

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ARISTA RECORDS LLC, a Delaware limited liability company; ATLANTIC RECORDING CORPORATION, a Delaware corporation; BMG MUSIC, a New York general partnership; CAPITOL RECORDS, INC., a Delaware corporation; ELEKTRA ENTERTAINMENT GROUP INC., a Delaware corporation; INTERSCOPE RECORDS, a California general partnership; LAFACE RECORDS LLC, a Delaware limited liability company; LOUD RECORDS LLC, a Delaware corporation; MAVERICK RECORDING COMPANY, a California joint venture; MOTOWN RECORD COMPANY, L.P., a California limited partnership; PRIORITY RECORDS LLC, a Delaware limited liability company; SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership; UMG RECORDINGS, INC., a Delaware corporation; VIRGIN RECORDS AMERICA, INC., a California corporation; and WARNER BROS. RECORDS INC., a Delaware corporation,

Plaintiffs,

v.

DOES 1-27,

Defendants.

PLAINTIFFS' OBJECTION TO MOTION OF DOES 2, 3, 6, 8, 15 & 23 TO VACATE EX PARTE DISCOVERY ORDER, TO QUASH THE SUBPOENA AND TO TAKE DISCOVERY AND INCORPORATED MEMORANDUM OF LAW

CIVIL ACTION FILE:

No. 1:07-cv-00162-JAW

PLAINTIFFS' OBJECTION TO MOTION OF DOES 2, 3, 6, 8, 15 & 23 TO VACATE EX PARTE DISCOVERY ORDER, TO QUASH THE SUBPOENA AND TO TAKE DISCOVERY

Plaintiffs submit the following Objection to the Motion of Doe Defendants ("Defendants") to Vacate Ex Parte Discovery Order, to Quash the Subpoena and to Take Discovery. ("Defendants' Motion").

INTRODUCTION AND SUMMARY OF ARGUMENTS

The Declaration of Carlos Linares (“Linares Declaration”), was submitted in support of Plaintiffs’ Motion for Leave to Take Immediate Discovery. Defendants argue that “the Linares Declaration is based on evidence gathered by criminal conduct, and should not have been the basis for any Order.” Defendant’s Motion at 3. More specifically, Defendant claims that MediaSentry’s work in this case was “criminal” because MediaSentry did not have a private investigator’s license pursuant to Chapter 32 Maine Revised Statutes (“M.R.S.”) Section 8104. Defendant is wrong for several reasons. First, even if a violation of Section 8104 occurred, this Court previously held that the failure of a witness to obtain a private investigator’s license did not warrant excluding his testimony. Additionally, MediaSentry does not fall under the M.R.S. Section 8104 licensing requirements because the investigative work was performed on behalf of counsel and accordingly was not subject to the Maine licensing requirements. Further, MediaSentry did not conduct an investigation subject to the Maine licensing provisions because its work merely involved gathering public information. Finally, Defendants do not have standing to enforce the statute.

Defendants also claim that Plaintiffs have failed to make a showing of good cause for expedited discovery. Defendants’ argument is based in part upon a mischaracterization of the Linares Declaration. Defendants argue that Plaintiffs have not shown irreparable harm because they have failed to provide evidence that, absent expedited discovery, information regarding Defendants’ identity would be destroyed by the Internet Service Provider (“ISP”), the University of Maine (the “University”). This is simply not true. Instead, Plaintiffs seek discovery to learn Defendants’ identity. Absent this information, Plaintiffs would be irreparably harmed because they could not proceed with this case. Not surprisingly, this Court, along with courts throughout

the country, have concluded that Plaintiffs have shown good cause for expedited discovery.

Defendants also claim that they will be irreparably harmed if their identities are revealed. Conspicuously absent from Defendants' argument is an assertion of innocence or misidentification. Instead, Defendants simply seek to avoid identification and prosecution for copyright infringement.

Defendants also raise disputed factual issues and seek limited discovery. A dispute over factual issues, however, does not provide a proper basis for striking the Linares declaration. Additionally, Defendants' factual arguments are incorrect. For example, Defendants claim that Mr. Linares is not a reliable witness. Defendants' Motion at 3-4. This is simply not true. Mr. Linares is an attorney employed by the Recording Industry Association of America ("RIAA") to work on behalf of the Plaintiff record companies. His duties include supervising copyright infringement investigations, including the work of MediaSentry in this case. Thus, Mr. Linares' testimony is well founded and based on personal knowledge.

Finally, Defendants seek Court authorization to depose Mr. Linares and a representative of MediaSentry. Defendants' request is premature. Once properly before the Court, Defendants may proceed with depositions and other discovery. The information Defendants seek is also not relevant to any of the issues in this case.

ARGUMENTS

1. **Plaintiffs Conducted a Proper Investigation of Defendants' Infringement.**

Defendants argue that the Linares Declaration should be stricken because it is based on an improper investigation conducted by MediaSentry. Defendants claim that this investigation

was improper because MediaSentry is not licensed in Maine.¹

Defendants' arguments are wrong for at least three reasons. First, this Court has already held that failure of a witness to obtain a private investigator's license did not warrant excluding his testimony at trial. In *TNT Road Co. v. Sterling Truck Corp.*, 2004 U.S. Dist. LEXIS 13463 * 6 (D. Ma. July 19, 2004), the Court concluded that:

Assuming that [the expert] was required by Maine law to have a license to conduct his investigation of the vehicle fire in this case, I am not persuaded that his failure to do so justifies the exclusion of his testimony. Nor do I think that his failure to obtain a license prevents the court from considering his expert qualifications or the reliability of his investigatory methods.

Id at * 6.

Moreover, defendants have not and cannot point to any authority that supports exclusion. There is no portion of the M.R.S. Provisions that support Defendants' position. The instant case is a purely civil matter that does not involve any government action that would invoke the Fourth Amendment. *Mejia v. City of News York*, 119 F. Supp. 2d 232, 254 (S.D.N.Y. 2000) ("the Fourth Amendment's exclusionary rule does not apply in civil actions other than civil forfeiture proceedings.") (citing *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998); *Nutrasweet Co. v. X-L Eng'g Corp.*, 926 F. Supp. 767, 769 (N.D. Ill. 1996) ("[T]he Fourth and Fourteenth Amendments do not require in civil cases that the exclusionary rule be extended to situations where private parties seek to introduce evidence obtained through unauthorized searches made by state officials.")).

¹ Much of Defendants' arguments is based upon a similar Massachusetts statute. The factual basis for Defendants' arguments is limited at best. MediaSentry received a letter, dated January 2, 2008, from a Sergeant Bishop in the Certification Unit of the Massachusetts Department of State Police, indicating that MediaSentry was allegedly in violation of the Massachusetts General Law Provisions. By letter dated January 10, 2008, counsel for MediaSentry disputed Sergeant Bishop's initial assessment. Since then, MediaSentry has received no further communication from the State Police.

Second, the investigations performed by MediaSentry do not fall under the M.R.S. Section 8104 licensing requirements because this section does not apply to “an attorney acting in a professional capacity.” Section 8104 (2)(f). The scope of this provision has not been addressed by courts within Maine. However, similar exemptions in New York and Massachusetts have been interpreted to include agents and investigators retained by the attorney.² The New York Attorney General, interpreting a provision similar to Section 8104, found that “[o]ne who devotes himself exclusively to making investigations for patent attorneys in connection with litigations for infringements does not require a license.” Op. Atty. Gen., 21 St Dept Rep 495 (1919); New York Supreme Judicial Court Rule 3:08, PF 15; N.Y. Gen. Bus. Law §70 (annotated case notes No. 3); *Grand Jury Investigation*, 407 Mass. 916 (1990). In this case, MediaSentry’s work was performed under the supervision and direction of MediaSentry’s own counsel and Mr. Linares, an attorney working on behalf of Plaintiffs in their investigation and litigation against copyright infringers.

Third, there was no private investigation here because the information that MediaSentry gathered is public information that was placed out on the Internet from Defendants’ computers, on Defendants’ internet accounts, for any P2P user to see.³ As a result, Defendants have no expectation of privacy with respect to such information and cannot claim to have been harmed by the disclosure of private information. *See In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 257, 267 (D.D.C. 2003) (when an ISP subscriber “opens his computer to permit others, through peer-to-peer file sharing, to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to

² Any other interpretation of the Maine Statute could result in paralegals and others assisting an attorney being required to obtain a private investigator’s license.

³ The integrity of the evidence gathered by MediaSentry is not at issue.

the world.”), *rev'd on other grounds*, 351 F.3d 1229 (D.C. Cir. 2003); *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (activation of file-sharing mechanism shows no expectation of privacy); *Elektra Entm't Group, Inc. v. Does 1-9*, 2004 LEXIS 23560 at *13 (S.D.N.Y. Sep. 7, 2004) (holding that defendant has “minimal expectation of privacy in downloading and distributing copyrighted songs without permission”) (citations omitted). For this reason, too, Defendants' allegation that MediaSentry has violated the M.R.S. provisions fails.

Finally, Defendants do not have standing to assert claims under the M.R.S. Provisions. Defendants fail to cite any authority in support of their standing argument. Indeed, Title 8108, The Private Investigations Act, does not contain a provision that authorizes a private party to enforce the statute. Instead, the Commissioner of Public Safety and local law officials are charged with enforcing its provisions. 32 M.R.S. §§8113-8116. Indeed, MediaSentry recently received a letter from Detective Pelletier of the Maine State Police, requesting further information that would clarify the Detective's understanding of MediaSentry's work. (Attached as Exhibit A). Plaintiffs anticipate that once MediaSentry provides additional information, this matter will be dropped.

For all of these reasons, the Court should decline to strike the Linares Declaration based upon MediaSentry's work in this case.

2. **Mr. Linares' Declaration is Factually Correct and Based on Personal Knowledge.**

Mr. Linares is an attorney who serves as Vice President, Anti-Piracy Legal Affairs for RIAA. (Linares Decl at ¶2) In this capacity, he works entirely on behalf of the Plaintiff record companies, supervising investigations into copyright infringement, including the work of MediaSentry in this case. *Id.* The statements in the Linares Declaration are based upon personal

knowledge. *Id.*

Defendants offer various factual challenges to the Linares Declaration. Factual challenges, however, do not provide a legal basis for excluding the Linares Declaration. *Eicken v. USAA Federal Savings Bank*, 498 F. Supp. 2d 954, 960-61 (S.D. Tx. 2007) (denying motion to strike affidavit that included disputed factual allegations); *Freeman v. Berge*, 2003 U.S. Dist. LEXIS 24692, 2-4 (W.D. Wis. Dec. 3, 2003) (disputes over proposed findings of fact are not grounds to strike an affidavit). Additionally, Defendants' factual arguments are incorrect. Defendants claim that the Linares Declaration should be stricken because Mr. Linares does not have the expertise to make the statements in his Declaration. In fact, Mr. Linares offers factual testimony that is based on personal knowledge derived from his supervision of MediaSentry, who investigated the copyright infringement at issue in this case. As such, Mr. Linares is intimately familiar with the infringement investigation procedures and resulting evidence in this case. At best, Defendants' assertions involve factual disputes that are properly addressed in discovery and trial.

3. Plaintiffs Have Shown Good Cause for Expedited Discovery.

This Court previously concluded that Plaintiffs had shown good cause for expedited discovery. Defendants' challenge to this holding is based upon a mischaracterization of the Linares Declaration. Defendants claim that the Plaintiffs' showing of good cause for expedited discovery was based upon the possibility that the University would destroy the information Plaintiffs seek. In fact, Plaintiffs' good cause showing was primarily based upon Plaintiffs' need to identify the Doe Defendants.

Good cause exists where, as here, the complaint alleges claims of infringement.

Interscope Records v. Does 1-14, No. 5:07-4107-RDR, 2007 U.S. Dist. LEXIS 73627, *3 (D.

Kan. Oct. 1, 2007) (citations omitted) (“Good cause can exist in cases involving claims of infringement and unfair competition); *Energetics Sys. Corp.*, 1996 U.S. Dist. LEXIS 2830 at *5-6 (good cause standard satisfied where the moving party had asserted claims of infringement); *Semitool*, 208 F.R.D. at 276; *Benham Jewelry Corp. v. Aron Basha Corp.*, No. 97 CIV 3841, 1997 WL 639037, at *20 (S.D.N.Y. Oct. 14, 1997). *Taylor Corp. v. Four Seasons Greetings, LLC*, 315 F.3d 1034, 1042 (8th Cir. 2003); *Health Ins. Ass’n of Am. v. Novelli*, 211 F. Supp. 2d 23, 28 (D.D.C. 2002) (“A copyright holder [is] presumed to suffer irreparable harm as a matter of law when his right to the exclusive use of copyrighted material is invaded.”) (quotations and citations omitted); *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 66 (2d Cir. 1996).

In summary, without this information, this case cannot proceed.⁴ Defendants implicitly admit that the case could not go forward without identification of the Doe Defendants, noting that “[i]f plaintiffs cannot learn [Defendants’] identity, [Defendants] are relieved of the burden of defending lawsuits. . .”. Defendants’ Motion at 8. Defendants claim that this identification will cause them irreparable harm. Defendants do not claim to be innocent. Instead, Defendants seek to avoid prosecution for copyright infringement by remaining anonymous.

Finally, Defendants seek leave of this Court to depose Mr. Linares and a representative of MediaSentry. The court in *UMG Recordings, Inc v. Lindor*, 05-cv-1095 (DGT) (RML) at p.4 (E.D.N.Y. May 16, 2008), rejected defendant’s attempt to obtain similar discovery from MediaSentry, noting that

⁴ To support their good cause argument, Defendants cite *McMann v. Doe*, 460 F. Supp. 2d 259, 265 (D. Mass. 2006). In *McMann*, the plaintiff failed to make a prima facie showing of defamation. As a result, discovery of information that would identify the defendant was not warranted. In contrast, in this case and many others, the Court found that Plaintiffs provided sufficient evidence to make a prima facie case of copyright infringement.

[T]he criteria that Plaintiffs and MediaSentry use in selecting targets for investigation, the timing and frequency of their efforts to monitor infringement, the methods infringers have developed to evade detection and MediaSentry's efforts to counteract them have no relevance to the claims of infringement against defendants and their defenses to them.

Finally, Defendants' discovery request is also premature at this stage of the litigation.

Once the parties are before the Court, Defendants will have ample opportunity to take depositions and serve written discovery requests.

CONCLUSION

For all of the reasons set forth above, Defendants' Motion should be denied and the ongoing expedited discovery in this case should continue.

Respectfully submitted,

ARISTA RECORDS LLC, ATLANTIC RECORDING CORPORATION, BMG MUSIC, CAPITOL RECORDS, INC., ELEKTRA ENTERTAINMENT GROUP INC., INTERSCOPE RECORDS, LAFACE RECORDS LLC, LOUD RECORDS LLC, MAVERICK RECORDING COMPANY, MOTOWN RECORD COMPANY, L.P., PRIORITY RECORDS LLC, SONY BMG MUSIC ENTERTAINMENT, UMG RECORDINGS, INC., VIRGIN RECORDS AMERICA, INC., WARNER BROS. RECORDS INC., and ZOMBA RECORDING LLC

By their attorneys,

**SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION**

Dated: May 29, 2008

By: /s/ James S. LaMontagne

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May, 2008, a copy of the foregoing was sent via the court's ECF filing system to Robert E. Mittel, Esquire and Paul W. Chaiken.

/s/ James S. LaMontagne

James S. LaMontagne