

*The PAIGE Notes* ★  
*Missouri High School Mock Trial Competition*

*2017-2018 Edition*

Reptile Records, LLC

(Π)

v.

Changez, Inc.,  
d/b/a Spiders in Cars

(Δ)

*In the event of a conflict, BAMSL's official Case Packet, Mock Trial Local Rules, Rules of Evidence, and Case Questions & Clarifications are controlling.*

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*Prepared by Judge David Lee Vincent, III in Memory of  
Ms. Paige Victoria Hicks (1989-2010), a former Marquette High School Mock Trial Team Member*

## *The PAIGE Notes*

Greetings All:

These are *The Paige Notes*, formerly known as the Evidentiary INs and OUTs, which are prepared to assist Missouri high school students across the State with understanding the Legal Rules of Evidence for use in the BAMSL mock trial competition, and includes witnesses' statements. Color (Δ) coded (Π) legal objections and responses are included in the witnesses' statements to show or suggest how an attorney may attempt to keep the statements or evidence that you want 'IN' (let the jury hear them) or statements or evidence that you want "OUT" (exclude from the jury's hearing). However, your strategy may change to where you may want some of the statements or evidence suggested to be excluded (OUT) to be included (IN), and vice versa.

These *Paige Notes* are not exhaustive but contain illustrations on basic strategies and objections. Sometimes you may want to make an objection to throw off your opponent or your opponent's witness. **However, pleeeeeease remember, just because you can object, you don't always have to. If the opposing side has a good response to your objection, the more points that they will build up by responding to your objection.**

Please note that these *Paige Notes* do not include the line numbers shown in the case manual, which are important for impeachment (cross examining witness on an inconsistent statement), etc. You will need your case manual materials at trial. If your copy of the *Paige Notes* are printed in black and white, you may want to use a highlighter to highlight the suggestions or objections.

**Nonetheless!** These *Paige Notes* are no substitute for preparation. They only assist the students in understanding the case and in developing litigation strategies. It is the attorneys' and witnesses' responsibilities to thoroughly read the case and understand their respective parts or roles.

In the event of a conflict, BAMSL's official Case Packet, Mock Trial Local Rules, Rules of Evidence, and Case Questions & Clarifications are controlling.

Good luck in the competition! Judge Vinny  
*a friend of the Fifth Beatle.*

## *Basic Competition Strategies*

**Opening Statements:** Requirements (not in any specific order)

Introduction of Attorneys & Witnesses

Burden of Proof (Preponderance of the Evidence (more likely true than not true))

Law

Facts *anticipated* at trial

Theme

**Note:** Your statement is limited to the evidence that you anticipate at trial. You may not treat the opening statement as a closing argument, except for perhaps the ‘theme.’

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**Closing arguments** contain burdens, law, theme, and facts *shown* at trial. (more of an argument). Team with burden of proof (for example, prosecution) uses jury instruction to show how they proved case.

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### **Basic Objections:**

**Relevance;** Prejudicial effect outweighs probative value (even if relevant);

**Leading questions;** Narrative questions and answers (form); Improper character evidence; Beyond the Scope of direct/cross examination; **Hearsay;**

**Speculation;** Improper opinion; Lack of personal knowledge; Badgering; Asked & answered (repetitive); **Lack of foundation;** Objection to form of Questions (compound, confusing, etc); **“backdoor” objections** (see below) and Improper impeachment.

\*Note: As a litigation strategy, the attorneys should especially consider using **“backdoor” objections**, which are “thoroughly stated” objections that are immediately withdrawn upon certain conditions. For example, “Your Honor, I object to the hearsay. Opposing counsel is attempting to elicit an out of court statement offered for the truth of the matter asserted. However, I will withdraw my objection if the testimony is not offered for the truth, but instead offered to show the subsequent investigation of the witness or for foundation for expert testimony.” **“Backdoor” objections** may show evaluators a thorough understanding of the law, which may result in higher points for your team.

**Remember: Just because you can object, you don’t always have to. If the opposing side has a good response, the more points that they will build up.**

### **Other weapons:**

Approach the Bench; **Offer of Proof** - highly illegal (may be prohibited under mock trial rules) but you may have to use this tool in this competition involving the expert witnesses in this case; **Move to Strike, witness is nonresponsive;** Direct the Witness; Cross-examination: Is that a Yes or No? “I withdraw the question”. **The acting attorney© [this is a complicated scheme where the witness is actually controlling the cross examination by opposing counsel]. And “like I told” responses.**

### **Statement of Facts:**

All witnesses are bound by the statement of facts. **These facts cannot be changed!**, but you may use “fair extrapolations.”

**Reptile Records, LLC (□)**  
VS  
**Changez, Inc., d/b/a Spiders in Cars (Δ)**

**The Basic Facts:**

In 2012, David “Jazz Hands” Bowe wrote and publicly performed the song “A Song for Sam,” which was copyrighted. Bowe had a contract with Plaintiff (□) Reptile Records for profits made from the copyrighted song, but Bowe died in 2015. Also, in 2014, Defendant (Δ) Spiders in Cars recorded the hit song “Young Americans.” Bowe’s friend played the song “Young Americans” during Bowe’s funeral, which Bowe’s parent, Sam Haggard, recognized as being similar to the song “A Song for Sam.”

**The Civil Complaint and Answer:**

□ Reptile Records has alleged in its claims against Δ Spiders in Cars that the Δ violated the □’s exclusive copyright in the song “A Song for Sam” because Δ’s song “Young Americans” is substantially similar to □’s song “A Song for Sam.” As an affirmative defense, Δ Spiders in Cars alleges that □ Reptile Records does not have a case because “Young Americans” was independently created by Δ.

**BURDENS**

*Preponderance of the Evidence is defined as  
“More likely true than not true” (Instruction number 6)*

□ Reptile Records

□ Reptile Records must prove the following by a preponderance of the evidence:

**1<sup>st</sup>:** □ Reptile Records was **owner of valid copyright** for “A Song for Sam,” and

**2<sup>nd</sup>:** Δ Spiders in Cars had access to “A Song for Sam” before creation of “Young Americans,” and

**3<sup>rd</sup>:** The songs are **substantially similar**.

(“**Owner of a valid copyright**” means the work is original and not copied from other works and was written by David Bowe. “**Substantially similar**” means the similarities are so striking so as to preclude the possibility both works were arrived at independently).

**Δ Spiders in Cars**

Δ Spiders in Cars must prove by a preponderance of the evidence its affirmative defense that “Young Americans” was independently created by Δ. *See also instruction no. 8.*

## Witnesses for [] Reptile Records:

**Pat Smith** - record executive at Reptile Records

**Ricky Springfield** - Fan of Spiders in Cars

**Sam Haggar** - parent of Dave Bowe

## Witnesses for Δ Spiders in Cars:

**Romney Bingensteimer** - DJ of Big City Radio Station K-Hz 99.3 & moonlight record producer

**Jamie Kelly** - drummer for Spiders in Cars

**Dr. Ivan(a)/A. Feelgood**- musicologist

## Exhibits

- (1). Internal memo from Senior Executive with Capital City Records
- (2). Album cover for “Summer of Sam”
- (3). InstaSnap Snipes between \$ndrakemd and \$iwoulddoanythingfordrums
- (4). Set List from David Bowe show
- (5). Original handwritten draft of “Young Americans”
- (6). Chord Chart for “A Song for Sam”
- (7). Chord Chart for "Seguidilla"
- (8). Lyrics for "Young Americans"
- (9). Recording of “Seguidilla” (*Downloadable from BAMSL*)
- (10). Recording of “A Song for Sam” (*Downloadable from BAMSL*)
- (11). Recording of “Young Americans” (*Downloadable from BAMSL*)

## **“Some” Stipulations and other agreements:**

### Admissions in Pleadings

The parties agree to the following in their pleadings (**Δ Spiders in Cars**' admissions in its answer to **Π Reptile Records**' allegations in its complaint):

¶ 3: David Bowe first recorded “A Song for Sam” on September 1, 2012 and performed it publicly numerous times.

¶ 5: David Bowe died January 2, 2015.

¶ 8: On or about May 5, 2014, Spiders in Cars recorded “Young Americans.”

### Case Stipulations

Issue in case is whether **Δ Spiders in Cars** is liable to **Π Reptile Records**'. Damages are not an issue, **but for points you should advise the judge about this stipulation.**

Neither party may present any claim or defense not raised in the pleadings.

All Exhibits are to be considered authentic copies of the documents. **But no stipulations for** origin and author of the documents and signatures thereon. You may still make other objections to admission of exhibits into evidence.

May play portions of any song with any device, but counts against total competition time.

All depositions are presumed to be signed and read by the deponent.

The gender identification of Ziggy Armus shall be the same as the gender identification of Jamie Kelly.

Cannot ask witness to sing song (pretrial order).

Lay witnesses are not experts in performing music but may give their own opinion whether pieces of music are similar or dissimilar (pretrial order).

## The Citations of the Evidence Rules

**Rule 403:** Relevant, but **Probative value** outweighed by prejudicial effect  
Confusing, misleading, cumulative, waste of time.

**Rule 404: Character evidence** Not Admissible to prove conduct. But see exceptions.

(a)

(1) Character of defendant (offered by defendant or by prosecution to rebut same)

(2) Character (pertinent) of victim offered by defendant or prosecution to rebut same or to show victim's peacefulness in murder case to rebut defense evidence that victim was aggressor.

(b)

Other crimes (bad acts) okay if shows person's action conforms with character; also okay to show **motive, opportunity, intent, plan, knowledge, absence of mistake.**

**Rule 405(a): Proving character**

Witness may give opinion (Did you survey people that know defendant? Did you form opinion as to character (note: on cross examination, examiner may go into specific conduct).

**Rule 406: Habit of person and Routine practice of Organization**

[shows conduct on particular occasion was in conformity]

**Rule 501: Privileges**

Communications between attorney and client (defendant)

**Rule 602: Witness**, unless an expert, must have **personal knowledge**

[lack of foundation is the objection]

**Rule 608: Evidence of Character and Conduct of Witness**

Okay to attack credibility with evidence of opinion or reputation if: evidence refers to (un)truthfulness and evidence of truthfulness only after witness' credibility attacked. Specific instances of conduct okay if it affects (un)truthfulness, if judge allows it (discretionary).

## Citations Continued

- Rule 609** (a): **Impeachment by Conviction** (witnesses with prior convictions)  
May cross-exam witness or elicit by public record  
Conviction must be punishable > 1 year (and more probative than prejudicial), unless involves dishonesty (like stealing)
- (b) conviction not admissible if > 10 years old (unless judge determines value outweighs prejudicial effect.
- (d) juvenile adjudications generally not admissible

### **Rule 610: Religious Beliefs – Opinions**

Not relevant to show witness' credibility is impaired or enhanced.

- Rule 611** (b): **Scope of Cross-exam**, not limited to scope of direct exam, but may ask about any relevant facts in witness' statement.

### **Rule 612: Writing used to refresh memory**

### **Rule 613: Examining Witness on prior statement**

Need not show witness statement nor contents disclosed at time of examination.

### **Rule 701: Opinion by Lay Witness** (non-expert)

Okay if based on perception, even if opinion or inference.

### **Rule 702: Expert Opinion**, Specialized knowledge that will assist jury.

Based on experience, knowledge, skill, training, or education.

### **Rule 703: Expert Opinion, basis**

Facts perceived or made known to expert.

If not admissible, facts reasonably relied upon by experts in Field

**Rule 704:** Expert may testify on **ultimate issue**, not including opinion as to guilt or innocence.

## Citations Continued

### Rule 801: Hearsay

Out of court statement by non-witness (oral or written) offered for the truth of matter asserted.

Examples:     What did that person say to you?  
                  What did you learn? [based on hearsay]  
                  What did your investigation disclose?  
                  What is your understanding?

- (d) Not hearsay
  - (1) prior statement of witness
  - (2) Admission of party opponent (including peo with authority or agents)

### Rule 803: Hearsay Exceptions (Doesn't matter if non-witness is available for court)

- (1) **Present sense impression**  
Statement of explaining event/cond while perceiving same
- (2) **Excited Utterance**  
Statement regarding startling event/cond while under stress of excitement
- (3) **State of Mind**, Emotion, Sensation, Physical Condition (“then existing”)
- (4) Statements regarding medical diagnosis or treatment
- (5) Recorded Recollection
- (6) Records of Regularly Conducted Activity (business)
- (7) **Learned treatises** – relied on by experts and must be established as a reliable authority.
- (9) Judgment of prior conviction
- (21) Reputation as to character of witness.

### Rule 804: Hearsay Exceptions (non-witness is unavailable)

- (b)(2) statement *under belief of impending death*.
- (b)(3) Statement (declaration) against interest
- (b)(4) Personal of family history, etc., of non-witness

### Rule 805: Hearsay within Hearsay okay if exceptions apply.

# The Plaintiff's Witnesses

## Statement of Sam Haggar

¶1. I've had a hard life. I was married at age 18 to my high school sweetheart, Tommy/Tomi Bowe. 9 months later, my son David was born. We kept Tommy/Tomi's last name for Davey. I think the reason is obvious. We planned to make a life together and for a time I thought we would. We had each other, and that was a lot. I thought my life was complete. But what did I know? I was only 19. (Π: IN, relevant - Rule 403; foundation for first hand knowledge of child - rule 602; Δ: OUT, irrelevant; self serving)

¶2. I took a job as a server to help fulfill my spouse's dream of becoming a professional musician. Despite the long hours, I made decent money, at least enough to rent a small apartment and put food on the table. (Π: IN, relevant - Rule 403; foundation for first hand knowledge of child - rule 602; Δ: OUT, irrelevant; self serving) Tommy/Tomi worked in the shipping yards, but first the union went on strike, then the economy went south. While it was hard at first, it freed Tommy/Tomi to get back into music. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); Δ: OUT, irrelevant; self serving; hearsay - rule 801)

¶3. My spouse was great with Davey. Getting work as a musician is hard, especially when you choose the glockenspiel as your instrument. We had the good sense

to start Davey on the piano, an old Casio they found left on the curb by another family.

And almost before he could talk, Davey could play simple chords. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); Δ: OUT, irrelevant; self serving; improper opinion; lack of foundation.)

¶4. Soon the house was filled with music. I'm no slouch, I can play a bit on the guitar, but nothing like the two of them. I have tried to sing, but unfortunately I can not hold a melody myself. And frankly I have something of a tin ear. That's why I loved my Tommy's/Tomi's music so much, because it's a talent that I don't really have. (Π: IN, relevant - Rule 403; foundation for first hand knowledge of child's music - rule 602; perception - Rule 701 (personal opinion okay); Δ: OUT, irrelevant; lack of foundation; testimony based on hearsay - rule 801)

¶5. But one day, my life changed. I thought of it as the day the music died. Davey was thirteen. I came home after a double shift and found Davey home alone at his piano. I asked him where Tommy/Tomi was and Davey pointed at the kitchen table. Davey had come home from school and found the "Dear John/Jane" letter left by my spouse. (Π: IN, relevant - Rule 403; foundation for first hand knowledge - rule 602; witness' perception - Rule 701; witness' state of mind - Rule 803; Δ: OUT, irrelevant; self serving; prejudicial effect outweighs probative value Rule 403; testimony based on hearsay - rule 801)

¶6. Apparently, my spouse had lost his/her creative spark a number of years ago, but had reclaimed it by playing with a new xylophone player. (Π: IN, relevant - Rule 403; perception - Rule 701 (personal opinion okay), foundation for Dave's musical ability; Δ: OUT, irrelevant; self serving; speculation; testimony based on hearsay - rule 801) Their band was called Can You Hear Me Major Tom? which featured duets between Tommy's/Tomi's glockenspiel and the xylophone. They planned to be on the road quite a bit on tour, and Tommy/Tomi had decided it was easier just to break it off now, rather than spend the next several years lying to me about the nature of Tommy's/Tomi's relationship with the xylophone player. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); foundation for Dave's musical ability; Δ: OUT, irrelevant; lack of foundation; speculation; hearsay - rule 801) It was so abrupt that I couldn't find words. I honestly had not known there was a problem. I hugged Davey good night and went to bed at 4 pm, leaving Davey to his own devices. (Π: IN, relevant - Rule 403; perception - Rule 701 (personal opinion okay); witness' state of mind - Rule 803; foundation for Dave's musical ability; Δ: OUT, irrelevant; self serving;)

¶7. The next morning, I awoke to Davey playing on the old glockenspiel Tommy/Tomi had left behind. I wasn't in the mood. I lost it and I screamed at Davey to stop, that he should never play the glockenspiel ever again, and threw the darn thing out the window. Once my rage was spent, I sat on the ground and began to cry. Davey

calmly weathered the storm, letting out only a single tear as I destroyed the glockenspiel.

He put his arms around me and swore he would never touch a glockenspiel again. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); witness' state of mind - Rule 803; foundation for Dave's musical ability/creativity; Δ: OUT, irrelevant; self serving; speculation as to Dave's reaction)

¶8. He then went over to the piano and began to pick out the same notes he had been playing before I broke his instrument. The song came together over that morning and by the evening, Davey had written the whole song, even the controversial bridge section. I know Davey had never listened to opera before. (Π: IN, relevant - Rule 403; foundation for first hand knowledge of song - rule 602; perception - Rule 701 (personal opinion okay); Δ: OUT, irrelevant; lack of foundation; speculation;) It's not something Tommy/Tomi or I would listen to, and it's unlikely his music teachers at school would have played it. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); Δ: OUT, irrelevant; lack of foundation; speculation as to what Tommy/Tomi would listen to and what is unlikely about teachers;) Davey didn't do all that well in music class at school because his playing was so far beyond his teachers' abilities, I don't think he ever respected them enough to try to pay attention in class. At least that's what I heard at every parent teacher conference. (Π: IN, relevant - Rule 403;

first hand knowledge of parent about child's education - rule 602; perception  
- Rule 701 (personal opinion okay); Δ: OUT, irrelevant; slack of foundation;  
speculation; hearsay - rule 801)

¶9. The song started as just a few basic chords, but over the course of the day, it turned into a beautiful melody; one I'd never heard before. As the sun set, Davey asked me over the piano, and said, "This one's for you, Mom/Dad," and played me my song. That boy was so sweet. We sat together on the kitchen chair that served as a piano bench for his Casio and cried for a long time when he got to the end. I recognize Ex. F as the sheet music he wrote that day. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); Dave's statements not hearsay, not offered for truth; Δ: OUT, irrelevant; lack of foundation; speculation; improper expert opinion; testimony based on hearsay - rule 801)

¶10. Time went on, and Davey's abilities grew. Turns out jazz was his calling. The minister at our church asked Davey to play with the youth choir. I don't know what the minister was expecting, but he got more than he bargained for. Davey had a great sense of humor, though only a musician would appreciate it. He often threw in bits of other songs in quick improvisations to make some point about the main piece he was playing. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), see also stipulations; Δ: OUT, irrelevant; improper opinion; hearsay - rule 801) Something must have gotten under Davey's skin, because right in the middle of the third verse he threw in the melody

from “Beat on the Brat” by The Ramones when one of the other kids hit a sour note, then ended the piece by playing a seventh chord instead of resolving the song. The congregation and choir were confused because they thought the song would go on, but they had run out of lyrics. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), see also stipulations;

Δ: OUT, irrelevant; lack of foundation; speculation; improper opinions;)

¶11. Pat Smith was in the congregation that day and it would change Davey’s life. Pat is a record executive with Reptile Records. Pat came up to me after the service and handed me a business card. Pat had apparently understood the two jokes and was impressed with Davey’s playing and offered to become his agent. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), not hearsay - not offered for truth; Δ: OUT, irrelevant; lack of foundation; hearsay - rule 801)

¶12. And Pat was good. Almost immediately, Pat got Davey into a recording studio and got Davey lined up with other, older musicians. Unfortunately, Davey just wanted to play jazz. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; lack of foundation; hearsay - rule 801) He once told me it was the only music that allowed him to draw from any other genre while performing. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; not hearsay - statement not offered for truth; Δ: OUT, irrelevant; hearsay - rule 801) I had never made all that much

money. I knew Davey wasn't likely to make all that much money by sticking to jazz in where its popularity is fading. But I was happy knowing he could pursue his dream of being a professional musician. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; lack of foundation; speculation as to what Dave's dream was)

¶13. Not to say he didn't have some success. In fact, that song he played for me when he was 13 ended up as the title track on his second album, "A Song for Sam." (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; foundation for knowledge and perception of song; Δ: OUT, irrelevant; lack of foundation;) I can still remember the excitement and expectation in his voice when he called me to play the recording of it over the phone for me. It wasn't his biggest or best known song because it didn't end up on an album until after his death, but it meant a lot to me because of when he wrote it and why he wrote it. (Π: IN, relevant - Rule 403; foundation for first hand knowledge of song - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; lack of foundation; speculation;) The crowds at his shows ended up growing. In fact, it got the point where other types of acts asked to open for him. He thought it was hilarious when the jazz audience reacted when they discovered the opening act was a crunkmeister from New Orleans. Or that Swedish folk metal band.... Almost like Dylan walking on for his second set with an electric guitar. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception -

Rule 701 (personal opinion okay); Δ: OUT, irrelevant; lack of foundation; speculation; improper opinion;)

¶14. Davey loved every minute of it. And in every set I was able to watch (which was not often because of the hours I worked and not being able to afford to travel), he played “A Song for Sam” as an encore for me. I don’t honestly know if he played it every show, or just when I was there. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; lack of foundation; speculation) And the forty or fifty people at the show would cheer. For my song. For me. And never once would he play the song on the glockenspiel out of respect for me. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; lack of foundation; speculation on why crowd would cheer;)

¶15. In 2014, I got a phone call from Pat Smith. Pat gave me the terrible news Davey had been diagnosed with cancer. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; Davey's death is stipulated fact; witness Pat Smith is subject to cross examination; not hearsay - not mention what Smith specifically stated; Δ: OUT, irrelevant; hearsay - rule 801) He was only 26.

The cancer took Davey from me after only a few months. He passed early in 2015. I had been wrong before. *That* was the day the music died. I was distraught, but Pat was great. Pat was able to arrange the funeral for the church where Pat had first discovered Davey and sent out invitations to several of the bands and fans who had supported

Davey's short career. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; lack of foundation; speculation; testimony based on hearsay - rule 801)

¶16. One of his friends, the lead guitarist of the Swedish folk metal band I mentioned, asked to play a song as a eulogy. As she started to play, I thought how nice it was that she would play "A Song for Sam." But she went on. It wasn't the same piece. I mean it was, but it wasn't. There were parts that didn't sound at all like "A Song for Sam." That distinctive bridge was missing, and it wasn't in 3/4 time, but in 4/4 time. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception on similarities of song - Rule 701 (personal opinion okay), see also stipulations; Δ: OUT, irrelevant; lack of foundation;; improper expert opinion; testimony based on hearsay - rule 801) And there were words. Others at the funeral started to sing along with the chorus. Clearly, they had all heard whatever the guitarist was playing before. I went on stage and stopped the song after just one chorus and demanded to know just what was going on. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; lack of foundation;) She stammered out it was a song from Spiders in Cars that reminded her of Davey's music. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), exception to hearsay - statement not offered for truth but to show subsequent (conduct)

investigation by Haggar that leads to lawsuit;  $\Delta$ : OUT, irrelevant; hearsay - rule 801)

¶17. I could not believe they had been so close with Davey and hear him play “A Song for Sam” so many times, but did not recognize that these pop “musicians” had ripped off Davey’s work and turned it into a Top 40 hit! (II: IN, relevant - Rule 403; perception - Rule 701 (personal opinion okay), see also stipulations as to similarities of songs;  $\Delta$ : OUT, irrelevant; prejudicial effect outweighs probative value Rule 403; conclusory as to “ripped off”; improper opinion; speculation on what others thought or recognized.)

¶18. I could not control myself. I took to the lectern and proceeded to memorialize the life of my only child with a 30 minute diatribe against no-talent musicians who know only a few chords ripping off the work of my child and trying to pretend that it was their own. (II: IN, relevant - Rule 403; first hand knowledge - rule 602; witness' state of mind - Rule 803;  $\Delta$ : OUT, irrelevant; self serving; prejudicial effect outweighs probative value Rule 403; lack of foundation; speculation; conclusory; improper opinion; improper character evidence - Rule 404; Haggar's out of court statements are hearsay; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611 - claiming rip off before any investigation;) I’ve never forgiven myself for that eulogy. It was unfair, and not at all what I had meant to say about Davey’s short life. (II: IN, relevant - Rule

403; first hand knowledge - rule 602; witness' state of mind - Rule 803; vs. OUT, highly prejudicial -Rule 403; irrelevant; Δ: OUT, irrelevant; self serving; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; statement by party opponent -Rule 801(d)(2); state of mind - Rule 803)

¶19. What I forgot in my moment of anger was how Davey approached music. Music is collaboration. Once the artist has put their work out into the world, it no longer belongs to them. There was no such thing as a final performance of any song. The performance itself was the important part of any piece. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), expert opinion or knowledge about musicians - Rule 702 (based on knowledge, experience, education, etc.) Δ: OUT, irrelevant; self serving; lack of foundation; improper opinion;) Any attempt to use his work in another song isn't a violation of some code, some law of art, but a natural process. (Π: IN, relevant - Rule 403; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; self serving; conclusory; improper opinion;) Davey would have wanted me to embrace someone else using his song in their own song, and for him to live on in every future piece based on that melody. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Davey's state of mind Rule 803; Δ: OUT, irrelevant; lack of foundation; speculation;)

¶20. I don't necessarily ascribe to everything Davey believed in, but he is not around anymore to speak for himself. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; Δ: OUT, irrelevant; self serving; prejudicial effect outweighs probative value Rule 403;)

¶21. I was approached by Pat Smith in February or March 2016, about two months after the funeral. Pat apologized for not reaching out sooner but Reptile Records, LLC needed to finalize some paperwork with Davey's estate. I had opened the Estate just a few days prior on the advice of an attorney friend. Pat sent over an Assignment of Rights. Essentially, Reptile wanted me to turn over exclusive copyright to all of Davey's material in exchange for \$100,000. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; hearsay; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; statement by party opponent -Rule 801(d)(2); state of mind - Rule 803;)

¶22. I was incensed. First of all, I'm no idiot. Davey's catalog is worth a lot more than that over the next 70 years that the copyright lasts. But second, it seemed to me Davey never would have wanted profit to be the driving force behind any use of his music. By turning over the rights to all of the music, I would be allowing Reptile to use Davey's music to sell cars or other corporate products. I refused. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); witness' state of mind - Rule 803; Δ: OUT, irrelevant; lack of

foundation; speculation on what Davey would have wanted and what Reptile would do; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; statement by party opponent -Rule 801(d)(2); state of mind - Rule 803;)

¶23. However, Pat explained Reptile already owned a significant interest in Davey's music from the contract Davey signed within his lifetime. Pat offered to give that interest back to the estate in exchange for all interests in "A Song for Sam." And \$100,000. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; not inadmissible hearsay by Pat - witness is subject to cross examination; Δ: OUT, irrelevant; lack of foundation; hearsay - rule 801 vs. IN, impeachment on witness' and Pat Smith's biases - wide latitude for cross examination, rule 611; statement by party opponent -Rule 801(d)(2);)

¶24. That was the hardest choice I ever had to make. But I needed the money. Jazz royalties don't pay very much. I really hope I never have to hear the song being used to sell an F-150. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); witness' state of mind - Rule 803; vs. OUT, personal information is irrelevant; improper impeachment; irrelevant; Δ: OUT, irrelevant; self serving; vs. IN, impeachment on witness' bias (greed) - wide latitude for cross examination, rule 611; statement by party opponent -Rule 801(d)(2); state of mind - Rule 803). *Signed: Sam Haggard*

## Statement of Pat Smith

**Strategy Note:** The only issue in this case is whether the defendant is liable to plaintiff. The damages issue (lost profits, attorneys' fees, etc) is not to be considered by the jury, but may not necessarily make this issue totally irrelevant. A few judges may exclude all evidence of damages as irrelevant (for example, how much did the song sell after the lawsuit was filed) while mostly others may allow it into evidence because it may affect the interests, motives, or biases of witnesses. Also, if any testimony or evidence in plaintiff's case is about Davey's record sales, this may "open the door" to cross examination of issues regarding the record sales, including the issue of damages.

¶1. I never wanted the fame for myself. My artists are more important than the money. I mean, sure, I have to keep the doors open, but when you represent jazz artists, you have to truly love the music. (Π: IN, relevant - Rule 403; foundation for testimony in music business - rule 602; witness' state of mind - Rule 803; Δ: OUT, irrelevant; self serving)

¶2. I'm from Big City originally, but I left for law school at New York University, and graduated in 2009. I worked in a large corporate firm for a few years and was introduced to Reptile Records as a client. I fell in love with the music recording world, and took a rather drastic pay cut to change jobs and join Reptile as an executive. (Π: IN, relevant - Rule 403; foundation for first hand knowledge - rule 602; Δ: OUT, irrelevant;)

¶3. Reptile Records started in the 1970's at a time when the music industry was still fairly simple. Back then, artists had to come to you in order to find a way to distribute their songs. No one could record at home in a way that produced anything of quality. And if you did record at home, there was no easy way to mass produce 8 track tapes to sell at shows. (Π: IN, relevant - Rule 403; first hand knowledge - rule

602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; lack of foundation; speculation; testimony based on hearsay - rule 801)

¶4. Back then, record executives got to shape American tastes, to create new artists, heck, to make the hits themselves. And the industry made money! Even smaller labels like Reptile could get artists to give over 90% of the mechanicals on their recordings in exchange for paying for the studio, making the records, distributing the songs, and getting DJ's to play them. Artists got to keep the copyright to the songs they wrote, and made money off ticket sales, and off airplay. Everyone made money. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; lack of foundation; speculation; testimony based on hearsay - rule 801)

¶5. And then, the internet. Within just a few short years, everything had changed. By the time I went to law school, digital technology had become so advanced and so inexpensive that anyone with basic computer skills could record entire albums in a one bedroom apartment. And get pretty decent production quality. And distribute it themselves on any one of a hundred websites. If someone gets real ambitious, they can even distribute it on a streaming service and make a few dollars. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), expert opinion on business climate- Rule 702 (based on knowledge, experience, education, etc.) not hearsay; facts perceived or made known to expert or, if inadmissible, facts reasonably relied upon by experts

Rule 703; Δ: OUT, irrelevant; lack of foundation; speculation; testimony based on hearsay - rule 801)

¶6. That's what music has become, just another arm of the ever growing gig economy. The taste makers have been consolidated into just three massive multi-national corporations which seek out and control the very few artists with any real talent. But they only take those artists if they feel the market will buy them, instead of the way it used to be, back when Record Labels themselves controlled the market and made the consumers of music buy what was truly good. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), expert opinion in business climate - Rule 702 (based on knowledge, experience, education, etc.) not hearsay; facts perceived or made known to expert or, if inadmissible, facts reasonably relied upon by experts Rule 703; Δ: OUT, irrelevant; prejudicial effect outweighs probative value Rule 403; lack of foundation; speculation; testimony based on hearsay - rule 801)

¶7. Needless to say, Reptile Records was struggling as a member of the pre-internet model. The internet allowed America so many opinions on what qualified as "music" that it forced the big mega labels to start selling to the least common denominator in order to compete with all the other tripe on the internet. If you want to record really good music, you probably can not get signed with one of the big three labels, or you have to modify your sound so much that you no longer sound like you play original music. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602;

perception - Rule 701 (personal opinion okay), expert opinion on business climate - Rule 702 (based on knowledge, experience, education, etc.) not hearsay; facts perceived or made known to expert or, if inadmissible, facts reasonably relied upon by experts Rule 703;  $\Delta$ : OUT, irrelevant; self serving; lack of foundation; speculation; testimony based on hearsay - rule 801)

¶8. When I came on board at Reptile, I was given the chance to head up a work group focused on signing new talent. There were a few left over artists who still made money for the company, but by and large it was just barely surviving on a few bands it signed in the 80's whose music was being played at nostalgia nights around the country. ( $\Pi$ : IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); routine practice of organization Rule 406;  $\Delta$ : OUT, irrelevant; lack of foundation; speculation)

¶9. I was able to get an influx of capital using my former law firm contacts and set out to find new talent. Sure, I listened to several artists on-line, but many of them were unwilling to record at our somewhat outdated analog studio, especially when I explained we could not give them an advance, and explained the studio's old publishing arrangement. ( $\Pi$ : IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), routine practice of organization Rule 406;  $\Delta$ : OUT, irrelevant; lack of foundation; speculation; testimony based on hearsay - rule 801)

¶10. 90% of mechanicals? Even as I tried to convince these fellow millennials to sign with Reptile, I realized how ludicrous that is in today's market. 90% of mechanicals means the label keeps 90% of the profit on any physical copy of the recording. So CD's, records, cassette tapes. The only problem is that smaller bands are not going to sell that many physical copies. Beyoncé, sure, but not someone who is going to sell the majority of any physical copies at his or her shows; you know, like jazz musicians. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), routine practice of organization Rule 406; Δ: OUT, irrelevant; s lack of foundation; speculation; testimony based on hearsay - rule 801) While that arrangement might have made the musicians more money as they would keep most of their publishing rights and streaming rights, they thought I was clueless about modern day digital distribution. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); Δ: OUT, irrelevant; self serving; lack of foundation; speculation as to what others thought)

¶11. So we had to change our model to fit the times. I saw Davey Bowe as one of those opportunities. Such a nice kid, but it doesn't hurt me any if you sign a contract without a lawyer to review it first. Reptile became his label and his publisher in exchange for 50% of mechanicals and 50% of all other copyright royalties. So we would keep 50% of all net album sales, 50% of what he received from ASCAP when his music was played out or covered, 50% of streaming, etc. (Π: IN, relevant - Rule 403; first

hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); Δ: OUT, irrelevant; lack of foundation; improper expert opinion; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; relevant in showing taking advantage of a "kid" without legal representation in signing contract;) We never did get around to getting his music onto a streaming site until after this lawsuit was filed. Frankly, I just did not think it would sell much, and you hate to be the publisher of one of those songs Spotify puts out on its Never Been Played playlist. (Π: IN, relevant - Rule 403; perception - Rule 701 (personal opinion okay), vs. OUT, irrelevant on anything after lawsuit filed; improper impeachment; speculation; highly prejudicial -Rule 403; Δ: OUT, irrelevant; lack of foundation; speculation; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; statement by party opponent through its agent -Rule 801(d)(2); state of mind - Rule 803)

¶12. I don't do the recording myself. We have a sound engineer for that. I know Davey never liked to spend much time in the studio. Without a crowd, it was too much like work. So whenever possible he would record his part in just one take. "A Song for Sam" was like that. One take. Not enough for a "Behind the Scenes" documentary. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; lack of foundation; speculation; testimony based on hearsay - rule 801) Which is too bad. Now that he's dead, there is whole lot more interest in his music. I even have a deal

in the works to use “A Song for Sam” in a car commercial. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay; vs OUT, damages are irrelevant as to interests in music.), Δ: OUT, irrelevant; lack of foundation; speculation; testimony based on hearsay - rule 801; prejudicial effect outweighs probative value regarding Davey's death and interest in his music vs. IN, relevant as to interests in music for 'mitigation' of damages.) I know Sam Haggard does not want that, but he/she is out of his/her mind! Commercials and TV shows which might get syndicated bring in the most money for niche artists because it brings in a little money each time the song is played. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay; Δ: OUT, irrelevant; lack of foundation; speculation; testimony based on hearsay - rule 801) It's a moot point anyway. I bought out Sam's interest in “A Song for Sam” and I am only defending the label's interest in the song. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; self serving; conclusory about defending label)

¶13. It's true that the publicity of this trial has increased sales of David's music. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), vs. OUT, damages are irrelevant; speculation; Δ: OUT, irrelevant; lack of foundation; speculation, vs. IN,

impeachment on witness' bias - wide latitude for cross examination, relevant on mitigation of damages) But since you still can't get it over streaming services, people have to buy a physical copy. We released the album with "A Song for Sam", entitled "Summer of Sam" shortly after David's death. It was actually the first album we recorded with David but we did not release it right away. He had wanted to return to the songs later so he could get them just right, just not right then. I told you about his attitude in the studio. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), hearsay exception - Davey's state of mind Rule 803; Δ: OUT, irrelevant; lack of foundation; hearsay - rule 801) We went ahead and sent them to the Library of Congress to perfect the copyright just in case. It's a good thing we did. Or we wouldn't have been able to file this suit. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; lack of foundation; conclusory as to ability to file lawsuit; improper bolstering of testimony)

¶14. We released the album just after his death, and it did as well as most jazz albums, but after we filed the lawsuit to force Spiders in Cars to admit they stole "Young Americans" from David, the first run of "Summer of Sam" sold out in a number of days. We've had to make two additional runs to meet demand. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; prejudicial effect outweighs probative value Rule

403; conclusory as to force Spiders to admit to stealing; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611 as to motive for greed in selling more records)

¶15. If we win, Reptile Records is entitled to royalties for the writing credits on the Spiders in Cars song. That means the estate is entitled to a portion of all the money that song has generated and will generate in the future. For a song that was likely only going to be heard by a few hundred thousand people, and certainly only purchased by a fraction of those, having Spiders in Cars steal it is probably the single best thing that could have happened. If we win this lawsuit, anytime anyone plays the “Young Americans” song, the label will make money. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay) vs. OUT, damages issue is irrelevant; Δ: OUT, irrelevant; self serving; prejudicial effect outweighs probative value Rule 403; lack of foundation; speculation; improper opinion; invading scope of jury's authority to determine issue of liability; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; statement by party opponent through its agent - Rule 801(d)(2);)

¶16. By owning the copyright to “A Song for Sam,” Reptile Records also has the exclusive rights to the song. That gives us some control over the song, though not total control. For instance, anyone can perform the song, even record the song, but only if they pay something to us as the owner of the copyright. But no one else can use the

song in a different medium without the copyright owner's permission, like in a movie, or on TV. The price per use can then be negotiated and if it lands in a commercial or a syndicated show with extended distribution, the copyright owner can receive money each time the song is aired on a rerun of the show. (Π: IN, relevant - Rule 403; first hand business knowledge of copyrights of song - rule 602; perception - Rule 701 (personal opinion okay; vs. OUT, irrelevant; improper impeachment; highly prejudicial -Rule 403; Δ: OUT, irrelevant; self serving; lack of foundation; improper legal conclusions; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; statement by party opponent through its agent -Rule 801(d)(2))

¶17. If we can prove Spiders in Cars stole David's song, Reptile Records will also have a share of the copyright in the Spiders in Cars song, because for all intents and purposes, it's the same song. Not only will we recover the statutorily set amount for each copy of "Young Americans" that is sold or played on the radio, but a portion of each streamed play. And we will have control over the song's use in commercials. And I intend to squeeze every last dime out of this song. Even in ten years when we can license it for nostalgia purposes in a period TV show. (Π: IN, relevant - Rule 403; first hand knowledge of business - rule 602; perception - Rule 701 (personal opinion okay), see also stipulations; expert opinion - Rule 702 (based on knowledge, experience, education, etc.) vs. OUT, damages issue is irrelevant; Δ: OUT, irrelevant; self serving; prejudicial effect outweighs probative value

Rule 403; lack of foundation; speculation; improper opinion; improper bolstering of testimony; testimony based on hearsay - rule 801 vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; statement by party opponent's agent -Rule 801(d)(2);)

¶18. I was at the Big Sign Music awards show in early 2015. I had a couple artists up for various awards: Best New Female Latin Artist from North America and Best Crossover Single. I knew Spiders in Cars was going to perform as well. I did not plan on confronting them, even though “Young Americans” was already on heavy rotation on most Top 40 stations. (Π: IN, relevant - Rule 403; hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), not hearsay - not offered for truth of statement; Δ: OUT, irrelevant; testimony based in part on hearsay - rule 801; vs. IN, impeachment on witness' bias - wide latitude for cross examination,)

¶19. I have to admit, it was not one of my finer moments. But Davey had just died from cancer. I was hoping to receive an posthumous award on David' behalf for Best Crossover Single for one of his other songs, “Chameleon Man,” but the award went to a country music star who performed on a French rapper's cover of “Beat It.” Big labels get all the breaks. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), foundation for confrontation with Spiders; Δ: OUT, irrelevant; hearsay; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611)

¶20. As soon as Spiders in Cars got off stage following their performance, I went up to Ziggy to confront him. They had played “Young Americans” and I was incensed. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; Δ: OUT, irrelevant; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611;) It's ridiculous how much that song sounds like “A Song for Sam,” I just can't understand how certain music critics don't hear the comparison. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), see also stipulations regarding songs' similarities; Δ: OUT, irrelevant; lack of foundation; improper opinion; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611 (shows how other critics disagree with Smith); statement by party opponent's agent -Rule 801(d)(2);) There were lots of cameras around as I approached Ziggy. I recognized at least one photographer from “Aging Boulder Magazine,” in the vicinity. I wanted to make sure I had at least a few witnesses. I asked Ziggy where he/she got his/her inspiration for the song. I think Ziggy assumed I was a reporter at first, and started in on some nonsense about writing the song with the drummer on someone's back porch. What crap! I cut Ziggy off and accused Ziggy of stealing the song. I'm positive I didn't mention David Bowie by name. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); Δ: OUT, irrelevant; speculation of what Ziggy

assumed; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; statement by party opponent -Rule 801(d)(2))

¶21. Ziggy stared at me for a full ten seconds before he/she yelled, "Jazz is dead! I didn't rip anything off! No one listens to jazz anyway! It's as dead as David Bowe!" (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); excited utterance - not hearsay Rule 803(2); Ziggy's statements are made by party opponent's (Spiders) agent Rule 801(d)(2); Δ: OUT, irrelevant; hearsay - rule 801 ; probative value outweighed by prejudicial effect.) It's too bad none of the cameras were able to get the guilty look on Ziggy's face. All they got was a picture of me being taken off by security after I took a swing at Ziggy. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; self serving; lack of foundation; speculation; conclusory about "guilty look"; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; statement by party opponent -Rule 801(d)(2))

¶22. I personally negotiated the sale of the copyright to "A Song For Sam" to Reptile Records, LLC. I approached Sam in February of 2015. Davey had just died in January. The grief was still fresh. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; Δ: OUT, irrelevant; vs. IN, impeachment on witness'

bias - wide latitude for cross examination, rule 611, shows greed in negotiating with person who suffered loss;) I had been at the funeral when Sam gave the now infamous eulogy about the sorry state of music, and how nothing was sacred anymore. That any no talent hack who knew three chords and an unethical producer could record anything and claim it for their own. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; hearsay as to what Sam said; prejudicial effect outweighs probative value Rule 403;)

¶23. Reptile Records paid Sam \$100,000 for the assignment of the interest in the copyright for “A Song For Sam.” We gave Sam back all other rights to Davey’s other material as part of the deal. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; Δ: OUT, irrelevant; vs. IN, impeachment on witness’ and Haggar’s biases - wide latitude for cross examination, rule 611;) But ultimately, no one pays for jazz anymore. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; self serving; improper opinion;)

¶24. I know the two songs are not identical, but that’s not the standard. They have to be substantially similar. So how are these songs alike? Isn’t it obvious? Let’s start with chord progressions. I know chord progressions are not normally copyrightable because western music only has so many chords in any one key. “A Song for Sam” and “Young Americans” are essentially the same chords as “All Along the Watchtower” by

Bob Dylan, later made famous by Jimi Hendrix. But Dylan can't sue for using the same chords. But the rhythm is part of what makes the two songs so similar. In both "A Song for Sam" and "Young Americans," the A minor is held out for two measures, there is a walk down to the F for one measure, then back to the G for the final measure. The progression then resolves by returning to the Am at the beginning of the next measure for the next four bars. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), see also stipulations regarding similarities; Δ: OUT, irrelevant; lack of foundation; speculation; improper "undisclosed" opinion which is too technical to be a lay opinion;)

¶25. Dylan's song, by contrast, spends an even number of beats on the A minor, walks down using the G, then spends the same number of beats on the F, before returning to the A minor. The timing of how long each chord is held and how they switch at a unique point in the melody is crucial in seeing the similarities between "A Song for Sam" and "Young Americans". (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), see also stipulations regarding similarities; Δ: OUT, irrelevant; lack of foundation; speculation; improper "undisclosed" opinion which is too technical to be a lay opinion;)

¶26. Let's talk about the melody next. It's exactly the same! I get that it's in a different time signature. "A Song for Sam" is technically a waltz or  $\frac{3}{4}$  time, while "Young Americans" is in  $\frac{4}{4}$  time. But the melody, while easily recognizable, is fairly simple. The notes are in the same order. The only real difference is the swing feel

created by the waltz time signature would be written as triplets, while “Young Americans” notes would be written as eighth notes. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), see also stipulations regarding similarities; Δ: OUT, irrelevant; lack of foundation; speculation; improper “undisclosed” opinion which is too technical to be a lay opinion;)

¶27. Over the past 600 years or more, we have learned that chords only go together in so many ways or they are not pleasing to the ear. But melodies? There are an infinite number of ways to combine musical notes. Change the octave of a note, or put multiple notes together. When two songs are as similar as these two, there has to be a single source. I’m convinced “Spiders In Cars” were not just influenced by David Bowie, they stole his work and claimed it for their own. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), see also stipulations; Δ: OUT, irrelevant; self serving; prejudicial effect outweighs probative value Rule 403; lack of foundation; speculation; improper “undisclosed” opinion which is too technical to be a lay opinion.)

*Signed: Pat Smith*

## **Statement of Ricky Springfield**

¶1. My name is Ricky Springfield. I work in a record store. I know, its anachronistic, but there are a few of us audiophiles around who still appreciate music on vinyl. The way it was meant to be heard. I dream of owning my own store someday. However, I am going to need a lot more money than I have now working as a record store clerk. And getting a loan is out of the question due to my somewhat checkered past. (Π: IN, relevant - Rule 403; foundation for first hand knowledge - rule 602; vs. OUT, "checkered past" is improper impeachment; highly prejudicial -Rule 403; irrelevant; not a criminal conviction - Rule 609; improper character evidence [specific conduct] which does not affect truthfulness - Rule 608; Δ: OUT, irrelevant; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611)

¶2. I know you're going to ask me, so I might as well come clean. I have a couple convictions. I mean, who doesn't? With no convictions, what do you even believe? No sense of humor with you attorneys. (Π: IN, relevant - Rule 403; vs. OUT, personal information is irrelevant; improper impeachment; highly prejudicial -Rule 403; irrelevant; not proper for impeachment as criminal conviction - Rule 609; *strategy note*: plaintiff's attorneys may want to examine the witness' convictions on direct examination before cross examination by defense attorney;

Δ: IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; proper impeachment on prior convictions Rule 609)

¶3. So when I was 18, I used a fake I.D. to sneak into a show that was supposed to be only 21 and up. I met someone that night and decided to buy them a drink. One of the bartenders must have caught wise and asked for an I.D.. Just my luck that the fake I.D. listed my age as 46 and they called me out. The person I was flirting with turned out to be an undercover cop. I was convicted for possessing a fake I.D.. Just goes to show you, don't talk to strangers. (Π: IN, relevant - Rule 403; vs. OUT, personal information is irrelevant; improper impeachment for crime with punishment less than a year imprisonment; highly prejudicial -Rule 403; irrelevant; not proper for impeachment as criminal conviction - Rule 609; *strategy note*: plaintiff's attorneys may want to examine the witness' convictions on direct examination before cross examination by defense attorney; Δ: IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; proper impeachment on prior convictions as conviction involves dishonesty - Rule 609)

¶4. I learned my lesson and I swore off drinking. But my trouble with the law continued. Before I found my job at the record store, I was arrested for shoplifting on more than one occasion. What was I supposed to do? It's not like I could find a job at General Hospital. I had trouble finding work because I had to disclose the prior conviction with the fake I.D. and nobody was hiring someone with a high school

education with even a misdemeanor conviction on their record. But I had to eat somehow. And shoplifting doesn't hurt anybody but the big corporations. Fortunately, I had learned to talk my way out of most problems, and both times I was caught, I managed to convince the cop to let me go with a warning. (Π: OUT, personal information is irrelevant; improper impeachment; highly prejudicial -Rule 403; irrelevant; not a criminal conviction - Rule 609; improper character evidence [specific conduct] which does not affect truthfulness - Rule 608; Δ: IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; reputation or specific character evidence involving truthfulness of witness - Rule 608;)

¶5. You want to know more about the show? I mean, that's whole reason I reached out to you guys in the first place. I think it's very important that people know about the Dave Bowe show. I don't normally go to jazz shows, but there was an opening act I had heard a lot about; in particular the lead singer of that opening act. Ziggy Armus was not that well known. That could be why I so into him/her. Not in any kind of creepy stalker way, but because of the music. And maybe a little because he was left handed. Pretty unusual for a guitar player, except maybe Hendrix. I knew even then that someday Ziggy was going to hit it big once he/she was discovered and his/her sound was polished by a good record producer. (Π: IN, relevant - Rule 403; foundation for first hand knowledge of Ziggy's access to Bowe's song prior to making "Young

Americans" - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; lack of foundation; speculation.)

¶6. But back then, no one had heard of Ziggy yet, except maybe me. I had streamed enough of his/her songs from the band's MyFace page to actually know some of the words. The other patrons were obviously there to see Bowe and paid little interest to Ziggy's band. Not me. I stayed in front the whole 30 minute set and sang along loudly enough that I think Ziggy heard me. After the last song, I walked over the side of the stage. I think Ziggy was not used to any attention after their shows and it did not take much to strike up a conversation with Ziggy. We must have talked for half an hour about music and our local music scene before Bowe's band took the stage. Ziggy's not from Big City, but from Collegeville about two hours away. Ziggy's band was not truly local, but was still part of the local scene. (Π: IN, relevant - Rule 403; foundation for first hand knowledge of Ziggy's access to song - rule 602; perception - Rule 701 (personal opinion okay),; Δ: OUT, irrelevant; lack of foundation; speculation; testimony based on hearsay - rule 801)

¶7. I got Ziggy to sign a setlist from David Bowe from that night. It's something I try to do with every show I go to. I had to get the setlist from Bowe by sneaking backstage between sets. You never know when one of these up and coming musicians actually makes it to the big time and I can sell one of those setlists for a few hundred dollars. Normally, I would get a set list from the up and coming artist for an autograph, but I figured it would be cool to get a set list from someone Ziggy might list as an unlikely influence. (Π: IN, relevant - Rule 403; foundation for first hand

knowledge of Ziggy's access to song - rule 602; perception - Rule 701

(personal opinion okay), Δ: OUT, irrelevant; lack of foundation;) I mean, jazz?

Ziggy's music was nothing like Bowe's music and nobody would believe Ziggy had once opened for the greatest jazz musician of our era. (Π: IN, relevant - Rule 403;

first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; lack of foundation; speculation; improper expert opinion;)

¶8. The club was not very big, but it was crowded. I know I saw Ziggy in the audience for most of David Bowe's show. It was too loud to talk and Ziggy had other band members around so I let them have their space. I was surprised at how much I liked David Bowe. I don't really like modern jazz all that much, but Bowe's take on it was really unique. After Bowe's initial set, he came back on stage by himself for an encore with a glockenspiel, a hand held one, and played a song he said he had written for one of his parents called "Song for Sam" or something. I remember it because I'd never seen someone play solo jazz glockenspiel before. But Bowe pulled it off. I actually enjoyed Bowe's set so much, I bought a CD with a recorded version of the song at the show. I don't have it anymore as my full bred Daschund, Jesse's Girl, ate it. (Π: IN, relevant -

Rule 403; foundation for first hand knowledge of Ziggy's access to song - rule 602; perception - Rule 701 (personal opinion okay), Δ: OUT, irrelevant; lack of foundation; speculation;)

¶9. So you know the rest: Ziggy got hooked up with Jamie Kelly, the former drummer of The Tumors, and they formed Spiders in Cars. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); common public knowledge; Δ: OUT, irrelevant; lack of foundation; speculation; testimony based on hearsay) I lost most of my interest in the band after everyone else started to listen to it and they got played on Top 40 radio. Spiders in Cars had just started a worldwide tour when I heard a rumor that its biggest hit, “Young Americans” was plagiarized from David Bowie. I had not heard “Young Americans” until then, but I found a vinyl version and listened to it. I sure think it sounds like the melody from “Song for Sam,” but I can’t find any copies of that album to know for sure. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), see also stipulations; Δ: OUT, irrelevant; prejudicial effect outweighs probative value Rule 403; lack of foundation; speculation;)

¶10. I wasn’t sure at first that the set list from the David Bowie show would make money on M-Bay. I remember the night of the BigSign Music Awards show in 2015. I remember having a bet with my roommate that Olaf would win Best Male Vocalist in Crossover Single. I won that one. I also remember Spiders in Cars performing “Young Americans.” I told my roommate the melody reminded me of something. My roommate was a big jazz fan and almost instantly said that’s “‘A Song for Sam’ by David Bowie!” I put two and two together and remembered how I had seen Ziggy Armus open for David Bowie. I rifled through papers back in my bedroom and

found the set list and showed it to my roommate. (II: IN, relevant - Rule 403; foundation for first hand knowledge - rule 602; perception of similarity of song - Rule 701 (personal opinion okay), see also stipulations; statements made to witness not hearsay - not offered for truth of matter asserted but to show Springfield's investigation (recollection) into the similarities and names of the songs; Δ: OUT, irrelevant; lack of foundation; speculation; testimony based on hearsay - rule 801)

¶11. My roommate and I talked about what to do with the set list. My roommate was super excited and kept saying, "This is gold!" I jokingly suggested we should send Spiders in Cars a Snipe..., you know, a message on InstaSnap? Anyway, "a Snipe of the set list and see if they would send us concert tickets." (II: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), see also stipulations; statement made to Springfield not hearsay - not offered for truth of matter asserted; Δ: OUT, irrelevant; lack of foundation; testimony based on hearsay - rule 801; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; extorting tickets from Spiders)

¶12. I think my roommate got the wrong idea. I learned the next morning my roommate had gotten on my phone after I went to bed, got into my InstaSnap account and not only sent a Snipe with the setlist to Jamie Kelly, the drummer for Spiders in Cars, but also suggested that if they didn't pay us \$100,000, we would go to the press with the set

list. I would have been okay with free concert tickets, but I certainly didn't want to blackmail the band for money! I am their biggest fan! (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); roommate's state of mind - Rule 803; Δ: OUT, irrelevant; lack of foundation; speculation; self serving; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; "trying to blame someone else.")

¶13. \$ndrakemd is my InstaSnap handle, but I didn't send those Snipes. That was all my roommate, at least after the first one. I might have sent the picture of the set list. I just don't remember. It was very late at night. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); roommate's state of mind - Rule 803; Δ: OUT, irrelevant; lack of foundation; speculation; self serving; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; "trying to blame someone else.")

¶14. I have the set list from the night Ziggy's first band opened for David Bowie posted on M-Bay, the online shopping forum for all things musical. I did not get that many bids when Spiders in Cars first hit the scene. However, I will need that list back at the end of this trial. Why? Let's just say the bids increased substantially when I modified the item description to include the fact that the set list was from the night Ziggy stole his hit song from a dying musician. I never got my concert tickets, but I might actually get

that \$100,000. Such a big hit, and the whole reason for its success was that someone else wrote it. (Π: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay) vs. OUT, highly prejudicial - Rule 403; irrelevant; improper character evidence [specific conduct] which does not affect truthfulness - Rule 608; Δ: OUT, conclusory, improper opinion on "Ziggy stole"; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611)

*Signed: Ricky Springfield*

# The Defense Witnesses

## Statement of Romney “DJ Cherry” Bingensteimer

*Strategy Note:* Bingensteimer may be considered by some as an expert in the field of music due to his 40 years experience, Rules 702 and 703 (information this witness relies on may be hearsay if it is the type of information reasonably relied upon by experts in the field).

¶1. My name is Romney Bingensteimer, or better known by my Radio name, “DJ Cherry.” I’m actually retired after 40 years of being a radio DJ. I know I’m going to miss it, but the hours take a toll and I would like to spend more time with my family.

Having an overnight radio show, even one that is broadcast across the country, is hard after 40 years. (Π:OUT, irrelevant; Δ: IN, relevant - Rule 403; foundation for first hand knowledge - rule 602; preliminary information.)

¶2. I am also a record producer, and in a small studio like mine, I’m also the sound engineer and the sound board operator. It started out as a side hobby once my kids both graduated from college. My spouse encouraged me to do something on my days off from radio. I love music and musicians. (Π:OUT, irrelevant; Δ: IN, relevant - Rule 403; foundation for first hand knowledge - rule 602;) So many of them don’t have any kind of support system. Let’s face it, most of them will never make anything resembling a career out of it. (Π:OUT, irrelevant; lack of foundation; speculation; improper opinion; Δ: IN, relevant - Rule 403; first hand knowledge (has been in business for “40” years) - rule 602; perception - Rule 701 (personal opinion okay))

¶3. But that creative spark! Just because your music appeals to only a few people, the multiplicity of voices improves music overall. And that's where I come in. (Π:OUT, irrelevant; self serving; lack of foundation; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); see also stipulations;)

¶4. That's what my radio show has always done as well. Sure, I play a few "popular" songs, but I devote most of the weekly show to new acts, up and coming acts that would not have an outlet to have their music heard anywhere else. And I guess if can get a few of those bands to come record with me, it might improve my retirement account as well. But that's not why I do it. It's for the love of music. Yeah, even after 40 years I still love it. (Π:OUT, irrelevant; lack of foundation; speculation; Δ: IN, relevant - Rule 403; foundation for first hand knowledge for opinion on similarities - rule 602; perception - Rule 701 (personal opinion okay); see also stipulations;)

¶5. Major labels controlled our musical tastes for so long. Think back to the late 1950's and early 1960's. Bubble gum pop, big band jazz, and Motown were pretty much it. Basically, the studios had an in-house band, and songwriters captive to the studio, and they would sign a pretty face to sing the song. It doesn't mean the other stuff wasn't out there, singer-songwriters abounded, but they had little means to gain wider popularity. (Π:OUT, irrelevant; lack of foundation; speculation; testimony based on hearsay - rule 801; Δ: IN, relevant - Rule 403; first hand knowledge

in field of music - rule 602; perception - Rule 701 (personal opinion okay);  
expert opinion Rule 702 (based on knowledge, experience, education, etc.)  
and experts may rely on hearsay Rule 703)

¶6. I'm not sure Woody's guitar could actually destroy fascists, but it would have done a better job today because he would have been accessible to so many more people. The internet has been revolutionary for music. The whole industry is undergoing major transformation as a result. I know I probably won't be around to see where it all ends. (Π:OUT, irrelevant; lack of foundation; speculation; improper opinion; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); expert opinion - Rule 702 (based on knowledge, experience, education, etc.)) Anarchy takes away the power of a very few and returns it to us, the people. The major labels have to imitate us in order to make any money instead of force feeding us what they want us to buy. (Π:OUT, irrelevant; self serving; prejudicial effect outweighs probative value Rule 403; lack of foundation; improper opinion; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611 (shows that this witness may be a little out there); Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); expert opinion - Rule 702 (based on knowledge, experience, education, etc.))

¶7. I actually heard Spiders in Cars at a small club, the Way Out There Club, playing to an audience of about 20 friends and family. They were really raw. Part of that

was the club who didn't have one of their top people running the board for such a small show, but part of it was young musicians with a lot of passion but little technical know-how. (Π:OUT, irrelevant; lack of foundation; speculation; testimony based on hearsay - rule 801; Δ: IN, relevant - Rule 403; foundation for first hand knowledge of similarities of songs - rule 602; perception - Rule 701 (personal opinion okay); see also stipulations; not hearsay because not offering statement for truth; foundation for expert opinion, Rule 703.)

¶8. That's part of what I do with my radio show. I'm really not a taste-maker. I do not play a lot of Top 40 hits, and I don't play one style of music. I've always looked for new, different music from around the country and I play it on the radio to give these bands at least some national exposure. I get so many demos from bands that I often can't fit them all into my weekly four hour format. Even with the advent of internet music, regional bands need national distribution to help people find them on the web to create an audience willing to pay a few dollars to see them live when they go on tour. (Π:OUT, irrelevant; self serving; lack of foundation; speculation; improper opinion; testimony based on hearsay - rule 801; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); foundation for expert opinion - Rule 702; expert opinion - Rule 702 (based on knowledge, experience, education, etc.) not hearsay; facts perceived or made known to expert or, if inadmissible, facts reasonably relied upon by experts Rule 703)

¶9. Every once in awhile, though, I hear a band like Spiders in Cars. I was mesmerized by their presence. Like I said, the production quality was rough, but like a diamond coming from a lump of coal, I knew enough pressure and heat could transform them. I offered them the chance to play live on my radio show the very next week.

(Π:OUT, irrelevant; lack of foundation; speculation; Δ: IN, relevant - Rule 403; foundation for first hand knowledge of band - rule 602; perception - Rule 701 (personal opinion okay); foundation for expert opinion - Rule 702; expert opinion - Rule 702 (based on knowledge, experience, education, etc.))

¶10. Before the show, we discussed a few songs they should play. They were reluctant to play what I felt was one of their best songs, “Young Americans.” We recorded it as sort of a test run instead and I agreed not to play it on the air. I felt it was a bit strange as it was easily their best song, but when you have young musicians, you ease them along instead of forcing them into your mold. They hung out in the studio the whole show and I was able to show-case four of their other songs live. (Π:OUT,

irrelevant; vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611 - “band didn't want to play something copied from Bowe?”; Δ: IN, relevant - Rule 403; foundation for first hand knowledge of band - rule 602; perception - Rule 701 (personal opinion okay))

¶11. The set went so well that I got a call from a record executive over at Capital City Records the next morning who asked for the name of Spiders In Cars' agent. It was early in the morning, and I was still groggy after getting off the air at 4 am. I did tell Capital City I was the band's agent even though it wasn't true. The executive asked

for a demo. Without really thinking about it, I emailed them a digital copy of “Young Americans” even though I didn’t have permission from the band. It’s important to act quickly when you get a call from a major label. (II:OUT, irrelevant; testimony based on hearsay - rule 801 Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); not offering hearsay statements for truth but rather what this witness did and why.)

¶12. I got a call back from the executive from Capital City a few hours later. Apparently, they ran the song by the legal department who told them the band could record the song with Capital City Records but only if the producer could add enough other elements to the song to “mask the melody somewhat.” I didn’t know what they meant, but I agreed. (II:OUT, irrelevant; hearsay - rule 801 vs. IN, impeachment on witness’ bias - wide latitude for cross examination, rule 611; shows witness has knowledge of potentially copied works, may examine witness as expert regarding his/her knowledge, even if hearsay if relied upon, Rule 703; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); vs. OUT, irrelevant; highly prejudicial -Rule 403; testimony based on hearsay.)

¶13. Yeah, I did get that memo you’re showing me. Look, I needed a break for my own recording career, so I probably followed their suggestion. I may have added the extra layers of keyboards, and insisted on adding in an orchestral part because of the studio pressure. I probably would not have done it otherwise. But if they want the Phil

Spector sound, I will give them the Phil Spector sound. (Π:OUT, irrelevant; hearsay - rule 801 vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; shows witness has knowledge of potentially copied works, may examine witness as expert regarding his/her knowledge, even if hearsay if relied upon, Rule 703; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); vs. OUT, irrelevant; highly prejudicial -Rule 403; testimony based on hearsay.)

¶14. I called Jamie Kelly to tell him/her the news. I might have left out the bit where I claimed to be Spiders in Cars' agent. I instead focused on the chance to record in a real studio. Jamie was so thrilled, I was asked to come along to produce the album for them. (Π:OUT, irrelevant; testimony based on hearsay - rule 801 vs. IN, impeachment on witness' bias - wide latitude for cross examination, rule 611; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay), what Kelly said not hearsay - not offered for truth; also Kelly is witness that will be subject to cross examination.)

¶15. Capital City Studios was amazing! They agreed to let me produce the record so long as their own producers could have final say over the final mix and mastering. The band agreed, and I did too, begrudgingly. We recorded the album over three days. At least the band did. My job was hardly done once the band had laid down the last track. For instance, the Capital City producers insisted I use a full orchestra track on "Young Americans" instead of the synthesizer orchestra we used at first. I think they

made the right choice in the end, I was just nervous to show that I did not know how to mix a full orchestra. We eventually limited the orchestra parts on the chorus and the bridge at Ziggy's insistence. (Π:OUT, irrelevant; Δ: IN, relevant - Rule 403; first hand knowledge of song's development and independently created - rule 602; perception - Rule 701 (personal opinion okay))

¶16. Ziggy came into the studio from time to time to see how the mix-down process was going. The only real dust up we had was during the mixing of "Young Americans." The mix-down involves taking all the tracks we had recorded and setting the levels for each track so that the volume of each part harmonizes with the rest of the mix. I can also add EQ, which allows me to adjust the volume of specific frequencies within each track so that drums don't sound too tinny, or the hiss of fingers sliding across the frets on a bass guitar don't show up in the final mix. (Π:OUT, irrelevant; Δ: IN, relevant - Rule 403; first hand knowledge of song's development and independently created - rule 602; perception - Rule 701 (personal opinion okay))

¶17. I have a couple tricks I like to use when mixing to either pull a particular instrument forward in the mix or push it back into the background. The sound is still there but using these tools the producer can make the sound either distinct, like a guitar solo, or make it part of a larger wall of sound so that something else becomes the focus. Compression is the big one. Essentially, compression cuts out the super high and super low frequencies from the instrument and the sound is more true to the note being played rather than including the resonant frequencies that cause an instrument to stand out. The

more compression, the more dull an instrument sounds. (Π:OUT, irrelevant;improper opinion; lack of foundation; Δ: IN, relevant - Rule 403; first hand knowledge of song's development and independently created - rule 602; perception - Rule 701 (personal opinion okay); expert opinion based on experience, Rules 702 and 703)

¶18. I can also add more reverb or chorus to a track to make it stand out. Essentially, these modulate the sound in different ways. They mimic playing in a larger space so that there is a slight echo, but not enough that the track is doubled back at you like a delay pedal might do. (Π:OUT, irrelevant;improper opinion; lack of foundation; Δ: IN, relevant - Rule 403; first hand knowledge of song's development and independently created - rule 602; perception - Rule 701 (personal opinion okay); expert opinion based on experience, Rules 702 and 703)

¶19. We disagreed strongly over where to put the melody of “Young Americans” within the mix. I took the studio’s admonition to heart. Ziggy would not have it. The band was never shown that memo and I never explained my reluctance to them. Ziggy threatened to walk out, so I compromised and took off most of the compression allowing the melody to come through the mix. But Ziggy agreed to allow me to remove the chorus effect from the track, so I could tell the studio I had tried my best to push the melody back into the mix. (Π:OUT, irrelevant; hearsay - rule 801 vs. IN, impeachment on witness' bias - wide latitude for cross examination,

rule 611; shows witness has knowledge of potentially copied works, may examine witness as expert regarding his/her knowledge, even if hearsay if relied upon, Rule 703, and reasons why memo not shown to Ziggy; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); vs. OUT, irrelevant; highly prejudicial -Rule 403; testimony based on hearsay.)

¶20. Ziggy was a little reluctant at first to record “Young Americans.” I don’t know where the reluctance came from, but I convinced Ziggy the song was good enough to merit being on the album. And once the full studio cut was mastered, I think the whole band agreed. In fact, Capital City made it the first single to be released. (Π:OUT, irrelevant; lack of foundation; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay)) It has been downloaded now at an unprecedented pace for a new act. Even a whole year after its release, it continues to be streamed hundreds of thousands of times a month. The pace did pick up after the incident at the Big Sign Music awards last year, and again when this lawsuit was filed. (Π:OUT, irrelevant; lack of foundation; speculation; based on hearsay - rule 801; vs. IN, impeachment on witness’ bias - wide latitude for cross examination, rule 611 showing “greed”; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); vs. OUT, damages issue is irrelevant;)

¶21. I have to confess, I'm not much on jazz. I've gone back and listened to David Bowie once this lawsuit was filed. I just don't get the comparison. The melodies might be similar, but they're not identical. I mean, someone might confuse the two of them, but not someone who has been spinning records for as long as I have been. There are only twelve notes in any key. And while there may be an infinite number of ways of combining them, there are a finite number of ways to play them so they are pleasant to listen to. I don't think the song was copied from David Bowie, but what do I know? I have just spun records for forty years. (Π:OUT, irrelevant; lack of foundation; speculation; improper opinion; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); see also stipulations on lay witness' opinion; expert opinion - Rule 702 (based on knowledge, experience, education, etc.)).

*Signed: Romney "DJ Cherry" Bingensteimer*

**Statement of  
Jamie Kelly**

¶1. My name is Jamie Kelly. I am the drummer for Spiders in Cars, though we are currently on break after Ziggy got himself/herself arrested for indecent exposure. We can come back to that. (Π:IN, impeachment on witness' bias - wide latitude for cross examination on why band is not together, rule 611; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); vs. OUT, Ziggy's conduct is irrelevant; improper impeachment; highly prejudicial -Rule 403; not a criminal conviction - Rule 609; improper character evidence of Ziggy [specific conduct] which does not affect truthfulness - Rule 608)

¶2. I played in several smaller bands in high school before I went to Truman State University where I met Ziggy. We struck up a friendship that has lasted to this day. We started a ska punk band called The Tumors there and mostly played at fraternity and sorority parties. Occasionally, the school would have bigger acts on campus and we'd be invited to open for them. (Π:OUT, irrelevant; self serving; Δ: IN, relevant - Rule 403; foundation for first hand knowledge on how band started - rule 602;)

¶3. Ziggy dropped out his/her junior year, and left us without a guitar player. There were some family problems back home and Ziggy had to get a job that actually paid to support parents that were not able to support themselves. (Π:OUT, irrelevant; lack of foundation; speculation; Δ: IN, relevant - Rule 403; foundation for

first hand knowledge - rule 602; perception on what Ziggy was going through  
- Rule 701 (personal opinion okay))

¶4. But the urge to play on stage, even to twenty people, isn't something you just lose overnight. I was able to keep The Tumors together for a time and even went on a regional tour after graduation. Ziggy had also kept up with music and had started a band that played circus music over funk riffs while the lead singer rapped Dr. Suess. I know it sounds strange, but it actually kind of worked. (Π:OUT, irrelevant; lack of foundation; speculation; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay))

¶5. Let me tell you how we wrote "Young Americans." Ziggy and I reconnected at a show in Jefferson City, Missouri. Ziggy came by to see The Tumors perform and stuck around afterwards. I had never seen Ziggy quite so excited. I later learned Ziggy was actually struggling with manic depression and was probably in one of the manic periods. I think that's partly why Ziggy took to, well....I'd really prefer not to get into that. (Π:OUT, irrelevant; self serving; improper opinion; testimony based on hearsay - rule 801 Δ: IN, relevant - Rule 403; foundation for first hand knowledge on creation of song - rule 602; perception - Rule 701 (personal opinion okay); Not hearsay - not offered for truth.)

¶6. It was raining outside after the show, and Ziggy's car had a flat tire. We were crashing on the floor of the promoter for the show and I asked Ziggy to come with us back to stay the night. I think it was one of the luckiest decisions of my life. At first I was a bit annoyed, because Ziggy could not sit still in the car and kept hitting the dash

like a drummer. It was especially annoying because Ziggy's sense of rhythm has never been all that great. (Π:OUT, irrelevant; lack of foundation; improper opinion; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay))

¶7. But, I kept my mouth shut and as we drove, Ziggy asked if I had the rhythm Ziggy was just playing. I tried to imitate it, albeit much more consistently. I mean, I'm a drummer. And Ziggy started to sing. (Π:OUT, irrelevant; hearsay; Δ: IN, relevant - Rule 403; foundation for first hand knowledge of creation of song - rule 602; perception - Rule 701 (personal opinion okay), not hearsay - not offered for truth.)

¶8. Up until then, I did not know Ziggy could sing. We'd always had other singers, and Ziggy never really sang other than backup harmonies. Neither of us knew that much music theory and our harmonies almost always ended up just being us shouting the same thing the lead singer was shouting in approximately the same pitch. (Π:OUT, irrelevant; self serving; Δ: IN, relevant - Rule 403; first hand knowledge on song's creation - rule 602; perception - Rule 701 (personal opinion okay))

¶9. We kept at it for the rest of the way back to the promoter's house. Instead of going to sleep, Ziggy and I stayed up the rest of the night working on the song. Ziggy had the chorus written, but we wrote the verses together. We took acoustic guitars out on the back porch and laid out the basic chord structure for the song. Admittedly, we didn't know that many chords. I remember teasing him that the chords sounded like "Mother"

by Glenn Danzig. You know, A minor, F, G, over and over again. I had two concerns. First, I was aware of copyright issues even then, but I also knew you can't copyright chord progressions. The drum part Ziggy and I came up with in the car really made it different from the way Danzig played that same progression. (Π:OUT, irrelevant; testimony based on hearsay - rule 801; Δ: IN, relevant - Rule 403; foundation for first hand knowledge of song's creation - rule 602; perception - Rule 701 (personal opinion okay); not hearsay on statements by Ziggy - not offered for truth but to show song's independent creation.)

¶10. My second concern was that Ziggy typically played lead guitar, not rhythm. Because he really only knew how to play barre chords, which is just the first and fifth note of a chord, everything he plucked out sounded like punk rock, hence the Danzig reference. I wasn't sure I wanted to play in a Misfits cover band. That comparison, though, sort of became our signature sound. We jokingly call it "pfunk rock," combining funk and punk elements into the music. In order to avoid straying too far into punk, we added syncopated guitar picking in the background of the mix. We also decided to have the main melody be played by keyboard rather than on guitar, though the original idea was to have it be a guitar lead. Raif Manzarek, our keyboard player, had found an old Moog keyboard and brought with him/her into the studio when we recorded. The Moog sound brought even more of the 70's funk sound into the song, so we stuck with it. And then the horns, and orchestra section Romney put in there. Totally funk, or pfunk.

(Π:OUT, irrelevant; lack of foundation; improper opinion; based on hearsay - rule 801; Δ: IN, relevant - Rule 403; foundation for first hand knowledge of

song's independent creation - rule 602; perception - Rule 701 (personal opinion okay); not hearsay - not offered for truth but to show song's creation.)

¶11. But back to the night we wrote “Young Americans”: Ziggy really sang, he/she screwed up his/her eyes and belted out the song. I think we woke up half the neighborhood. But it worked. The song came together and in the morning, we had a completed song. The handwritten chord chart for the song marked as Ex. E is the same one we wrote down that night. The final recording pretty much follows that chart.

(Π:OUT, irrelevant; lack of foundation; improper opinion; based on hearsay - rule 801; Δ: IN, relevant - Rule 403; foundation for first hand knowledge of song's independent creation - rule 602; perception - Rule 701 (personal opinion okay); not hearsay - not offered for truth but to show song's creation.)

¶12. I decided that night I enjoyed working with Ziggy so much that I could forgive the ups and downs. We decided to hold auditions for a bass player, and keyboardist when we got back to Big City. (Π:OUT, irrelevant; self serving; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay))

¶13. I finished the regional tour with the Tumors and told them the news. That was October of 2013. Within a few weeks, Ziggy and I had a bass player, a keyboard player and new band name, Spiders in Cars. The song we had written was really good,

much better than anything we had ever written before then. And really, probably better than anything we've written since. (Π:OUT, irrelevant; self serving; improper opinion; lack of foundation; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay))

¶14. We caught our big break when a local DJ, Romney Bingensteime, a/k/a DJ Cherry, saw us at a local night club, and asked us to come to the station to play a short live set. Romney had us play "Young Americans" before we went live as sort of a test run. Romney suggested that we wait to release the song until we recorded it in the studio and not play it live. Even though it was easily the best song in our set, we trusted Romney and held it back when we played the live set. (Π:OUT, irrelevant; self serving; hearsay as to what Romney said; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); Romney's statements not hearsay - not offered for truth; also, Romney is witness that is subject to cross examination.)

¶15. DJ Cherry got us in touch with Capital City Records who gave us an advance and got us into the studio with Romney to record our first album. We signed the record deal and an exclusive agency agreement with the label before we began. I honestly don't remember much about the recording process. The advance was spent pretty quickly and in ways that left us with little memory of the night before. (Π:OUT, irrelevant; self serving; improper opinion; lack of foundation; Δ: IN, relevant

- Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay))

¶16. However, I clearly remember recording “Young Americans.” I guess since it was the first song Ziggy and I wrote as a band, I wanted to remember the experience. It was the only song on the album where Bingensteimer and Ziggy clashed at all. Ziggy wanted the melody out front, while Bingenmesiter wanted to bury it with heavier orchestration. You can’t really tell on the demo copy you have because the melody is so prominent. Romney was really upset when Ziggy threatened to walk out during the mix-down. Romney kept trying to overly compress the melody to make it sit back in the mix almost to the point where it melded with the horn section Romney had added. Ziggy kept insisting the organ melody was the best part. Romney finally relented and let it stay out in front. The opening hook just before the lyrics start. That hook is played throughout the song, giving “Young Americans” its essential character. That’s what Ziggy and I wrote that night in the car and on the back porch at the promoter’s house. (Π:OUT, irrelevant; self serving; testimony based on hearsay - rule 801 Δ: IN, relevant - Rule 403; foundation for first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); hearsay statements not offered for truth but why witness recalls song (offered for recollection)) And no matter what Smith says, it is original! (Π:OUT, irrelevant; witness cannot comment on testimony of another witness - highly prejudicial and invades province of jury to determine credibility of witnesses;

prejudicial effect outweighs probative value Rule 403; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); see also stipulations on lay opinions)

¶17. Needless to say, without Romney's guiding hand, the album you hear today would never have occurred. Other than the disagreement over the melody for "Young Americans," we let Romney have final say on the mix. The orchestral section and the extra percussion Romney put into the final tracks is what made not only "Young Americans," but the whole album, a hit. (Π:OUT, irrelevant; self serving; improper opinion; lack of foundation; Δ: IN, relevant - Rule 403; first hand knowledge of song's independent creation - rule 602; perception - Rule 701 (personal opinion okay))

¶18. The album took off, and the first single "Young Americans" became so popular, it was being streamed at unprecedented levels on PearShare, our exclusive digital distributor. We got invited to The Big Sign Music Awards Show in early 2015. I do remember seeing Pat Smith from Reptile Records there. I had met Pat while Pat was lurking around one of my shows with The Tumors trying to get us to sign with his label. Talks got to the point where Pat actually offered us a record deal, and offered us 90% of mechanicals. I don't even know what that means, but it sure didn't sound like Pat knew anything about modern music distribution, and we told him to sod off. (Π:OUT, irrelevant; lack of foundation; speculation; testimony based on hearsay - rule 801; vs. IN, impeachment on witness' bias - wide latitude for cross

examination, rule 611 - shows greed; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay); Also, shows biasness of plaintiff's witness Pat Smith)

¶19. At the Awards Show, Pat came up to us after we played “Young Americans” and accused us of having ripped off the song from one of his clients, some bloke named David Bowe. I’d never even heard of the guy before. Ziggy looked confused at first, Pat pressed on and said something like, “You know, the jazz pianist.” Ziggy denied stealing the song, and said something like, “No one listens to jazz anyway. It’s as dead as David Bowe.” I’d never seen someone quite so upset as Pat got at that. It’s a good thing security stepped in right then before Pat took a swing at Ziggy. (Π:vs. IN, first hand knowledge; perception; wide latitude for cross examination, rule 611 to corroborate Pat’s confrontation and Ziggy’s reaction; Pat Smith’s and Ziggy’s statements are excited utterances exceptions to hearsay, Rule 803(2), and Pat Smith is a witness subject to cross examination of statements; and statements by Ziggy are admissions by party opponent’s agent, Rule 801(d)(2); Δ: OUT, irrelevant; hearsay statements are inadmissible and highly prejudicial -Rule 403; Ziggy is not the spokesperson (agent) for the band.)

¶20. That was a terrible night. Not only did Ziggy almost get arrested for the altercation with Smith, I later got those Snipes from some loser named Ricky Springfield. \$ndrakemd sent me a picture of a set list to my InstaSnap handle,

\$iwoulddoanythingfordrums. I still deal with all of my own social media. I don't trust the studio not to send out something stupid under my handle. (Π:OUT, irrelevant; self serving; improper opinion or characterization of Springfield; vs. IN, perception about Ziggy's arrest; bias against Springfield; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay);)

¶21. We had just gotten done with the show and were back on the tour bus. I saw the Snipe with the set list and immediately demanded to know who the Snipe was from. As you can see, the sender was trying to extort money from us. I sent out some pretty nasty Snipes. All I can say is I was pretty upset from what happened at the awards show, and I must have just been venting. (Π:OUT, irrelevant; lack of foundation; speculation; conclusory about extortion; improper opinion; vs. IN, impeachment on witness' bias against Springfield or witness' paranoid attitude - wide latitude for cross examination, rule 611; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay))

¶22. I definitely recognize the signature on your copy of the set list as Ziggy's signature. What I don't get is the set list. You mean to tell me this David Bowe guy wrote his own material, but blatantly "borrowed" all of the song names on his set list? I mean, I don't know a lot about jazz, but I know enough to recognize "Ain't Misbehavin'" and "The Way You Look Tonight." (Π:OUT, irrelevant; self serving; improper

opinions; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602;  
perception - Rule 701 (personal opinion okay); vs. OUT, improper  
impeachment of statements made by another witness - hearsay; highly  
prejudicial -Rule 403; irrelevant;)

¶23. We got sued shortly after the BigSign Awards show. In fact, it was just before we could start our national tour. In a true rock 'n roll moment, Ziggy had a “wardrobe malfunction” during our kick off show in Big City. Ziggy had gone commando that night due to the overly tight jeans Ziggy prefers. (Π:OUT, irrelevant; Δ: IN, relevant - Rule 403; first hand knowledge - rule 602; perception - Rule 701 (personal opinion okay)) Instead of stepping offstage following the malfunction, Ziggy played on through the next two songs with no pants and nothing but the guitar to cover the more sensitive areas. (Π: IN, wide latitude for cross examination, rule 611; proper character evidence of Ziggy; Δ: OUT, irrelevant; highly prejudicial -Rule 403; improper character evidence [specific conduct] which does not affect truthfulness - Rule 608)

¶24. It's something that I both admire and something I loathe about Ziggy. Sometimes coming on so loaded man can really inspire a performance, but it can also be so self destructive. Apparently the cops here in Big City felt playing on stage with no pants on was too self destructive, and stopped the show. (Π: IN, wide latitude for cross examination, rule 611; proper character evidence of Ziggy; Δ: OUT, irrelevant; highly prejudicial -Rule 403; improper character evidence

[specific conduct] which does not affect truthfulness - Rule 608) This is the same police department that put that sports agent on trial for murder then later figured out it was the homeless person who had id'ed the agent in the first place. (Π:OUT, irrelevant; prejudicial effect outweighs probative value Rule 403; Δ: IN, relevant - Rule 403; perception - Rule 701 (personal opinion okay))

¶25. Either way, Ziggy fought the law and we all know how that turned out. It's probably not a bad thing, as Ziggy is getting treatment for some of the more self-destructive tendencies. (Π: IN, wide latitude for cross examination, rule 611; proper character evidence of Ziggy; Δ: OUT, irrelevant; highly prejudicial - Rule 403; improper character evidence [specific conduct] which does not affect truthfulness - Rule 608)

¶26. So now, while Ziggy is being hosted by the Missouri Department of Corrections, I have to defend the band by myself. (Π: IN, wide latitude for cross examination, rule 611; proper character evidence of Ziggy; vs OUT, improper opinion, conclusory, lack of foundation; Δ: IN, relevant; perception; vs. OUT, irrelevant; highly prejudicial -Rule 403; improper character evidence [specific conduct] which does not affect truthfulness - Rule 608)

*Signed: Jamie Kelly*

**Statement of**  
**Dr. Ivan(a)/ A. Feelgood**

*Strategy Note:* “Dr.” Feelgood is an expert.

¶1. Yes, I’m the one they call Dr. Feelgood. It’s pronounced “Fellgood.”

Why is that funny? (Π:OUT, irrelevant; Δ: IN, relevant - Rule 403; preliminary information.)

¶2. I am a professor of Music at Indiana University, the Harvard of the Midwest. I conduct the faculty orchestra. I teach several music theory classes, including Woodwinds for the Mathematical Mind and Romantic String Theory. That last one is not about loving the underlying structure of matter, it’s about the integration of orchestral strings into late 1700’s chamber music. The bulk of my current work is teaching classes on musical cultural appropriation. A lot of the coursework explores the history of so called “mainstream” culture adopting the forms and memes of an underrepresented genre, and transforming it into popular music. Like Elvis who coopted Memphis blues and turned it mainstream. Or more recently, the string of suburban yuppies who take gangster rap songs from the 1990’s, play them on acoustic guitar, and pretend to be ironic. My recent publications are all on this topic, in particular in identifying the similarities in stylistic elements which become coopted when music subcultures cross over into the so-called mainstream. (Π:OUT, irrelevant; Δ: IN, relevant - Rule 403; foundation for first hand knowledge - rule 602; foundation for expert opinion - Rule 702; expert opinion - Rule 702 (based on knowledge, experience, education, etc.))

¶3. I attended undergrad at Northernmost Missouri State College and received a BA in Math, of all things. I also received a minor in musical theater. My most memorable role was as both Iago and Desdemona in a musical version of Othello. I sang a duet with myself about loving and loathing the lead. We had a pretty small theater department. (Π:OUT, irrelevant; Δ: IN, relevant - Rule 403; foundation for first hand knowledge - rule 602; foundation for expert opinion - Rule 702; expert opinion - Rule 702 (based on knowledge, experience, education, etc.))

¶4. Anyway, I discovered my love of classical music and music theory when I went into my Masters Program at MIT. I met a few members of the Boston Philharmonic while working on my thesis. I was invited to watch them perform from backstage and I fell in love. The way the various melodies intertwine to form these fleeting chords, all with the rolling bass of kettle drums.... I'm sorry, I'm geeking out a little on you.

Apologies. (Π:OUT, irrelevant; Δ: IN, relevant - Rule 403; foundation for first hand knowledge - rule 602; foundation for expert opinion - Rule 702; expert opinion - Rule 702 (based on knowledge, experience, education, etc.))

¶5. In the end, I finished my Masters in Mathematics, and went to a smaller, and less expensive, state school in Massachusetts where I studied music theory and earned a BA in Music Theory. My doctorate is actually in Mathematics, though my thesis was called, "Music Theory in a Time of Cholera." It explored the mathematical underpinnings of Western Music, comparing them to the music traditions of native peoples in South America from the time of First Contact. Rhythmically, the two have quite a bit in common, though the  $\frac{3}{4}$  time signature does not exist in most Native

Cultures. But the whole 12 note concept upon which Western Music is centered does not exist in South American pre-Columbian music. And frankly, the mathematics of both cultures ended up being greatly influenced thereby. Guns, germs and steel? Whatever! It was the half tone and Dorian mode that ultimately paved the way for the Conquistadors.

(Π:OUT, irrelevant; Δ: IN, relevant - Rule 403; foundation for first hand knowledge - rule 602; foundation for expert opinion - Rule 702; expert opinion - Rule 702 (based on knowledge, experience, education, etc.))

¶6. I am being paid to testify in this case, though I love music enough that might even do it for free. I do not make a whole lot as a professor, so I really do need you to pay me for my time. I mean like soon. My rent is up at the end of the month, and I might not be able to afford it. My normal rate is \$250 an hour. I've spent over 10 hours so far listening to the songs at issue, and I anticipate I will have spent at least another 10 hours before trial. (Π: IN, wide latitude for cross examination, rule 611, of witness' interests, motives, or biases; Δ: IN, relevant - Rule 403; customary for experts to be paid for testimony (*strategy note*: may want to ask witness about fees during direct examination))

¶7. I was asked to listen to a song by Spiders in Cars by the band's attorneys and compare the main melody, or "hook," of the song to a song by David Bowie. I see you have copies of the scores I wrote. (Π:OUT, irrelevant; hearsay Δ: IN, relevant - Rule 403; foundation for expert opinion - Rule 702; expert opinion - Rule 702 (based on knowledge, experience, education, etc.) not hearsay; facts

perceived or made known to expert or, if inadmissible, facts reasonably relied upon by experts Rule 703;)

¶8. Now, I must confess to you: I do not listen to a whole lot of pop music, and really not a whole lot of jazz. I think it has to do with originality more than anything. There really are only 12 notes in any scale in Western Music. And by and large, pop music is normally confined to just one key throughout most songs. Modern pop music might change from a major key to the relative minor for a bridge, but other than that, pop music is static. It's easy to listen to, there's no complexity, and in some sense it's all been done before. (Π:OUT, irrelevant; vs. IN, shows lack of foundation for expert opinion in certain field of music; speculation; Δ: IN, relevant - Rule 403; foundation for expert opinion - Rule 702;)

¶9. So it really was no surprise to me that the two songs sounded pretty similar. That is not to say they are identical. In order to violate a copyright, a song has to be "substantially similar." Having the same chords is not enough. Chord progressions are the transition from one backup chord to the next. Normally, the melody consists of notes within each chord as it is being played. There are fewer possible chord progressions than there are melodies because of how the chords sound together. For instance, the blues progression consists of Major chords for the first, fourth and fifth notes within a key. Like G, C, D. "Louie, Louie," "Break Another Little Piece of My Heart," or really any blues song all follow the same pattern. By adding in A minor, you get "Poker Face" by Lady Gaga or "Africa" by Toto. (Π:OUT, irrelevant; lack of foundation; speculation; improper opinion; hearsay, improper legal conclusion about

copyright violation, invades province of judge to determine legal issues;  $\Delta$ :  
IN, relevant - Rule 403; expert opinion - Rule 702 (based on knowledge,  
experience, education, etc.) not hearsay; facts perceived or made known to  
expert or, if inadmissible, facts reasonably relied upon by experts Rule 703;  
expert may testify on ultimate issue of copyright violation, Rule 704:)

¶10. Drum beats can be identical and in fact the disco era of music can be identified as “disco” because the drum beat consisted of four drum beats played over and over and over. But that defined the sound of a music style and did not make the songs substantially similar, at least not from a musical perspective. Take “I Will Survive” by Gloria Gaynor. It has the same basic drum beat as “Young Americans,” but there is no way you could confuse the two songs. ( $\Pi$ :OUT, irrelevant; lack of foundation; speculation; improper opinion; hearsay, improper legal conclusion about copyright violation, invades province of judge to determine legal issues;  $\Delta$ : IN, relevant - Rule 403; expert opinion - Rule 702 (based on knowledge, experience, education, etc.) not hearsay; facts perceived or made known to expert or, if inadmissible, facts reasonably relied upon by experts Rule 703; expert may testify on ultimate issue of copyright violation, Rule 704:)

¶11. Strangely enough, song titles are not copyrightable. “Young Americans” might be a David Bowie (not to be confused with David Bowe, the jazz musician) reference, but simply having the same title is not enough to violate someone else’s copyright. Now putting a lot Bowie song titles into the lyrics of a song...I don’t know.

(Π:OUT, irrelevant; lack of foundation; speculation; improper opinion; hearsay, improper legal conclusion about copyright violation, invades province of judge to determine legal issues; Δ: IN, relevant - Rule 403; expert opinion - Rule 702 (based on knowledge, experience, education, etc.) not hearsay; facts perceived or made known to expert or, if inadmissible, facts reasonably relied upon by experts Rule 703; expert may testify on ultimate issue of copyright violation, Rule 704;) But Bowie hasn't sued...at least not yet.

(Π:OUT, irrelevant; improper personal comment or opinion - outside of scope of expert opinion; prejudicial effect outweighs probative value Rule 403; vs. IN, witness' bias against Bowie - wide latitude for cross examination, Δ: IN, relevant - Rule 403; expert opinion - Rule 702 (based on knowledge, experience, education, etc.), experts may consider hearsay in formulating opinions, Rule 703)

¶12. The popular theory put out by other musicologists today is that two songs can be substantially similar if they have enough stylistic elements that are the same.

Marvin Gaye's estate used this theory to sue Robin Thicke and Pharrell Williams for "Blurred Lines." The songs did not follow the same melody, but the expert testified there were something like 17 stylistic similarities shared by the two songs. And since Mr. Thicke testified he told Mr. Pharrell he wanted a song that sounded like Marvin Gaye's song, it was enough to convince a jury. (Π:OUT, irrelevant; lack of foundation;

speculation; improper opinion; hearsay, improper legal conclusion about copyright violation, invades province of judge to determine legal issues; Δ: IN, relevant - Rule 403; expert opinion - Rule 702 (based on knowledge, experience, education, etc.) not hearsay; facts perceived or made known to expert or, if inadmissible, facts reasonably relied upon by experts Rule 703; expert may testify on ultimate issue of copyright violation, Rule 704:)

¶13. After 10 hours of listening, I can find only one stylistic element that is similar between “Young Americans” and “A Song for Sam”: the root notes of the chords. Root notes are the notes from which we take the name of the chord, like “C” or “G.” For these two songs, the roots notes are A (played as a minor chord), G and F for the parts of the song in question. However, the chords are not identical. The David Bowie song uses jazz versions of those chords, like a diminished 5th, which takes the fifth note of the chords and drops it a half step. That kind of chord is more complicated on guitar and can not easily be distinguished in a rock mix, so rock musicians tend to play the basic chords Majors, Minors, 7ths, or even just barre chords which may just be the first and fifth note of the chord played as an interval. Depends on the talent level of the musician and from what I can tell Spiders in Cars is not the most technically proficient set of musicians. So in essence, the chords, while similar, are not identical. (Π:OUT, irrelevant; lack of foundation; speculation; improper opinion; hearsay, Δ: IN, relevant - Rule 403; expert opinion - Rule 702 (based on knowledge, experience, education, etc.) not hearsay; facts perceived or made known to

expert or, if inadmissible, facts reasonably relied upon by experts Rule 703; witness may also give lay opinion, perception, see also stipulations.)

¶14. In my opinion, the melodies, while similar, are not identical. “Young Americans” is played in 4/4 time, so the notes are played as eighth notes. But in “A Song For Sam,” the notes are played as triplets, or as a sixteenth note followed by an eighth note to denominate the style as swing. So while the notes are in the same order, the way they are played is totally different. Straight ahead rock, or swing. Not the same thing, really. (Π:OUT, irrelevant; lack of foundation; speculation; improper opinion; hearsay; Δ: IN, relevant - Rule 403; expert opinion - Rule 702 (based on knowledge, experience, education, etc.) not hearsay; facts perceived or made known to expert or, if inadmissible, facts reasonably relied upon by experts Rule 703; expert may testify on ultimate issue, Rule 704:)

¶15. Plus, the difference in style goes much deeper. I understand Spiders in Cars is attempting to merge two styles of music, namely punk and funk, or pfunk as they have called it. The drum beat makes a huge difference in distinguishing the songs. You are correct that someone can play a cover of another artist’s song in a different style and it isn’t considered a different song. But here, melody is just different enough because of the difference in feel that it does not meet the stylistic similarities test I mentioned above. Especially because Spiders in Cars has insisted over and over again they were not influenced by jazz at all. (Π:OUT, irrelevant; lack of foundation; speculation; improper opinion; hearsay; Δ: IN, relevant - Rule 403; expert opinion - Rule 702 (based

on knowledge, experience, education, etc.) not hearsay; facts perceived or made known to expert or, if inadmissible, facts reasonably relied upon by experts Rule 703; expert may testify on ultimate issue, Rule 704;)

¶16. Therefore, the two songs do not have enough stylistic similarities to be “substantially similar.” (Π:OUT, irrelevant; lack of foundation; speculation; improper opinion; hearsay; Δ: IN, relevant - Rule 403; expert opinion - Rule 702 (based on knowledge, experience, education, etc.) not hearsay; facts perceived or made known to expert or, if inadmissible, facts reasonably relied upon by experts Rule 703; expert may testify on ultimate issue, Rule 704;)

¶17. The more surprising thing to me was how similar the bridge melody in the David Bowie song sounds to a piece by Georges Bizet from his opera “Carmen.” The melody and chords are straight from the “Seguidilla,” a piece from Act 1. I have a copy of “Seguidilla” performed by my friend Melissa Fathman, accompanied by Dr. Anthony Fathman on the piano that we provided in my expert disclosures. I also transcribed the basic melody of the piece as Ex. G. You will notice Ms. Fathman uses quite a few trills and flourishes, but I transcribed only the base notes of the melody for simplification.

(Π:OUT, irrelevant; lack of foundation; speculation; improper opinion; hearsay; Δ: IN, relevant - Rule 403; expert opinion - Rule 702 (based on knowledge, experience, education, etc.) not hearsay; facts perceived or made

known to expert or, if inadmissible, facts reasonably relied upon by experts

Rule 703; expert may testify on ultimate issue, Rule 704;)

¶18. The fact that so much of the bridge of "A Song for Sam" is essentially the "Seguidilla" certainly makes me wonder how "original" David Bowie's song truly is. If he copied the "Seguidilla" as the bridge, then how much of the rest of his song could possibly be original? Sort of like Eric Carmen's "All By Myself" - which was essentially Piano Concerto No. 2 in C minor by Rachmaninoff. (Π:OUT, irrelevant; lack of foundation; speculation; improper opinion; hearsay; Δ: IN, relevant - Rule 403; expert opinion - Rule 702 (based on knowledge, experience, education, etc.) not hearsay; facts perceived or made known to expert or, if inadmissible, facts reasonably relied upon by experts Rule 703; expert may testify on ultimate issue, Rule 704;) Carmen believed the copyright had expired, but the Rachmaninoff estate could count to 70, and it hadn't quite been that long since he had died, so they threatened suit. The estate settled for a share of the writing credits so it received royalties every time the song was played, which ended up being a lot, at least in the 1970's. At least Bizet has been dead long enough Bowie's estate can't be sued for using Carmen. It looked like Reptile actually gave Bizet partial writing credit on the song out of an abundance of caution. (Π:OUT, irrelevant; lack of foundation; speculation regarding the credit; improper personal opinion; hearsay, prejudicial effect outweighs probative value; Δ: IN, relevant - Rule 403; expert opinion - Rule 702 (based on knowledge, experience, education, etc.)

not hearsay; facts perceived or made known to expert or, if inadmissible, facts reasonably relied upon by experts Rule 703; expert may testify on ultimate issue, Rule 704;)

¶19. True, I can not tell you if the main melody of “A Song for Sam” is not actually original, but if an artist steals one part of a song, how likely is it the rest of the song is original? I have a hard time believing David Bowie wrote that piece alone. I’ve heard the story from Sam Haggard about David writing it at age 13. I mean, I know David was a phenom, and was writing and performing at an early age. But it’s much more likely he heard the “Seguidilla” piece and forgot that he’d heard it and incorporated it into his song, just as he probably heard the other melody and borrowed it as well.

(Π:OUT, irrelevant; lack of foundation; speculation regarding the credit; improper personal opinion; hearsay, prejudicial effect outweighs probative value; Δ: IN, relevant - Rule 403; expert opinion - Rule 702 (based on knowledge, experience, education, etc.) not hearsay; facts perceived or made known to expert or, if inadmissible, facts reasonably relied upon by experts Rule 703; expert may testify on ultimate issue, Rule 704;)

*Signed: Dr. Ivan(a)/ A. Feelgood*