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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CONCORD MUSIC GROUP, INC., ET AL.,

Plaintiffs,

v.

ANTHROPIC PBC,

Defendant.

Case Number: 5:24-cv-03811-EKL-SVK

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO PARTIALLY EXCLUDE THE OPINIONS OF DR. ETHAN LUSTIG

Judge Eumi K. Lee
Magistrate Judge Susan van Keulen
Hearing Date: July 15, 2026, 10:00 am
Courtroom: 7

CERTIFICATION OF COMPLIANCE WITH CIVIL STANDING ORDER SEC. VIII.A

Pursuant to Sec. VIII.A of the Court's Civil Standing Order, the undersigned counsel certifies that Publishers' counsel met and conferred with Anthropic's counsel by videoconference on March 24, 2026 and by email to discuss the bases for this Motion in an effort to resolve or narrow disputed issues where possible to reduce motion practice.

TABLE OF CONTENTS

NOTICE OF MOTION AND MOTION 1

STATEMENT OF RELIEF 1

INTRODUCTION 1

BACKGROUND 2

LEGAL STANDARD 3

ARGUMENT 3

I. Dr. Lustig's coding methodology is not supported by his expertise. 3

II. The Court Should Exclude Dr. Lustig's Unreliable and Unhelpful "Similarity" Calculation. 5

III. The Court should exclude Dr. Lustig's unreliable opinions on "baseline similarity". ... 8

IV. The Court should exclude Dr. Lustig's *ipse dixit* opinions on "parodic intent". 9

CONCLUSION 10

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 15, 2026, at 10:00 am (see ECF No. 587), or as soon thereafter as this matter may be heard, before the Honorable Eumi K. Lee, District Judge, U.S. District Court for the Northern District of California, in Courtroom 7 – 4th Floor, 280 South 1st Street, San Jose, CA 95113, Plaintiffs Concord Music Group, Inc., Capitol CMG, Inc., Universal Music Corp., Songs of Universal, Inc., Universal Music - MGB NA LLC, Polygram Publishing, Inc., Universal Music - Z Tunes LLC, and ABKCO Music, Inc. (collectively, "Publishers") will and hereby do respectfully move this Court for an order partially excluding the opinions of Defendant Anthropic PBC's ("Anthropic") expert witness, Dr. Ethan Lustig.

STATEMENT OF RELIEF

Publishers respectfully request that the Court exclude the opinions of Dr. Ethan Lustig (i) that rely on his coding methodology; (ii) that rely on his similarity calculation; (iii) that rely on his analysis of random lyrics; and (iv) that certain records display parodic intent.

INTRODUCTION

Dr. Lustig is a musicologist who seeks to offer unsupported and unreliable testimony concerning the amount of "similarity" between Publishers' lyrics and Claude outputs, as well as characterizing certain Claude records demonstrating "parodic intent," while never explaining what he means by parody. ***First***, the Court should exclude Dr. Lustig's opinions based on his methodology for categorizing the relationship between Publishers' lyrics and lyrics in Claude outputs because, as a musicologist and not a linguist, he lacks any expertise to justify that methodology. ***Second***, Dr. Lustig's calculation of how "similar" Publishers' lyrics are to lyrics in Claude outputs should be excluded because it is unreliable and unhelpful to the jury. ***Third***, the Court should exclude Dr. Lustig's opinions purporting to establish a baseline level of "similarity" between random sets of lyrics because he fails to establish the sample of lyrics he compared is representative. ***Fourth***, the Court should preclude Dr. Lustig from testifying to his unexplained and unsupported opinion that certain Claude outputs display "parodic intent."

BACKGROUND

Dr. Lustig is a musicologist who holds degrees in Music Theory. Decl. of Andrew Guerra in Supp. of Pls.' Mot. to Exclude the Opinions of Dr. Ethan Lustig ("Guerra Decl.") Ex. A ¶ 1, App'x 1 at 1, Rebuttal Report of Dr. Ethan Lustig (Jan. 23, 2026) ("Rebuttal"). In connection with this matter, Dr. Lustig submitted two reports on behalf of Anthropic. First, on January 23, 2026, Dr. Lustig submitted a Rebuttal Report responding to Publishers' expert linguist Dr. Leonard and Publishers' expert statistician Mr. Dennis. *Id.* ¶ 6. Second, on February 13, 2026, Dr. Lustig submitted a Reply Report responding to Publishers' technical experts Dr. Shan and Dr. Zhao. Guerra Decl. Ex. B ¶ 5, Reply Report of Dr. Ethan Lustig (Feb. 13, 2026) ("Reply"). Relevant to this motion, Dr. Lustig's reports disclose the following opinions:

First, Dr. Lustig criticizes the methodology that Dr. Leonard uses to identify and categorize relationship between Publishers' lyrics and lyrics in Claude outputs. *See generally,* Rebuttal ¶¶ 9–21. Dr. Lustig then adopts a modified version of Dr. Leonard's methodology to perform his own categorization of Publishers' lyrics and Claude outputs consisting of four categories: Local Verbatim, Long-Range Verbatim, Near Verbatim, and Different. *Id.* at ¶ 21.

Second, after Dr. Lustig applies the methodology described above, he performs a "similarity" calculation. Rebuttal ¶¶ 27–32. To perform this calculation, Dr. Lustig defines the four categories of his methodology as "similar" or "different." *Id.* ¶ 29. He then counts the number of "similar" syllables in both the Publishers' lyrics and the Claude output and divides this by the total number of syllables in Publishers' lyrics and the Claude output. *Id.* ¶ 30.

Third, in his Reply Report, Dr. Lustig relies on a third-party website, randomsonggenerator.com, to "randomly" select 30 pairs of songs. Reply ¶ 13. After identifying the songs, Dr. Lustig looked up their lyrics on LyricFind, applied his coding methodology to the pairs of songs, and calculates the similarity between the pairs. *Id.* Dr. Lustig then relies on the results to draw conclusions about the "average" percent of "similarity" between pairs of random English language lyrics. *Id.* ¶¶ 13–14.

Fourth, Dr. Lustig reviews records of Claude interactions produced in this case and opines that certain Claude prompts and outputs reflect "parodic intent." Rebuttal ¶ 36.

LEGAL STANDARD

"In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court held that Rule 702 governs the admissibility of expert testimony." *Engilis v. Monsanto Co.,* 151 F.4th 1040, 1047 (9th Cir. 2025) (citing *Daubert*, 509 U.S. 579, 597 (1993)). Rule 702 requires "the proponent demonstrate to the court that it is more likely than not that: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." Fed. R. Evid. 702. "[T]he proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence." Fed. R. Evid. 702 Adv. Comm. Note to 2000 Amendment. There is no presumption in favor of admission. *Engilis*, 151 F.4th at 1049.

"[A] district court discharges its 'gatekeeping role' under Rule 702 by 'ensuring that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Engilis*, 151 F.4th at 1047 (quoting *Daubert* at 589, 597) (alterations omitted). "Any step that renders an expert's analysis unreliable renders the expert's testimony inadmissible. That is true whether the step completely changes a reliable methodology or merely misapplies that methodology." *Megabyte, Inc. v. Canal+ Techs., S.A.*, 2005 WL 6032845, at * 2 (N.D. Cal. June 17, 2005) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994)) (alterations omitted). "[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

ARGUMENT

I. Dr. Lustig's coding methodology is not supported by his expertise.

Dr. Lustig lacks the expertise to support his coding methodology. Much of Dr. Lustig's Rebuttal Report critiques the methodology for categorizing, or "coding," Claude outputs containing lyrics that Publishers' linguistic expert, Dr. Robert Leonard, set forth in his December 19, 2025 Expert Report. Rebuttal ¶¶ 9–21. With each critique, Dr. Lustig edits Dr. Leonard's

methodology to match his own preferences. Indeed, at deposition, Dr. Lustig testified that the methodology in his reports "is modeled on – it's a response to Leonard's analysis. . . ." Guerra Decl. Ex. C 38:8–39:6, Lustig Dep. Tr. ("Dep. Tr."). However, Dr. Leonard is a linguist and based his coding methodology on linguistic principles drawn from his extensive expertise in that field. *See* ECF No. 50 ¶¶ 12–16.

Dr. Lustig, on the other hand, concedes that he is *not* a linguist. Dep. Tr. 31:9–11. Apart from a one-semester seminar, he has no educational experience in linguistics. Dep. Tr. 30:3-19. He also has no professional experience in linguistics. Dep. Tr. 31:6–8. He has been involved in only one prior case involving comparison of lyrics, as opposed to music. Dep. Tr. 38:6–39:6, 39:24–40:22. Dr. Lustig did not employ the same coding methodology in his prior lyrics case as he asserts here. Dep. Tr. 38:8–39:6; *see also* Dep. Tr. 42:9–22, Guerra Decl. Ex. D (*AOM Music, Inc. v. Ocasio* complaint and Ex. A) (demonstrating Dr. Lustig's analysis in complaint exhibit did not involve any categorization of lyrics).

As a musicologist, Dr. Lustig lacks the necessary linguistic expertise to employ Dr. Leonard's linguistics-based methodology or to modify it in any way. Assessing similarity between two pieces of text is a different enterprise involving different skills and training from assessing similarity between two pieces of music; Dr. Lustig's lack of expertise to do the former is clear. His opinions based on his coding methodology should be excluded.

The revisions Dr. Lustig makes to Dr. Leonard's methodology are extensive. For example, he finds Dr. Leonard's "Orthographic" category (*e.g.*, spelling, punctuation, and capitalization) "unnecessary" because musical compositions are "heard rather than read," Rebuttal ¶ 11, despite the fact that that Dr. Lustig did not review any sound recordings in this case. Dep. Tr. 78:1–3. In addition, he collapses Dr. Leonard's "Missing" and "Different categories because "both represent lyrics that are non-similar between the two datasets . . . ." Rebuttal ¶ 9. He also replaces Dr. Leonard's "Missing Repetition" category with "Local Verbatim" and "Long-Range Verbatim." *Id.* ¶ 14.

Dr. Lustig's lack of linguistic expertise leads him to make fundamental errors that are linguistically unsound and render his opinion unreliable. As Dr. Leonard explained in his February

13, 2026 Reply Report, Dr. Lustig misunderstands lyrics as a genre of language. *See generally*, Guerra Decl. Ex. E ¶¶ 16–25 Rebuttal Report of Dr. Robert Leonard (Feb. 13, 2026) ("Leonard Reply"). Lyrics as a linguistic genre are defined by orthographic choices such as nonstandard spellings and colloquial or informal style, rendering Dr. Lustig's choice to disregard Orthography entirely contrary to the scientific literature. Guerra Decl. Ex. F pp. 34–35, 37–38, R. Kreyer & J. Mukherjee, *The Style of Pop Song Lyrics: A Corpus-Linguistic Pilot Study,* 125 ANGLIA 1 (2007); Guerra Decl. Ex. G pp. 6–7, L. Squires, *Genre and linguistic expectation shift: Evidence from pop song lyrics,* 48 LANGUAGE IN SOCIETY 1 (2018) ("Squires"); *see also* Leonard Reply ¶¶ 17–18. Similarly, lyrics as a genre incorporate repetition due to song structure. Accordingly, Dr. Lustig's decision to exclude the Missing Repetition analytic category, which identifies language not present in the comparison data "that are repetitions of earlier, previously reproduced lines or stanzas, including choruses," *see* ECF No. 50 ¶ 20, again runs contrary to a linguistic understanding of lyrics as a genre of language. Squires p. 6; *see also* Leonard Reply ¶¶ 19–20. Dr. Lustig's choices also obscure evidence of copying, including because collapsing Dr. Leonard's Missing and Different categories makes it more difficult to identify instances where Claude used more sophisticated copying techniques discussed in linguistic literature, such as word substitution with

II. The Court Should Exclude Dr. Lustig's Unreliable and Unhelpful "Similarity" Calculation.

After applying his flawed coding methodology, Dr. Lustig then conducts a "similarity" calculation. *See generally* Rebuttal ¶¶ 27–32. To perform this calculation, Dr. Lustig *further* collapses his coding methodology into "similar" and "dissimilar." Rebuttal ¶ 29. He then counts the number of similar and dissimilar syllables across both Publishers' lyrics and Claude output, sums similar lyrics across both, and divides by the total number of lyrics across both. Rebuttal ¶ 30. Dr. Lustig's "similarity" calculation is unreliable and unhelpful to the jury, and his testimony and opinions based on it should be excluded.

First, Dr. Lustig's similarity calculation rests upon the coding methodology for which he lacks expertise as explained *supra*, and should similarly be excluded.

Second, the literature Dr. Lustig cites in support of his similarity calculation is inapplicable to the issues in this case because it relates to *musical* similarity, not *lyrical* similarity. To support his similarity calculation, Dr. Lustig relies on *Quantitative Evaluation of Music Copyright Infringement* by Savage, et al. Rebuttal ¶ 30 n.19. Yet that paper focused on "the percentage of identical pitch classes shared between two *melodic* sequences," not lyrical sequences. Guerra Decl. Ex. H at 61 (emphasis added), Savage, et al., *Quantitative Evaluation of Music Copyright Infringement*, PROCEEDINGS OF THE FOLK MUSIC ANALYSIS WORKSHOP (2018). Indeed, to measure the performance of their methodology against past cases, the authors specifically "exclud[ed] cases focused on plagiarism of lyrics…." *Id.* at 63; Dep. Tr. 76:4-13. Dr. Lustig has identified no research to support a "similarity" calculation as applied to lyrics.

Third, Dr. Lustig's "similarity" calculation would obscure the nature of copying of Publishers' lyrics in Claude outputs, not assist the jury to better understand it. Dr. Lustig counts the number of times similar syllables are found both in Publishers' lyrics and the Claude output and compares that number with the total number of syllables in both Publishers' lyrics and Claude output, calculating a percentage match. Rebuttal ¶ 30. This straight percentage ignores all the nuances in what exactly those syllables are and how they are used. It fails to reflect that these syllables are not a random assortment of data but a unique collection that together have characteristics that make the lyrics distinctive and whose duplication shows that copying has occurred beyond the mere duplication of individual words or syllables. Dr. Lustig's calculation fails to account for the degree of **distinctiveness** of the overlapping lyrics, Rebuttal ¶ 31; Dep. Tr. 78:4–79:8; particular **orthography**, like consistent spelling and punctuation, Rebuttal ¶ 11; and **rhyming scheme**, Dep. Tr. 79:9–80:4. Dr. Lustig also only compared one Claude output to one song, meaning that, if a Claude output contained lyrics from more than one song—which occurred in evidence he reviewed—his similarity calculation would not capture it. Dep. Tr. 86:12–87:8.

Perhaps most critically, Dr. Lustig's calculation also fails to convey the **arrangement** of the syllables in his computation of "similarity." Consider an example. Dr. Lustig codes the outputs in Anthropic_0000074311 and Anthropic_0000076657b each as approximately 23% similar to the respective Publishers' lyrics. Rebuttal App'x 4 at 2 (22.9% and 22.5%, respectively). While a 23%

match may seem relatively low (although it may nevertheless be actionable copyright infringement), if the match comprises an entire verse or chorus, or a particularly memorable part of the song, that amount of copying could be significant.

In Anthropic_0000074311, Claude copies the first verse of "I Will Survive" by Gloria Gaynor nearly verbatim and thereafter, Claude incorporates at most four contiguous similar words from the original work throughout the rest of the output. Rebuttal App'x 2 at 29–31. By contrast, in Anthropic_0000076657b, "Roar" by Katy Perry, Claude tends to incorporate more "similar" words more often, but never a full line. *Id.* at 34–35. These two examples convey a different level of copying because in the first instance Claude captured nearly the entire famous first verse of "I Will Survive", while in the second instance Claude's copying of "Roar" was spread evenly throughout the whole work. In other words, the overall impression of Anthropic's copying in "I Will Survive" versus "Roar" is different because of the **arrangement** of the lyrical content copied. But Dr. Lustig's "similarity" calculation would mislead a jury into treating them the same and specifically, that the Claude outputs in both examples are "fundamentally different" than the original work. *See* Rebuttal App'x 4 at 2.

Dr. Lustig's percentage-based similarity metric, which fails to account for any of the ways that words are distinctive, both individually and in how they are used together to express an idea, is not a helpful metric for the jury. This numerical bean-counting approach does not align with how linguists understand the expression of ideas through lyrics, as discussed above. Moreover, it is not how courts assess the amount of copying for infringement purposes. In order to determine whether two works are substantially similar, the Ninth Circuit employes a two-part analysis including an objective extrinsic test and a subjective intrinsic test. *See Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004), *as amended on denial of reh'g* (Aug. 24, 2004). The point of the extrinsic test, which looks at objective criteria, is to allow the trier of fact to filter out unprotectible elements, not to count up numerically the elements that overlap. *Id.* at 847-48 (rejecting the district court's "measure-by-measure" analysis because it failed to consider the elements of the song in combination). Dr. Lustig's syllable count as a basis for determining similarity falls prey to the same flaw that *Swirsky* rejected.

III. The Court should exclude Dr. Lustig's unreliable opinions on "baseline similarity".

Dr. Lustig's analysis of "baseline" lyrical similarity rests upon unreliable data, and it should be excluded for several reasons.

First, Dr. Lustig's analysis relies on both his flawed coding methodology and his unreliable and unhelpful "similarity" calculation. As discussed, *supra*, the Court should exclude Dr. Lustig's opinions that rely on these flawed methodologies.

***Second*,** Dr. Lustig testified that he attempted to determine the "baseline" similarity of lyrics in general, "in order to have a better understanding of what is significant and what is simply a matter of chance." Dep. Tr. 115:17-116:3. It is not apparent what the point of this exercise might be in Dr. Lustig's analysis. He appears not to be arguing that this baseline should be "deducted" mathematically from a given output's similarly score. Regardless of his intent, deriving a baseline of common elements that all works in a given category share is a completely unorthodox method of assessing the level of infringement of a copyrighted work. The extrinsic test is applied on a work-by-work basis, taking into account the particular type and genre of the work and assessing the work as a whole in comparison to others of its kind. *See Swirsky*, 376 F.3d at 850 (musical works at issue were not in the same genre nor the same time signature). Deriving a baseline numerical score of commonality is simply not a recognized methodology in the field of linguistics or in copyright infringement cases. An expert must "point to some objective source to show that he has followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in his field." *Lust ex rel. Lust v. Merrell Dow Pharm., Inc.,* 89 F.3d 594, 598 (9th Cir. 1996) (internal alterations omitted) (quoting *Daubert v. Merrell Dow Pharm., Inc*., 43 F.3d 1311, 1319 (9th Cir. 1995).

Third, to determine this baseline, Dr. Lustig relied on a site called the Random Song Generator, which he used to generate 30 "random" pairs of songs. Reply ¶ 13. Dr. Lustig assumed that Random Song Generator selects from a pool of all released songs on Spotify. *Id.* ¶ 13 n.15. However, Dr. Lustig admitted that does not know the pool of songs from which Random Song Generator selects songs. Dep. Tr. 112:25–113:2. He also admitted that he does not know the individuals behind Random Song Generator. *Id.* 112:22–24. Even a cursory review of Random

Song Generator reveals serious problems about Dr. Lustig's reliance on it. Contrary to Dr. Lustig's goal that it provides a "random slice of Spotify releases," Reply ¶ 13 n.15, the website discloses that it selects only from "Spotify music videos," not the full selection of tracks on Spotify. Guerra Decl. Ex. I at 2 (Random Song Generator Website). Indeed, Dr. Lustig admits that Random Song Selector "seems to have a particular proclivity for Don Toliver and Olivia Dean," and that it is "unfortunately not a truly random slice of Spotify releases." Reply ¶ 13 n.15.

The Court should not accept a non-random sample of an unknown pool of songs as sufficiently representative of English-language lyrics to function as a similarity "baseline." An expert's conclusions are "undermined if the sample is not representative of the population that it purports to represent or is not selected in a sufficiently random manner." *IGT v. Alliance Gaming Corp.*, 2008 WL 7084606, at *10 (D. Nev. Oct. 21, 2008) (quoting *United Parcel Service, Inc. v. U.S. Postal Service*, 184 F.3d 827, 840 n. 14 (D.C. Cir. 1999)). Dr. Lustig's failure to adequately sample a known body of works renders his conclusions inadmissible.

IV. The Court should exclude Dr. Lustig's *ipse dixit* opinions on "parodic intent".

Dr. Lustig also opines that in certain cases "the user (and in some cases, Claude) [was] intending to create an obvious parody," but Dr. Lustig cannot identify any methodology for how he made this determination, nor does he have any expertise to do so. Lustig Rept. ¶ 36; *see also* App'x 4. The Court should exclude these opinions.

Dr. Lustig's Report contains no description of the steps or basis for his determining "parodic intent." It contains no definition or description of what Dr. Lustig considers parody. Rebuttal ¶¶ 8, 33, 36, 38. At deposition, Dr. Lustig testified that he "was using the commonsense definition of 'parody,' not a legal definition, and I think parody is one of those situations where you know it when you see it." Dep. Tr. 88:3–8. When pressed for the types of things he was looking for in assessing parody, Dr. Lustig testified that, "trying to or asking to rewrite the lyrics of a song, but making it about something else is a great example of a parodic intent." *Id.* 89:18–24. Dr. Lustig was also limited to considering the prompt and the output. *Id.* 92:12–21. He did not, for example, attempt to interview any user who entered a prompt.

Dr. Lustig's disclosures fall far short of the requirements of *Daubert* and Federal Rule of Evidence 702. As in *United States v. Valencia-Lopez*, Dr. Lustig "never explained the methodology, if any, that he relied on to arrive at" his opinion. 971 F.3d 891, 900 (9th Cir. 2020). Indeed, Dr. Lustig's "you know it when you see it" definition of parody does nothing to elucidate the standards by which Dr. Lustig reached his "parodic intent" opinions. Dep. Tr. 88:3–8. Without this information—which should have been disclosed in his reports—it is impossible to know whether Dr. Lustig applied this definition to the data in the case reliably, and if parody as he considers it has any relevance to any issue in the case. Dr. Lustig's opinions on "parodic intent" fail this basic requirement of Rule 702, and the Court should exclude them.

In addition, whether any of the Claude outputs at issue in the case should be considered parody or any other form of fair use is a mixed question of law and fact. *See Google LLC v. Oracle America, Inc.*, 593 U.S. 1, 2 (2021). To the extent that it is a legal question, Dr. Lustig's opinion is clearly improper. It is axiomatic that "an expert witness cannot give an opinion . . . on an ultimate issue of law[.]" *Laatz v. Zazzle, Inc.*, 2025 WL 3205586, at *4 (N.D. Cal. Nov. 17, 2025) (quotations and citations omitted). To the extent the question is factual, its determination is well within the realm of the jury. As Dr. Lustig applied a "commonsense definition of 'parody,'" he was not relying on any "scientific, technical, or other specialized knowledge" and his opinion will not assist the trier of fact. Fed. R. of Evid. 702(a). Determining whether a song should be considered a parody is precisely the sort of commonsense task for which the jury needs no expert assistance, particularly when it is unmoored by any analysis and simply based on the expert's *ipse dixit*. *General Elec. Co*, 522 U.S. at 146 (court should exclude *ipse dixit* of the expert); *Stanley v. Novartis Pharms. Corp.*, 11 F. Supp. 3d 987, 995 (C.D. Cal. 2014) (opinions based "on unsubstantiated generalizations or opinions not derived by the scientific method must be excluded").

CONCLUSION

For the reasons set forth above, the Court should exclude Dr. Lustig's testimony and opinions based on his unsupported coding methodology, unhelpful "similarity" calculation, unreliable baseline "similarity" analysis, and *ipse dixit* "parodic intent" opinions.

Dated: March 31, 2026

Respectfully submitted,

/s/ Andrew Guerra

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SIGNATURE ATTESTATION PURSUANT TO CIVIL L.R. 5-1(h)

Pursuant to Civil L.R. 5-1(h), I hereby attest that concurrence in the filing of this document was obtained from the signatory of this document. I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 31, 2026

/s/ Timothy Chung
Timothy Chung