

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)
(JCF)

DECLARATION OF IVAN A. RODRIGUEZ

I, Ivan A. Rodriguez, declare:

1. I am a music producer/sound recording-mixing engineer. I have been retained by plaintiffs Ralph Vargas and Bland-Ricky Roberts to provide an expert opinion as to whether or not the recording "*Aparthenonia*" and the drum section in the "*Celebrex Commercial*" are similar to the recording "*Bust Dat Groove w/out Ride*" and whether or not "*Aparthenonia*" and the drum section in the "*Celebrex Commercial*" were created by digitally sampling the composition "*Bust Dat Groove w/out Ride*."

Credentials

2. I have been a music producer and sound recording-mixing engineer for the past twenty years. As a music producer and sound recording-mixing engineer I have received 20 Gold Albums, 5 Platinum Albums, 2 Double Platinum Albums and 10 Ampex Golden Reel Awards. For over eight years I was the Chief Engineer/Producer for Power Play Studios in Long Island, New York.



3. Throughout my career I have primarily been involved in the hip-hop music genre. The hip-hop music genre is known for its use of digital samples of 1970's Jazz/Rock/Funk/R&B classics. As Chief Engineer/Producer at Power Play Studios, I digitally sampled hundreds of records and developed a unique understanding of the different techniques used in sampling records. I also have extensive knowledge of the equipment used in digital sampling. A copy of my full resume is attached as Exhibit A.

Materials Reviewed

4. After I was retained by Mr. Vargas and Mr. Ricky, I was asked to review the following materials:

- (a) a copy of the First Amended Complaint by Paul Chin
- (b) a Rule 56.1 Statement filed by Samuel Leaf
- (c) the Declaration of Rhys Moody, with attached waveform analysis
- (d) the Declaration of Brian Transeau
- (e) the Declaration of Anthony Ricigliano
- (f) a compact disc containing the composition "Bust Dat Groove W/Out Ride" ("*Bust Dat Groove*")
- (g) a compact disc containing the composition "*Aparthenonia*"
- (h) a compact disc containing the "Celebrex commercial" ("*Celebrex*")
- (i) a copy of the cd cover for the album "Breakz from the Nu School"

5. After reviewing the materials presented to me and listening to each of the three sources, it is my opinion that "*Aparthenonia*" and the drum section of "*Celebrex*" include elements and performance identical to "*Bust Dat Groove*." I have also concluded that "*Aparthenonia*" and the drum section of "*Celebrex*"

were created by digitally sampling and manipulating elements of “*Bust Dat Groove.*” I will explain the reasons for my conclusions.

Digital Sampling

6. Digital sampling has been in use for more than 20 years. The hip-hop music genre has become famous or infamous for its extensive use of sampling records. As a music producer and sound engineer during the mid-1980’s to the present, I have sampled hundreds of records in the process of producing, programming, tracking and mixing, for hip-hop stars from BDP, LL Cool J, EPMD and Run-DMC to Queen Latifah, DMX, Method Man and the Fugees.

7. The process of sampling a record is relatively simple. First you obtain a copy of the song or music you want to sample from (for example, vinyl record, compact disc, etc.). The record is then fed into a digital sampling machine. Once the music is loaded into the digital sampling machine the music producer or engineer can then manipulate the song in any way he/she wants. For example, he could move whole sections of the song around (take a snare from the first part of the song and place it in the middle or the end in the new song), he could move sounds, instruments, voices, phrases, etc. It is even possible to cut and paste individual notes from the sampled song and rearrange them. Anything that is in the sampled song can be divided and re-arranged. The speed (tempo) of the sampled song can be adjusted as well. Sampling is extremely simple and quick and it allows an experienced music producer or sound engineer to create a new song, complete with rhythm, harmony and melody, in a very short period of time.

8. Because sampling can be expensive many music producers and

engineers rearrange the sampled song in ways that would make it difficult to identify those portions of the sampled song in the new song. The general rule is the less you take (from the sampled song) the less likely it is that the sampled song will be recognized within the new song. It seems very clear to me that in this case the producer of *"Aparthenonia"* sampled musical elements of *"Bust Dat Groove"* and simply rearranged and manipulated different portions of *"Bust Dat Groove"* in making *"Aparthenonia"* and *"Celebrex"* (it should be noted that *"Aparthenonia"* and *"Celebrex"* have the identical drum beat, rhythm and pitch).

Rhys Moody's Waveform Analysis

9. The waveform analysis that was attached to the Declaration of Rhys Moody was prepared incorrectly and is not accurate. Based on Mr. Moody's waveform analysis, it is obvious why the drum beats from *"Aparthenonia"* and *"Bust Dat Groove"* do not match more closely.

10. First, the two songs were recorded into a computer recording program, known as Pro Tools, at two different sound levels. By recording *"Celebrex"* and *"Aparthenonia"* at one sound level (a higher level) and recording *"Bust Dat Groove"* at another sound level (a lower level) the music in *"Celebrex"* and *"Aparthenonia"* create a more defined waveform and look clearer than the music in *"Bust Dat Groove."* Mr. Moody should have recorded both songs into Pro Tools at the same sound level in order to receive a more accurate waveform comparison. Second, Mr. Moody recorded an unedited version of *"Bust Dat Groove"* that had not yet been digitally manipulated (i.e. sampled) prior to recording into Pro Tools.

Third, Mr. Moody's "differences" are not accurate differences because of the manner in which he recorded and/or imported all three songs into Pro Tools. In order to illustrate my point I have conducted the same exact waveform analysis using the same exact Pro Tools recording program, which is attached as Exhibit B.

11. After repeatedly listening to "*Aparthenonia*" and "*Bust Dat Groove*" I was able to identify how the music in "*Bust Dat Groove*" was re-arranged and manipulated (i.e. sampled) in order to create "*Aparthenonia*." I then duplicated the process and created a new version of "*Bust Dat Groove*" (using only samples from "*Bust Dat Groove*" and no DSP) that was almost identical to "*Aparthenonia*."

12. Prior to recording "*Bust Dat Groove*" into Pro Tools, I sampled "*Bust Dat Groove*" from the vinyl album titled "Funky Drummer, Volume II." In order to sample "*Bust Dat Groove*" I used an Akai/Roger Linn MPC-300 Sampling Drum Machine/MIDI Sequencer. It is important to note that this sampling machine loads empty. In other words, you cannot store songs into the device as it has no internal hard drive, in order to sample a song you have to record the musical material into the Akai/Roger Linn MPC-300 Sampling Drum Machine/MIDI Sequencer then assign/edit the sounds and program the composition. To playback the samples you must tap the touch sensitive pads. I also used: a Denon DJ-151 Digital Turntable to transfer the audio from "*Aparthenonia*" into the sampler; AKG K240 Audio Headphones/Mackie HR824 Studio Monitors were used to carefully monitor (listen) to the sampled material; and an Alesis Masterlink ML-9600 CD Recorder was used to record the final results onto a



Redbook standard CD. At no point during this process did I use any digital signal processing equipment (“DSP”), equalizers or dynamics processors to change the natural feel or characteristics of *“Bust Dat Groove.”* When transferring *“Aparthenonia”* into the sampler (for comparison) I did not make any changes, edits or manipulations to *“Aparthenonia”* of any kind.

13. Here is a list of the rearrangement - manipulation that occurred to *“Bust Dat Groove”*:

(a) Snare roll - In *“Bust Dat Groove”* the snare roll occurs at the end of the 2nd beat going into the 3rd beat, it was moved to the 4th beat going into the 1st/ down beat in *“Aparthenonia”* and *“Celebrex.”*

(b) Closed High hat - In *“Bust Dat Groove”* the closed high hat occurs after every snare hit, it was sampled and played back in 1/8th notes in *“Aparthenonia”* and *“Celebrex.”*

(c) Kick – “splash” - In *“Bust Dat Groove”* the kick – “splash” sound occurs at the 2nd beat going into the 3rd beat, it was moved to the 1st/3rd down beat in *“Aparthenonia”* and *“Celebrex.”*

(d) Alternate – kick - In *“Bust Dat Groove”* the alternate kick occurs at the 3rd beat going into the 4th beat, it was moved to the used as a filler in *“Aparthenonia”* and *“Celebrex.”*

(e) Snare drum in *“Bust Dat Groove”* beat 2 and 4 were sampled and played on beats 2 and 4 of *“Aparthenonia”* and *“Celebrex.”*

Although Mr. Ricigliano’s declaration indicates the use of tom-toms in the three songs, I did not hear any tom-toms in any of the three songs.



14. After rearranging and manipulating the sampled *"Bust Dat Groove"* record, I recorded it into Pro Tools (onto tracks $\frac{3}{4}$) and also recorded *"Aparthenonia"* into Pro Tools (onto tracks $\frac{1}{2}$) at identical levels (I did not record *"Celebrex"* into Pro Tools because the drum section in *"Celebrex"* came from *"Aparthenonia"* and were identical). In the new waveform analysis *"Aparthenonia"* is identified as "BT" and *"Bust Dat Groove"* is identified as "BTG." Both songs are played in stereo (this is why there are two lines one for Left and one for Right).

15. The new waveform analysis (Exhibit B) clearly shows that *"Aparthenonia"* and *"Bust Dat Groove"* are almost identical. In my opinion the slight differences in the waveform analysis are due to digital signal processing (or enhancements, reverb, equalizing, dynamics, mix-down, mastering, etc.) performed on "BT."

Rhythm, Melody and Over-All Feel Comparison

16. In order to demonstrate that *"Aparthenonia"* and *"Celebrex"* were made by using a sample of the entire *"Bust Dat Groove"* music, I conducted a comparison of the rhythm, beats, melody and over all feel of *"Aparthenonia"* to *"Bust Dat Groove."*

17. Attached as Exhibit C, is a stereo audio compact disc that I prepared. On this compact disc are 8 tracks comparing individual sounds and comparing the entire songs. I did not manipulate any portion of *"Aparthenonia"* for this exercise. In order to compare elements (sounds) from both *"Aparthenonia"* and *"Bust Dat Groove"* I digitally extracted individual elements (sounds) from each song then played them back individually then together. Here is a list of what is on each track:

(a) Track 1 - First sound heard is the "*Aparthenonia*" snare roll; Second sound heard is the "*Bust Dat Groove*" snare roll;

(b) Track 2 - First sound heard is the "*Aparthenonia*" closed hat; Second sound heard is the "*Bust Dat Groove*" closed hat;

(c) Track 3 - First sound heard is the "*Aparthenonia*" kick; Second sound heard is the "*Bust Dat Groove*" kick;

(d) Track 4 - First sound heard is the "*Aparthenonia*" filler kick; Second sound heard is the "*Bust Dat Groove*" kick; (the filler kick was a sample of the kick from "*Bust Dat Groove*" and was used in empty spaces in "*Aparthenonia*")

(e) Track 5 - First you hear the "*Aparthenonia*" drum loop; Second you hear the digitally manipulated sample of "*Bust Dat Groove*" drum loop; Third you hear both playing together at the same time. The resemblance is so that the audio "flanges." "Flanging" occurs when 2 identical audio sources play together through the same audio stereo channels at the same time.

(f) Track 6 - For an even clearer representation I have separated the sources in the stereo field as follows:
First you hear the "*Aparthenonia*" drum, loop on the left speaker for 4 bars; then you hear the digitally manipulated sample of "*Bust Dat Groove*" drum loop on the right speaker; then you hear both play at same time with the "*Aparthenonia*" drum loop on the left speaker and the digitally manipulated sample of "*Bust Dat Groove*" drum loop on right speaker; Again "flanging" occurs. The sources sound identical.



(g) Track 7 - First you hear the *"Aparthenonia"* drum loop on left speaker; then you hear the original (unedited version) *"Bust Dat Groove"* drum loop on right speaker; Second, both play at same time with *"Aparthenonia"* drum loop on left speaker and original (unedited version) *"Bust Dat Groove"* drum loop on right speaker; The purpose of this is to show that even with *"Bust Dat Groove"* in it's original form (unedited) the "feel" and "sound" of *"Aparthenonia"* are substantially similar to that of *"Bust Dat Groove."*

(h) Track 8 - original (unedited version) *"Bust Dat Groove"* drum loop on right speaker and *"Celebrex"* on left speaker (the *Celebrex Commercial* was intentionally lowered in order to hear the *"Bust Dat Groove"* coming from the right speaker).

This exercise shows how *"Aparthenonia"* and *"Celebrex"* were created from sampling and manipulating the original *"Bust Dat Groove"* record. Because the music producer sampled from the original *"Bust Dat Groove"* record, *"Aparthenonia"* and *"Celebrex"* have the same rhythm, sound, melody and over all feel of *"Bust Dat Groove."*

Conclusion

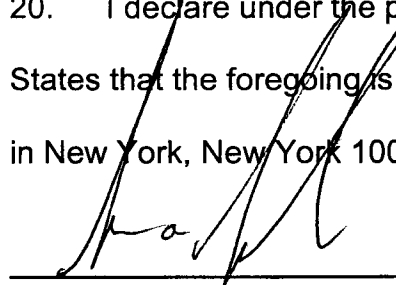
18. Attached as Exhibits C is a compact disc containing a pdf.format copy of the new waveform analysis. Attached as Exhibit D is a compact disc of an unedited copy of the actual (Mac or pc) Pro Tools session created for my analysis and contains the audio depicted in my waveforms (Exhibit C).

19. Based my knowledge of music and sound engineering, and my experience in listening to and creating digitally sampled songs, I have concluded that

"Aparthenonia" and *"Celebrex"* are almost identical, have the same rhythm, melody and over-all feel of the edited version of *"Bust Dat Groove"*.

"Aparthenonia" and *"Celebrex"* were created by sampling *"Bust Dat Groove."* If it is necessary, I can provide a live demonstration, in court, of how *"Bust Dat Groove"* was sampled and manipulated to create *"Aparthenonia"* and *"Celebrex."*

20. I declare under the penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct. Executed this 20th day of July 2005 in New York, New York 10024.



Ivan A. Rodriguez



EXHIBIT B

