Funky Drummer II* prior to composing *Aparthenonia*, and did not copy it. Rather, BT contends that he created *Aparthenonia* independently from scratch using specialized computer programs.