

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

JOINT PRETRIAL ORDER EXHIBIT A

STIPULATED FACTS

The parties agree and stipulate to the following facts:

1. Plaintiff Ralph Vargas is a drummer.
2. Ralph Vargas created *Bust Dat Groove (w/o ride)* ("BDG") and registered the copyright to the composition of *BDG*.
3. *BDG* is a one-bar percussion pattern that is looped and repeats.
4. Ralph Vargas recorded a performance of *BDG* some time in 1994 or early 1995. Ralph Vargas played *BDG* live in the studio using only a bass drum, snare drum and hi-hat. This recording of *BDG* was included on the album *Funky Drummer Vol. II* ("FD II").
5. The composition *BDG* was not recorded anywhere by Ralph Vargas other than as part of the *BDG* sound recording included on *FD II*.
6. Ralph Vargas does not read or write music.

7. *FD II* is a collection of drum rhythms (known as drum “tracks”) for hip hop artists, remixers, and producers to sample and use in other recordings. It contains 17 drum tracks and was recorded in approximately four hours in the studio.
8. *FD II* was released in February 1994 by JBR Music, Inc. (“JBR”), a company that is now defunct but was at the time owned by Plaintiff Bland-Ricky Roberts and operated out of his residence.
9. *FD II* was only released on vinyl LP. It was not released on CD, or any other medium.
10. Plaintiffs manufactured no more than 4,000 copies of *FD II*. *FD II* was on sale from February 1994 through April 1994. Plaintiffs did not sell any copies of *FD II* after April 1994.
11. Ralph Vargas cannot say how many copies of *FD II* were actually sold, but the income from these sales was so sporadic he did not report it on his taxes.
12. 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*.
13. In 2001, BT released a double compact disk sound library entitled *Breakz From The Nu Skool* (“*Breakz*”). It contains more than 400 tracks of “drum loops”—short drum patterns 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.
14. BT has not registered or claimed a copyright in the drum loops on *Breakz*.
15. BT sold *Breakz* through Defendant East West Communications under a distribution agreement. Upon sale, BT granted permission for purchasers of *Breakz* to use any of the tracks on *Breakz* in their own recordings.
16. One of the tracks on *Breakz* is entitled *Aparthenonia*.

17. *Aparthenonia* is a two and one-quarter bar drum pattern that lasts approximately nine seconds. It contains sounds of a high-hat, snare drum and bass drum.

18. Alanda Music Ltd, d/b/a/ Fluid Music (“Fluid”) purchased a copy of *Breakz* and used *Aparthenonia* as part of a song it produced for Publicis, Inc., an advertising agency, to use in a commercial for Celebrex, a drug manufactured and distributed by Pfizer, Inc.

19. To produce the song for the Celebrex commercial, Fluid recorded *Aparthenonia* exactly as heard on *Breakz* and did not mix or manipulate *Aparthenonia* in any way. On top of *Aparthenonia*, Fluid layered a number of other percussion and instrumental tracks to create the song for the Celebrex commercial.

20. Plaintiffs contend that BT created *Aparthenonia* by making a digital copy of *BDG* and digitally manipulating it, thus infringing Plaintiffs’ copyrights in both the composition and recording of *BDG*.

21. BT contends he did not hear *BDG* or any part of *FD II* prior to composing *Aparthenonia*, and did not copy it. Rather, he created *Aparthenonia* independently from scratch using specialized computer programs.

22. Dr. Smith, Plaintiffs’ digital signal processing expert, has “no musical training,” and thus “cannot render any opinion as to whether or not different musicians, with different instruments, playing at different points in time, can produce waveforms that look [as] similar” as *BDG* and *Aparthenonia*. (Smith Report at 2).

23. Spectrographic analysis is the best method for determining the similarities and differences between audio sounds.

24. Spectrographic analysis can reveal the special characteristics of sounds with much greater precision than the unaided ear.

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JOINT PRETRIAL ORDER EXHIBIT B

PLAINTIFFS' EXHIBIT LIST

Plaintiffs expect to introduce the following exhibits in the trial of this matter.
Defendants' objections, if any, are noted.

<u>No.</u>	<u>Description</u>	<u>Defendants' Objection(s)</u>
1.		
2.		
3.		
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10.		

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JOINT PRETRIAL ORDER EXHIBIT C

DEFENDANTS' EXHIBIT LIST

Defendants expect to introduce the following exhibits in the trial of this matter.
Plaintiffs' objections, if any, are noted.

<u>No.</u>	<u>Description</u>	<u>Plaintiffs' Objection(s)</u>
A.	Second Amended Complaint	
B.	BT's Answer to Second Amended Complaint	
C.	East West's Answer to Second Amended Complaint	
D.	Exhibit B of Anthony Ricigliano's Declaration, Pro Tools Waveform Graphs of Celebrex commercial, <i>Aparthenonia</i> and <i>BDG</i>	
E.	Exhibit C of Anthony Ricigliano's Declaration, Excerpts of Drum Training/Method Books	
F.	Exhibit D of Anthony Ricigliano's Declaration, audio CD with 11 tracks and written	

	transcriptions of the audio tracks	
G.	Exhibit A of Anthony Ricigliano's Supplemental Declaration, "Drums of indefinite pitch," <i>The New Harvard Dictionary of Music</i>	
H.	Exhibit B of Anthony Ricigliano's Supplemental Declaration, Turek, <i>The Elements of Music: Concepts and Applications</i> Volume 1, selected pages	
I.	Fig. 1 of Dr. Richard Boulanger's Original Report	
J.	Fig. 2 of Dr. Richard Boulanger's Original Report	
K.	Fig. 3 of Dr. Richard Boulanger's Original Report	
L.	Fig. 4 of Dr. Richard Boulanger's Original Report	
M.	Fig. 5 of Dr. Richard Boulanger's Original Report	
N.	Fig. 6 of Dr. Richard Boulanger's Original Report	
O.	Fig. 7 of Dr. Richard Boulanger's Original Report	
P.	Fig. 8 of Dr. Richard Boulanger's Original Report	
Q.	Fig. 9 of Dr. Richard Boulanger's Original Report	
R.	Fig. 10 of Dr. Richard Boulanger's Original Report	
S.	Fig. 11 of Dr. Richard Boulanger's Original Report	
T.	Fig. 12 of Dr. Richard Boulanger's Original Report	
U.	Fig. 13 of Dr. Richard Boulanger's Original Report	
V.	Fig. 14 of Dr. Richard Boulanger's Original Report	
W.	Fig. 15 of Dr. Richard Boulanger's Original Report	
X.	Fig. 16 of Dr. Richard Boulanger's Original Report	
Y.	Fig. 17 of Dr. Richard Boulanger's Original Report	

Z.	Fig. 18 of Dr. Richard Boulanger's Original Report	
AA.	Fig. 19 of Dr. Richard Boulanger's Original Report	
BB.	Fig. 20 of Dr. Richard Boulanger's Original Report	
CC.	Fig. 21 of Dr. Richard Boulanger's Original Report	
DD.	Fig. 22 of Dr. Richard Boulanger's Original Report	
EE.	Fig. 23 of Dr. Richard Boulanger's Original Report	
FF.	Fig. 24 of Dr. Richard Boulanger's Original Report	
GG.	Fig. 25 of Dr. Richard Boulanger's Original Report	
HH.	Fig. 26 of Dr. Richard Boulanger's Original Report	
II.	Fig. 27 of Dr. Richard Boulanger's Original Report	
JJ.	Fig. 28 of Dr. Richard Boulanger's Original Report	
KK.	Fig. 29 of Dr. Richard Boulanger's Original Report	
LL.	Fig. 30 of Dr. Richard Boulanger's Original Report	
MM.	Fig. 31 of Dr. Richard Boulanger's Original Report	
NN.	Fig. 32 of Dr. Richard Boulanger's Original Report	
OO.	Fig. 33 of Dr. Richard Boulanger's Original Report	
PP.	Fig. 34 of Dr. Richard Boulanger's Original Report	
QQ.	Fig. 35 of Dr. Richard Boulanger's Original Report	
RR.	Fig. 36 of Dr. Richard Boulanger's Original Report	
SS.	Ex. 2 of Dr. Richard Boulanger's Rebuttal Report	
TT.	Ex. 3 of Dr. Richard Boulanger's Rebuttal Report	
UU.	Ex. 4 of Dr. Richard Boulanger's Rebuttal Report	
VV.	Ex. 5 of Dr. Richard Boulanger's Rebuttal Report	

WW.	Ex. 6 of Dr. Richard Boulanger's Rebuttal Report	
XX.	Ex. 7 of Dr. Richard Boulanger's Rebuttal Report	
YY.	Ex. 8 of Dr. Richard Boulanger's Rebuttal Report	
ZZ.	Ex. 9 of Dr. Richard Boulanger's Rebuttal Report	
AAA.	Ex. 10 of Dr. Richard Boulanger's Rebuttal Report	
BBB.	Audio Sample CD of Dr. Richard Boulanger's Rebuttal Report, tracks 1 – 52	
CCC.	<i>Breakz from the Nu Skool</i> (BT 00026 & 00027, two audio CDs)	
DDD.	<i>Aparthenonia</i> , master version as rendered from Logic (BT 00021, audio CD, one track)	
EEE.	James Brown Funky Drummer Comparisons, audio CD, 4 tracks (BT 00028) (Defendant's Deposition Exhibit 4)	
FFF.	Royalty Report for January 2003 - December 2004 re: BT (EW 007)	
GGG.	Royalty Report for June 2002 - December 2002 re: BT (EW 008)	
HHH.	Royalty Report for October 2001 - June 2002 (EW 009)	
III.	Agreement between Brian Transeau and East West Communications, dated 4/6/2001 (EW 001-006)	
JJJ.	Confidential Settlement Agreement and General Release (FL 001 - FL 014)	
KKK.	Audio CD Edan, <i>Sound of The Funky Drummer</i> , with track list (BT 00022 - 00024)	
LLL.	LL Cool J, <i>Mama Said Knock You Out</i> , from the album <i>All World: Greatest Hits</i> (BT 00025, audio CD Track 1)	

MMM.	Pop Will Eat Itself, <i>Not Now James, We're Busy</i> , from the album <i>This Is the Day...This Is the Hour...This Is This!!</i> (BT 00025, audio CD Track 2)	
NNN.	Sinéad O'Connor, <i>I Am Stretched Out on Your Grave</i> , from the album <i>I Do Not Want What I Haven't Got</i> (BT 00025, audio CD Track 3)	
OOO.	New Order, <i>Ruined in a Day</i> , from the album <i>Republic</i> (US Release) (BT 00025, audio CD Track 4)	
PPP.	Nine Inch Nails, <i>Piggy (Nothing Can Stop Me Now)</i> , from the album <i>Further Down the Spiral</i> (BT 00025, audio CD Track 5)	
QQQ.	Fine Young Cannibals, <i>I'm Not the Man I Used to Be</i> , from the album <i>The Raw & the Cooked</i> (BT 00025, audio CD Track 6)	
RRR.	MC Frontalot, <i>Good Old Clyde</i> , from the album <i>Nerdcore Hip-hop (demo)</i> (BT 00025, audio CD Track 7)	
SSS.	Dr. Dre, <i>Let Me Ride</i> , from the album <i>The Chronic</i> (BT 00025, audio CD Track 8)	
TTT.	Public Enemy, <i>Fight the Power</i> , from the album <i>20th Century Masters - The Millennium Collection: The Best of Public Enemy</i> (BT 00025, audio CD Track 9)	
UUU.	Chubb Rock & Hitman Howie Tee, <i>Talkin' Loud, Ain't Sayin'</i>	

	<i>Jack</i> , from the album <i>And the Winner Is?</i> (BT 00025, audio CD Track 10)	
VVV.	The Pharcyde, <i>Officer</i> , from the album <i>Bizarre Ride II</i> (BT 00025, audio CD Track 11)	
WWW.	Elton John, <i>Little Jeannie</i> from the album <i>Greatest Hits, Vol. III</i> (BT 00029, audio CD Track 1)	
XXX.	Elton John, <i>Sad Songs Say So Much</i> , from the album <i>Greatest Hits, Vol. III</i> (BT 00029, audio CD Track 2)	
YYY.	Billy Joel, <i>Big Shot</i> , from the album <i>Greatest Hits, Vol. II</i> (BT 00029, audio CD Track 3)	
ZZZ.	Chicago, <i>We Can Stop The Hurtin'</i> from the album, <i>Chicago 17</i> (BT 00029, audio CD Track 4)	
AAAA.	The Miracles, <i>Love Machine</i> , from the album <i>Love Machine</i> (BT 00029, audio CD Track 5)	
BBBB.	James Brown, <i>Papa's Got A Brand New Bag</i> , from the album <i>20 All Time Greatest Hits</i> (BT 00029, audio CD Track 6)	
CCCC.	Plaintiffs' Responses and Objections to Fluid Music's Document Requests (7/24/2005)	
DDDD.	Plaintiffs' Responses and Objections to Fluid Music's Interrogatories (7/24/2005)	
EEEE.	Plaintiffs' Responses and Objections to Fluid Music's Requests to Admit (7/24/2005)	
FFFF.	Plaintiffs' Responses and Objections to Document Requests (Nov. 9, 2005)	
GGGG.	Plaintiffs' Supplemental Responses and Objections to Document Requests (April 11, 2006)	

HHHH.	Plaintiffs' Second Supplemental Response and Objections to Document Requests (7/26/2006)	
III.	Plaintiffs' Responses and Objections to Interrogatories (11/9/2005)	
JJJ.	Plaintiffs' Supplemental Responses and Objections to Interrogatories (7/26/2006) (with Roberts's verification dated 7/28/2006 and Vargas's verification dated 7/28/2006)	
KKKK.	7/26/2006 Letter from Paul Chin to Julie Ahrens re discovery	
LLLL.	8/28/2006 Letter from Julie Ahrens to Paul Chin re discovery	