

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

ATLANTIC RECORDS, LLC,)	
et als,)	
)	
Plaintiffs)	
v.)	CIVIL ACTION FILE NO. 08-28
)	
DOES 1-14,)	
)	
Defendants.)	
_____)	

Reply Memorandum of Doe 10 re Motion to Vacate etc

Plaintiffs’ arguments that are set forth in all their papers illustrate the real problem with this case, the other similar case in this District, Cv 07-162, and hundreds of similar cases pending in other jurisdictions. Plaintiffs think they don’t have to follow the rules of evidence and civil procedure because they have what they claim to be a serious economic problem.

Whether or not plaintiffs do in fact have a serious economic problem is irrelevant. They, like all other litigants including those with and without serious problems of any kind, must follow the statutes and rules put in place by Congress and the Supreme Court for resolving those problems in Article III courts. If the statutes and rules do not provide for a suitable remedy, the solution is to seek a change from Congress or the Supreme Court, not to ask this Court to ignore those statutes and rules.

However, that is exactly what plaintiffs seek to do. Their solution has been to race into the courthouse announcing “we have a serious economic problem and important rights that are being trampled on by bad people so give us special relief.” They do not bother to say, “by the way, we would be not entitled to the relief we seek if we were

treated in the manner in which all other litigants are treated.” It is because that argument succeeded when there was no opportunity to oppose plaintiffs’ Motion for an *ex parte* Order that Doe 10 has filed two motions: the Motion to Vacate, to Quash and for Early Discovery and the Motion to Strike the Linares Declaration.

In their Opposition to the Motion to Vacate, to Quash and for Early Discovery, which is now under consideration, plaintiffs argue, without explicitly doing so, that their situation is special so they can ignore the rules. Had they filed an Opposition to the Motion to Strike the Linares Declaration, they would have argued the same. However, they did not file an Opposition to that motion, which now should be granted pursuant to Local Rule 7(b). See *ITI Holdings, Inc. v. Odom et al*, 468 F.3d 17 (1st Cir. 2006). Once that Motion is granted and the Linares Declaration vanishes from the record, there is no basis to issue the *ex parte* Order and so Doe 10’s Motion under consideration should be granted. However, in an exercise of caution, Doe 10 addresses below the specific arguments made by Plaintiffs in their Opposition.

Plaintiffs suggest that Doe 10 argued that because there is an unlicensed investigation, the *ex parte* Order should be vacated and suggest that Doe 10 is arguing for a civil exclusionary rule. Opposition at 3-4. Doe 10 makes no such arguments. Rather, she argues that the Magistrate gave excessive weight to the testimony in the Linares Declaration because no Media Sentry employee has a license when granting the Motion for *ex parte* Relief. She relies on *TNT Rd. Co. v. Sterling Truck Corp.*, 2004 U.S. Dist. LEXIS 13463, n2 (D. Me. 2004) for that proposition. That is her sole argument. Plaintiffs straw man argument regarding a civil exclusionary rule should be ignored.

Plaintiffs argue at pages 4-5 of their Opposition that since Mr. Linares is an attorney or that Media Sentry has a lawyer who supervises the work, the MediaSentry employees do not need a license. See 32 M.R.S.A. § 8104-2-F. That argument fails for at least two reasons.

First, there is no record evidence that either Mr. Linares is a lawyer or that there are any attorneys employed at MediaSentry let alone supervising its employees. Second, if both those assertions were of record, the argument is too broad. The statute makes an exception for “attorneys.” One may assume that if a paralegal for Mr. LaMontagne had conducted this investigation then there would be no violation of the statute. That is because paralegals work directly under the supervision of an attorney.

It is a much greater stretch, and ultimately one that fails, to argue that if Mr. LaMontagne had hired Sherlock Holmes or Kinsey Milhone to do the work done by MediaSentry, neither Mr. Holmes nor Ms. Milhone needed a license. Either would have needed a license because those legendary detectives would have been operating as independent contractors, just as the MediaSentry employees did and do.

Plaintiffs also, on page 5 of their Opposition, cite to a Massachusetts case, *Grand Jury Investigation*, 407 Mass. 916 (1990). However, that case never even mentions the question argued here, whether failure to have a PI license weakens, fatally or otherwise, the strength of the evidence offered by the PI.

Plaintiffs argue at page 5 of their Opposition that Doe 10 seeks some right of privacy exception to the issuance of a subpoena. She does not. This is another straw man argument.

Plaintiffs argue at pages 5-6 of their Opposition that Doe 10 does not have standing to argue that evidence obtained illegally by a PI, admissible or otherwise, should be given minimal or no weight. Again, the arguments of Doe 10 are mischaracterized or misunderstood. Like any other litigant, she is arguing the weight of the evidence, which is exactly what *TNT* suggests should be done. She is not, because of the illegal investigation, seeking a damages award or injunctive relief against MediaSentry or its employees or RIAA which hired it; if she were she would probably have no standing but that is not a point the court need consider.

Plaintiffs argue at pages 6-7 of their Opposition that Doe 10 is challenging the factual accuracy of the Linares Declaration. She is not disputing the facts set forth in the Declaration; she is disputing, in the Motion before the Court, the weight to be given to it.¹

At pages 8-9 of their Opposition, plaintiffs argue that they are entitled to expedited discovery. That issue is not ripe, and will not be ripe until the motion under consideration is denied and the Motion to Strike is denied, if indeed they are denied.

At page 9 of their Opposition, plaintiffs argue that since Doe 10 has not proclaimed her “innocence,” her motion should be denied. What they mean to say is that since she has not proclaimed her “innocence,” they need not follow the rules of evidence or the rules of civil procedure. However, she need not proclaim her innocence. This is not a criminal case. She need not even file an answer at this time. If plaintiffs’ argument

¹ In her Motion to Strike to which no Opposition has been filed, she also made evidentiary arguments going, not to weight but to admissibility, and did not challenge the facts asserted by the Declarant. Plaintiffs take the position that the statements contained in the declaration are admissible because “Linares offers factual testimony that is based on personal knowledge derived from his supervision of MediaSentry.” But while Mr. Linares may have personal knowledge about what he was told, his testimony about what he was told is, of course, hearsay. It is what an out of court declarant told him that is offered to prove the truth of the statement. That is black letter law. F.R.Ev. 801(c). Plaintiffs suggest no exception to the general prohibition on the admission of hearsays that would apply to the statements made by Mr. Linares in his Declaration.

on this point carries they day, then no defendant will be allowed to file a motion to dismiss for lack of jurisdiction without first proclaiming their “innocence.” That is not and never has been the law.

For all the above reasons, the Motion to Vacate the *ex parte* Order, to Quash the Subpoena and to Permit Discovery by Doe 10 should be granted.

Dated: May 15, 2008

/s/Robert E. Mittel
Robert E. Mittel, Bar No. 75

MITTELASEN, LLC
85 Exchange Street
P.O. Box 427
Portland, ME 04112-0427
(207) 775-3101
Attorneys for Defendant Doe 10

CERTIFICATE OF SERVICE

I hereby certify that on May 15, I electronically filed Doe 10’s Reply Memorandum with the Clerk of Court using the CM/ECF system which will send notification of each filing to the following: James S. LaMontagne, Esq., John Osborn, Esq. and Paul Chaiken, Esq.

/s/Robert E. Mittel, Esq. (75)
MITTELASEN, LLC
85 Exchange Street
P.O. Box 427
Portland, ME 04112-0427
(207) 775-3101
Email: rmittel@mittelasen.com
Attorney for Defendant Doe 10