

## Vandenberg & Feliu, LLP

*Attorneys at Law*

110 East 42<sup>nd</sup> Street

New York, New York 10017

Telephone: 212-763-6800

Author's direct dial: 212-763-6809

Fax: 212-763-6810/6814

Ray Beckerman

E-mail: [rbeckerman@vanfeliu.com](mailto:rbeckerman@vanfeliu.com)

March 3, 2008

By mail and electronic filing

Hon. Robert M. Levy

Magistrate Judge

U. S. District Court, Eastern District of New York

225 Cadman Plaza East

Brooklyn, NY 11201

Re: UMG Recordings, Inc., et al v. Lindor, 05CV1095(DGT)(RML)

Dear Judge Levy:

This is in reply to the February 27, 2008, letter of Thomas M. Mullaney, Esq., attorney for nonparty witness SafeNet, Inc. f/k/a MediaSentry, Inc. ("SafeNet"). Due to space constraints, we will (a) ignore the ad hominem attacks and (b) incorporate by reference materials relating to the backup materials (items 6-22, 25, and 27-28), and miscellaneous items 1-3, 5, 23-24, and 26, in our reply to the letter of even date of Richard L. Gabriel, Esq., attorney for plaintiffs.

**Backup materials to the text documents (Items # 6-22, 25, 27-28)**

\_\_\_\_\_ This action was commenced February 28, 2005, and relates to alleged infringement occurring on August 7, 2004, allegedly detected by SafeNet (exhibit A). Plaintiffs have produced six (6) printouts of text documents dated "3/13/2006", bearing the name "Lindor Marie", which they intend to use as trial exhibits and which their expert has repeatedly testified form the basis of his opinion that someone uploaded and downloaded plaintiffs' song files (the "text documents")<sup>1</sup>. The text documents were prepared during the litigation, and for purposes of the litigation.

My technical advisers have indicated that in order to understand the online "investigation", by SafeNet on which plaintiffs rely, it is necessary that we obtain certain additional documents and computer data, which are set forth in items 6-22, 25, and 27-28 (a separate list of just those items is annexed hereto, for the Court's convenience, as exhibit C)(the "backup materials"). We would be pleased to submit an affidavit from a technical person, but do not think it should be necessary, as all of the items requested are fairly obvious. Item 6, e.g., asks for documents describing the exact methods and means of the investigative and evidence collection techniques. It is not known if SafeNet followed any industry-recognized procedures or formalized standards for observation, evidence gathering, and data archival. It has boasted in this case of its "multiple fail-

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<sup>1</sup> The text documents have been marked as exhibits 6 and 10-14 of the Jacobson deposition. Copies of exhibits 6, 10, 13, and 14, and the first three pages each of exhibits 11 and 12 are annexed hereto as exhibit B.

safes”(exhibit A, par. 10) but now seeks to conceal the information needed to test its boast. Nothing has been produced relating to its chain of custody, nor has it been shown that its data was collected in a controlled, scientific manner by qualified persons or automated processes, and that such data is free from error and contamination, other than its own good opinion of itself. Its methodologies and corresponding rate of error remain unknown and the accuracy and correctness of its methods have not been subject to peer review. Another example is item 19 which simply asks for the digital copies of the files from which Jacobson exhibit 12 (systemLog.txt) was printed out. SafeNet’s objection to that as “proprietary and confidential” is ludicrous, as SafeNet’s investigator has testified in this case that he “does nothing to create this text file. It exists on the user’s hard drive.” If it exists on the hard drive in the form presented then there is nothing proprietary or confidential about it. If on the other hand the investigator spoke falsely in his declaration, and in fact the document has been altered from what existed on “the user’s hard drive”, then defendant is obviously entitled to explore those alterations through discovery.<sup>2</sup>

### **Confidentiality**

\_\_\_\_\_The confidentiality objection is a ruse, as (a) the undersigned provided SafeNet and plaintiffs with a blanket confidentiality stipulation which they rejected (exhibit D), and (b) SafeNet indicated that – were it provided with a confidentiality stipulation which it deemed acceptable – the only further item it would produce is a resume of Tom Mizzone (exhibit E). I.e., not a *single* substantive document or item of data.

### **Privilege**

The assertions of “privilege” are frivolous on their face. In any event, SafeNet and plaintiffs have failed to assert any privileges in a legally cognizable manner, since they have never submitted the privilege log mandated by Fed. R. Civ. P. 26(b)(5)(A) and U.S. Dist. Ct. Rules S. & E.D.N.Y., Civil Rule 26.2(a)(1) and 26.2(a)(2)(A), despite having been in possession of the subpoena since *November 14, 2007*, so any rights they might have had to assert a “privilege” have clearly been waived.

### **Materials relating to private investigator’s license (Item #1(a))**

It appears that neither SafeNet nor its “investigator” are licensed by the State of New York as mandated by NY GBL § 70[2],<sup>3</sup> and that therefore the procurement of the text documents and their provision to plaintiffs’ counsel were crimes. NY GBL § 70[4]. It goes without saying that the possible criminal conduct of a witness is a legitimate area of pretrial discovery, especially where the criminality relates directly to the procurement of central evidence in the case.

### **False statements of fact abound in SafeNet’s opposition**

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<sup>2</sup> Additional discussion of backup materials in Letter replying to Gabriel letter.

<sup>3</sup> SafeNet has been accused of conducting investigations without a license in Oregon, Massachusetts, Texas, Florida, and New York. See, e.g. Memorandum of Law of Attorney General of State of Oregon in *Arista v. Does 1-17*, at page 5 (exhibit F). Where plaintiffs have responded to the accusation, their response has been not that SafeNet does in fact have a license, but that it is not required to have a license since its investigation is not really an investigation. See, e.g. Surreply Memorandum of Law in *Arista v. Does 1-17*, at pages 11-12 (exhibit G) and Opposition Memorandum in *Arista v. Does 1-21*, at pages 6-9 (Exhibit H). In the instant case, plaintiffs have submitted to this Court too many declarations under penalty of perjury to the effect that SafeNet is its “investigator” to take that tack.

Counsel has made a number of false statements of fact, including the following:

\*“*[h]er counsel... insisted that SafeNet not produce ... the “Lindor file”*” I never at any time told Mr. Mullaney not to produce the Lindor file. I told him not to produce additional identical copies of the text documents, and not to produce the agreements in item 29.

\*“*Defendant herself has stated that information now sought from SafeNet is proprietary and confidential. E.g., Letter of Ray Beckerman to Hon. Robert M. Levy, dated march 12, 2007.*” A copy of the March 12, 2007, letter is annexed hereto as exhibit H. It states that plaintiffs have taken the position that SafeNet’s methods are “proprietary”. It nowhere concedes that they are proprietary, or that they are or deserve to be confidential.

\*“*Defendant’s ... need for production of all of SafeNet’s source code*”. Our subpoena makes no such request. It demands production of only certain very specific pieces of code.

\*“*Defendant’s document requests effectively ask for every page and line of SafeNet’s internal techniques, processes and procedures for every facet of the former-MediaSentry’s internet security business, whether or not related to Defendant*” There is nothing whatsoever in the subpoena to support this nonsensical statement. The subpoena asks only for materials related to Defendant’s case. Every item is expressly limited to “the complaint” (defined as the complaint in this case) or “the Account” (defined as “(a) Marie Lindor or an internet access account paid for by her or otherwise in her name, (b) the Kazaa username “jrlindor@kazaa”, and/or (c) the use of IP address 141.155.57.198 on August 7, 2004, at 6:15 A.M. “) Instr./Def. 4 & 13.

\*“*Defendant ... has refused to even discuss an appropriate Protective Order.*” and “*defendant’s counsel....appears disconcertingly eager to obtain this information without the encumbrance of an appropriate Protective Order*”. As noted above, we not only discussed an appropriate protective order, we went to the trouble – at Mr. Mullaney’s request – of actually drafting such an order. Mr. Mullaney rejected it, and thereafter revealed that even if we had provided him with an order he deemed acceptable, he would still not have produced ANY of the documents or data we sought.

\*“*[I]t appears that [defendant] has repeatedly taken the position that an unknown individual used her computer to infringe copyright, while conceding that her computer was the one used to do so.*” and “*Defendant seems to be admitting that Plaintiff has the right street address and phone number*”. In the voluminous record of this case there is not a single line to support these fabrications. Defendant has never taken any of those positions at any time. She hasn’t a clue as to what anything in this case is about; it is not even clear that she has a computer, because the computer in her house was her late husband’s and she has never used that computer or any other. The only position she has ever taken is that she cannot understand why she is being sued. And to state that she concedes that her computer was the one used, when even plaintiffs’ forensics examiner could find no evidence that that is the case, is outrageous.

**Source code vs. working copy of code**

\_\_\_\_\_ We do not believe SafeNet has made any kind of case for prohibiting us from examining its source code under an appropriate protective order. But if the Court should feel otherwise, it should at least direct SafeNet to turn over working copies, so that we can test their operation.

Respectfully submitted,

/s/

Ray Beckerman

cc: Richard L. Gabriel, Esq.

Thomas M. Mullaney, Esq.