

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RALPH VARGAS and
BLAND-RICKY ROBERTS

Plaintiffs

vs.

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

DECLARATION OF MATTHEW RITTER

I, Matthew Ritter, declare:

1. I am a professional drummer and drum instructor. I have been retained by the plaintiffs Ralph Vargas and Bland-Ricky Roberts to render an expert opinion, based on my experience and knowledge in the musical field of drumming, regarding: a) whether or not the plaintiffs' musical work "*Bust Dat Groove W/out Ride*" ("*Bust Dat Groove*") is creative and original; b) a comparative analysis between "*Bust Dat Groove*," on the one hand, and the musical work "*Aparthenonia*" and the drum section in the "*Celebrex Commercial*" ("*Celebrex*"), on the other hand; and c) the opinions and conclusions by the musicologist, Anthony Ricigliano, as they pertain to the issues identified in (a) and (b).

CREDENTIALS

2. I have studied the musical aspects, and art, of drumming for the past 17 years. I received a BA degree from the University of Hartford/Hartt School of Music in music and music business. During my time at Hartt, I studied all aspects of music with a continued emphasis on drumming. I have also studied with many renowned drum instructors, including Kim Plainfield,

Dom Famularo, and drum legends Joe Morello and Jim Chapin. For the past 10 years I have performed professionally in nearly every drum style, including rock, country, funk, jazz, Afro-Cuban, Brazilian and musical theatre.

3. I have been teaching drumming for the past 10 years in New York City and have written articles on the musical and technical aspects of drumming for the world's leading drum magazine, *Modern Drummer*. I am currently producing an instructional drumming DVD which is scheduled to be released in Fall 2005. I have attached to this declaration my most recent Curriculum Vitae (Exhibit A).

MATERIALS REVIEWED

4. In undertaking this analysis, I reviewed the following material:
- a) a compact disc containing:
 - (i) "*Celebrex*," with complete background music, including drum section, and voiceover;
 - (ii) an isolated version of the drum loop featured in "*Celebrex*" (which I was informed was provided by Fluid Music);
 - (iii) a drumming track called "*Bust Dat Groove W/out Ride*" ("*Bust Dat Groove*") from *The Funky Drummer, Volume II* album by J.B.R. Records;
 - (iv) a drumming track titled "*Aparthenonia*" from the album *Breakz From The Nu Skool* by Eastwest/Brian Transeau;
 - b) a report by musicologist Anthony Ricigliano regarding the drum music in "*Bust Dat Groove*," "*Aparthenonia*" and "*Celebrex*;"
 - c) the Declaration of Anthony Ricigliano regarding the drum music in "*Bust Dat Groove*," "*Aparthenonia*" and "*Celebrex*;"

- d) various exhibits attached with Mr. Ricigliano's Declaration, including excerpts from drum method books and a CD with music samples of songs and drum beats;
- e) the Declaration of Rhys Moody;
- f) the Declaration of Brian Transeau;
- g) the Declaration of Brad Stratton;
- h) a "Rule 56.1 Statement of Undisputed Facts" by Samuel M. Leaf; and
- i) the "First Amendment Complaint" "Demand For Jury Trial" by Paul A. Chin, Esq.

"BUST DAT GROOVE"

5. Having repeatedly analyzed "*Bust Dat Groove*," it is my opinion that this drum track features a combination of musical elements that have been brought together in a way that is unique and unrepeatably (except perhaps by the same drummer). "*Bust Dat Groove*" was performed by a drummer who has a personal and very particular way of striking the drums which creates distinct sounds. This drummer has also chosen to tune and play his drums in a very creative and unusual way in certain sections of the composition. The most striking example of this is his decision to tension the snare drum wires exceedingly tightly and to then play the snare very delicately. This combination causes the snare to sound like a cross between a snare drum and a tom-tom drum during certain sections of "*Bust Dat Groove*." I consider this combination and the sound created an unusual "ghost note."

6. "Ghost notes" occur when a drummer plays extremely soft notes to fill in the gaps between other, more prominent notes. Ghost notes are usually played on a snare drum, as it was in the case of "*Bust Dat Groove*." Although "ghost notes," when played, sound faint they do not sound like other instruments. A snare drum sounds like a snare drum, even if played very

softly (i.e played as a “ghost note”). What is unique about the “ghost notes” in “*Bust Dat Groove*” is the drummer’s decision to tension the snare wires tightly and then delicately strike the snare in a way that alters the sound of the snare and creates a sound that is a cross between a tom-tom drum and a snare drum. This is very rare and demonstrates the drummer’s talent and creativity.

7. The drummer has also played these “ghost notes” by striking the snare only once and leaving the drum stick very close to the skin of the snare creating random hits or buzzes. These “multiple bounce strokes,” as they are referred to, adds to the rhythm and feel of “*Bust Dat Groove.*”

8. It is my opinion that “*Bust Dat Groove*” is creative and original.

Comparison of “*Celebrex,*” “*Aparthenonia,*” and “*Bust Dat Groove*”

9. Having reviewed the above material, it is clear to me that “*Celebrex,*” “*Aparthenonia,*” and “*Bust Dat Groove*” are identical in ways that would be impossible unless these 3 drum tracks were, in fact, one and the same. These “ways” include rhythmic elements, drum sounds, and the creative idiosyncracies of the drummer who created this music.

10. It is my opinion that “*Aparthenonia*” (which consists only of drum beats) and the isolated drum loop from “*Celebrex*” are identical, with no discernible differences whatsoever. This fact is confirmed by the Declaration of Brad Stratton in which he says that the drum loop in “*Celebrex*” came from “*Aparthenonia.*” In this declaration I will consider “*Aparthenonia*” and “*Celebrex*” to be 2 different names for the same piece of music (from this point forward, to be referred to as “*Aparthenonia*”). My analysis will focus on a comparison between “*Aparthenonia*” and “*Bust Dat Groove.*”

Similarities

11. Upon listening to "*Aparthenonia*" and "*Bust Dat Groove*," it was immediately clear that I was listening to 2 versions of the same recording. What is most obvious is that the "drum sounds," specifically the rhythm and pitch, in "*Aparthenonia*" and "*Bust Dat Groove*" are almost identical. Drums do not have a standard system of tuning (eg. "C sharp" "B flat" etc.). In practical terms, this means that drum tuning is based entirely on the subjective and creative expression of the drummer. It is unlikely to hear 2 drum sets that sound exactly alike unless, perhaps, they were tuned and played by the same drummer.

12. The way the musical elements in "*Aparthenonia*" and "*Bust Dat Groove*," are played, sound identical - same exact snare sound, same exact "ghost note" sound, same exact high hat sound, same exact bass drum sound. Because these sounds are identical I would have to conclude that the same drummer is playing "*Aparthenonia*" and "*Bust Dat Groove*" on the same drum set.

13. After listening to the drum sounds of "*Aparthenonia*" and "*Bust Dat Groove*," I analyzed the various musical elements in both compositions. With this declaration, I have included transcriptions (attached as Exhibit B) that I did for both tracks. I notated each track in 2 different ways- a) in the conventional manner of notating drums, where the high hat and snare are written together and the bass drum is written below; and b) as isolated lines of music (a separate line for snare, a separate line for high hat, etc.) so as to simplify the process of viewing the various musical figures involved. I have also transcribed the "ghost notes" which are notated by the "()" symbol.

14. I also used a lettering system to compare the various musical elements present in "*Bust Dat Groove*" and "*Aparthenonia*." For example, if a musical element appeared in both

tracks, I circled that element on both transcriptions and gave them the same letter identification. What this transcription illustrates is that there is no single or combination of musical elements, including “ghost notes,” present in “*Aparthenonia*” that does not also exist in “*Bust Dat Groove*.” I find this to be a significant similarity between the two drum works which I believe shows that “*Aparthenonia*” was created from “*Bust Dat Groove*.”

15. The only recognizable “difference” between “*Bust Dat Groove*” and “*Aparthenonia*” is the exact order in which these musical elements appear in each composition. Changing the order of musical elements can be accomplished very easily with today’s editing technology. I believe “*Aparthenonia*” is a digitally-edited version of “*Bust Dat Groove*.”

16. “*Aparthenonia*” and “*Bust Dat Groove*” also feature highly nuanced subtleties that stem from the unique “touch” of this particular drummer. Each drummer has his own personal way of holding the sticks and striking the drums. This results in a sort of “fingerprint” that gets left on every drum recording. In the case of “*Bust Dat Groove*” and “*Aparthenonia*,” this fingerprint is most evident in the drummer’s use of “ghost notes.”

17. In his Declaration, Mr. Ricigliano confirmed this significant similarity between “*Aparthenonia*” and “*Bust Dat Groove*” because he mistakenly identifies the “ghost notes” as tom-toms. Based on these significant similarities, it would be extremely difficult to show that “*Aparthenonia*” and “*Bust Dat Groove*” are not the same piece of music.

ANTHONY RICIGLIANO’S DECLARATION

18. Mr. Ricigliano’s Declaration contains many inaccuracies with respect to his analysis and transcription of “*Aparthenonia*” and “*Bust Dat Groove*.” Having read Mr. Ricigliano’s Declaration and reviewed his transcriptions, I cannot agree with Mr. Ricigliano’s opinions and conclusions regarding “*Aparthenonia*” and “*Bust Dat Groove*.”

The “ghost notes”

19. Mr. Ricigliano states that “*Aparthenonia*” and “*Bust Dat Groove*” feature a high hat, snare drum, tom-tom drum, and bass drum. This is not the case. What Mr. Ricigliano perceives as tom-toms are, in fact, “ghost notes” (i.e. tightly tensioned snare wires combined with drummer’s delicate “multiple bounce strokes”). As indicated in my transcription (Exhibit B), “*Aparthenonia*,” and “*Bust Dat Groove*” contain a high hat, snare drum/“ghost notes,” and bass drum. Although this distinction is subtle it is very significant because it shows the creativity of the drummer and significant similarity between “*Aparthenonia*” and “*Bust Dat Groove*.”

The “4 stroke ruff”

20. Mr. Ricigliano’s transcription of the “tom-tom” sounds (which does not exist in any of the 3 compositions) is inaccurate. Mr. Ricigliano’s review of certain percussion method books has led him to conclude that the tom-tom beat is a “4 stroke ruff.” It would be unlikely that the drummer playing the “tom-toms” (which are really “ghost notes”) in either “*Aparthenonia*” or “*Bust Dat Groove*” used a “4 stroke ruff.”

21. The “4 stroke ruff” is originally a military drumming pattern that requires a drummer to use both hands (R,L,R,L). To use a “4 stroke ruff” drumming pattern in the context of a drum track like “*Bust Dat Groove*” would be tremendously awkward and extremely difficult because it would require the drummer to take one hand momentarily off the high hat, which is being played continuously in “*Bust Dat Groove*” and “*Aparthenonia*.” Also, using both hands, as in the case of a “4 stroke ruff,” would likely cause a much harsher sound than actually exist in “*Bust Dat Groove*” and “*Aparthenonia*.”

22. The “ghost notes” (described by Ricigliano as tom-toms) are not 4 true notes. What Mr. Ricigliano considers to be a “4 stroke ruff” is actually a “multiple bounce stroke.”

Here the drummer has used one hand to make the tip of the drumstick bounce against the top of the drum. The stick ricochets against the drum and produces a number of somewhat random hits and buzzes (i.e. “multiple bounce strokes”). This nuanced sound is nothing like the clear, crisp sound of a military “4 stroke ruff.”

23. Mr. Ricigliano has not transcribed the additional “ghost notes” that are played (on all 3 compositions) immediately after the loud snare drum accents on beats 2 and 4. Mr. Ricigliano’s report does not include a transcription of these notes at all. My assumption is that he missed or did not perceive these nuanced sounds.

Transcription of the drum notes

24. Mr. Ricigliano’s transcriptions of the individual drum musical elements are inconsistent with standard practices of drum notation. Mr. Ricigliano wrote all of his drum notes with X’s rather than round note heads. Drums are generally notated with round note heads. All of the drum textbooks that were attached to Mr. Ricigliano’s Declaration clearly indicate that drums are notated with round note heads not Xs. The only time that a drum transcription would notate something with an X, instead of a round note head, would be in the case of a cymbal or a sound effect like a wood block or a handclap.

25. Mr. Ricigliano’s improper drum transcription is important because by notating the entire drum transcription with Xs, Mr. Ricigliano implies that drums, and therefore 3 compositions, do not have pitch. This is inaccurate.

26. Although drums do not adhere to the traditional pitch system of other instruments, drums do produce pitches that can be specific. The fact that it is possible to tune a drum means that drums produce pitch. Drums have long been recognized as being “pitched,” albeit in a way that is different from a guitar or piano (eg. specific “C sharp” “B flat,” etc.). The reason for this

is because drums often times produce pitches that fall in between the traditional specific pitches. That is why modern drum notation makes use of round note heads for drums and uses Xs for sound effects. Again, each of the drum textbooks attached to Mr. Ricigliano's Declaration clearly illustrates this point.

The drum tracks on the CD provided by Mr. Ricigliano

27. Mr. Ricigliano also included a CD with his Declaration that contained various songs and individual drum tracks. However, none of the tracks in the CD sound anything like "*Bust Dat Groove*." While the tracks on the CD are part of the same musical genre as "*Bust Dat Groove*," and contain certain genre-specific traits, the feel and artistic combination of musical elements in "*Bust Dat Groove*" make it immediately recognizable from the tracks on Mr. Ricigliano's CD.

28. Mr. Ricigliano also refers to "differences" between "*Aparthenonia*" and "*Bust Dat Groove*" that hardly qualify as differences at all. Mr. Ricigliano suggests that the open high hat sound that occurs in both tracks but in different places, demonstrates a "slight" but significant, difference in the placement." First, the sound of the open high hat itself is *identical* in "*Bust Dat Groove*" and "*Aparthenonia*." Second, modern music editing equipment can be used to alter a moment of music as brief as 1/30th of a second long (otherwise known as "one frame"). With this in mind, a slight shift in the placement of an open high hat sound could be done easily on a music editing machine. The same thing applies to the bass drum parts that Mr. Ricigliano finds to be different because of the placement of these bass drums in "*Bust Dat Groove*" and "*Aparthenonia*." In actuality, there is very little difference at all between the bass drum parts of "*Bust Dat Groove*" and "*Aparthenonia*."

29. Mr. Ricigliano points to a section of "*Bust Dat Groove*" where the bass drum plays "short-long-short." He then points to the section of "*Aparthenonia*" where the bass drum plays "short-short-long-short." "Short-short-long-short" is exactly the same as "short-long-short" except with an extra "short" digitally edited onto the beginning. This can hardly be considered a "significant difference" between "*Bust Dat Groove*" and "*Aparthenonia*."

30. Mr. Ricigliano also refers to a 4-note bass drum pattern that is part of "*Aparthenonia*." He then states that the entire *Aparthenonia* 4-note figure 2, placed on beat 3, is a basic rhythmic unit as shown on page 22 of Exhibit C 7 number 14. In fact, the 4-note bass drum pattern that occurs in "*Aparthenonia*" is entirely dissimilar to the 4-note bass drum pattern on Mr. Ricigliano's page 22 of exhibit C 7 number 14. None of the drum book excerpts referred to by Mr. Ricigliano contain transcriptions that notate the combination of musical elements and rhythm contained in "*Bust Dat Groove*" and "*Aparthenonia*."

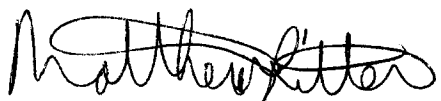
CONCLUSION

31. "*Bust Dat Groove*" features a sound, feel, and creative musical nuances that make it readily identifiable to the listener. The creation of unusual "ghost notes" and use "multiple bounce strokes" in "*Bust Dat Groove*" demonstrate the drummer's artistic input into this composition. Based on these features I conclude that "*Bust Dat Groove*" is creative and original.

32. The sound and feel of "*Bust Dat Groove*" and "*Aparthenonia*" are almost exactly the same. All of the musical elements, notes, rhythms and sound variations (such as the "ghost notes") that appear in "*Bust Dat Groove*," also appear in "*Aparthenonia*" (and therefore also appear in "*Celebrix*"). Based on these facts I conclude that "*Aparthenonia*" is significantly similar, if not identical, to "*Bust Dat Groove*."

33. Finally, I disagree with Mr. Ricigliano's conclusion that "*Bust Dat Groove*" is not original and that "*Aparthenonia*" (and therefore "*Celebrex*") is significantly different than "*Bust Dat Groove*."

I declare under penalty of perjury pursuant to the laws of the United States that the forgoing is true and correct. Executed this 19th day of July 2005 at Woodside, NY 11377.

A handwritten signature in black ink that reads "Matthew Ritter". The signature is written in a cursive style with a large, sweeping initial "M".

Matthew Ritter

EXHIBIT B

Explanation of Transcription Pages

Attached are 2 transcription pages. One page features 2 transcription versions of “Bust Dat Groove.” One page features 2 transcription versions of “Aparthenonia.”

The first transcription version on each page features the conventional system of notating drumset music. The hi hat part and snare part are presented as a single line of music. The bass drum part is written beneath this as its own line of music. All of this is contained within a single 5-line staff. The second transcription version on each page features each of the 3 relevant drumset components (hi hat, snare, and bass drum) written out separately as its own line of music. The content in each transcription version of a given track is exactly the same; I have simply offered 2 options in terms of the visual presentation of this content.

On the page pertaining to “Aparthenonia,” I have circled and lettered every one of the various rhythmic figures contained within the work. I have chosen to do this within the second transcription version, so that the reader can clearly see the different drumset components involved. On the page pertaining to “Bust Dat Groove,” I have circled one example of each of the figures in “Aparthenonia,” and I have lettered each example to correspond to the respective “Aparthenonia” figure. In the very few instances where a figure in “Aparthenonia” is a slightly-altered *version* of its corresponding figure in “Bust Dat Groove,” I have indicated this on the “Aparthenonia” transcription by putting * or ** after the letter of the figure in question.

In doing this analysis, I have discovered and illustrated the fact that there are absolutely no rhythmic elements present in “Aparthenonia” that do not ALSO exist somewhere in “Bust Dat Groove.”

Bust Dat Groove

hihat
snare
bass

4/4

hihat

4/4

snare

4/4

bass

4/4

() = "Ghost Note" 7 = "Multiple Bounce Stroke"

ø = "Open Hi Hat"

Aparthenonia

hi hat
snare
bass

This system contains three staves. The top staff is for hi hat, showing a sequence of notes with 'x' marks and some notes with a circled 'x' symbol. The middle staff is for snare, with notes and rests, some notes marked with a circled 'x'. The bottom staff is for bass, with notes and rests. The time signature is 4/4.

hi hat


This system contains one staff for hi hat, showing a sequence of notes with 'x' marks and some notes with a circled 'x' symbol. The time signature is 4/4.

snare

This system contains one staff for snare, with notes and rests, some notes marked with a circled 'x'. The time signature is 4/4.

bass

This system contains one staff for bass, with notes and rests. The time signature is 4/4.

() = "Ghost Note"  = "Multiple Bounce Stroke"

∅ = "Open Hi Hat"

Bust Dat Groove

hi-hat
snare
bass

hi-hat

snare

bass

() = "Ghost Note"

7 = "Multiple Bounce Stroke"

Ø = "Open Hi Hat"

Aparthenonia

hi hat
snare
bass

hi hat

snare

bass

() = "Ghost Note"  = "Multiple Bounce Stroke"

∅ = "Open Hi Hat"