

RICHARD A. ALTMAN
Attorney for Defendant
285 West Fourth Street
New York, New York 10014
212.633.0123

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LAVA RECORDS LLC *et al.*,

Plaintiffs,

07 CV 321 (CLB)

-against-

NOTICE OF MOTION

ROLANDO AMURAO,

Defendant.

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Upon the declaration of Richard A. Altman dated January 28, 2008 and the exhibits annexed, defendant Rolando Amurao hereby moves this Court for an order as follows:

- a. Pursuant to F.R.E. 104(a) and 601, barring any testimony or evidence from Media Sentry, plaintiffs' investigator, on the ground that Media Sentry is not a licensed private investigator pursuant to the New York General Business Law;
- b. Extending the discovery cutoff for the purpose of permitting defendant to take the deposition of Matthew Oppenheim;
- c. Pursuant to F.R.Civ.P. 37(a)(2)(B), compelling plaintiffs to provide a full and complete response to an interrogatory which they refused to answer.

Pursuant to agreement of the parties, opposition papers shall be served and filed by February 11, 2008.

Dated: New York, New York
January 28, 2008

/S/
RICHARD A. ALTMAN
Attorney for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LAVA RECORDS LLC *et al.*,

Plaintiffs,

07 CV 321 (CLB)

-against-

DECLARATION

ROLANDO AMURAO,

Defendant.

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RICHARD A. ALTMAN declares as follows:

1. I am the defendant's attorney and submit this declaration in support of this motion for the following relief:

a. An order pursuant to F.R.E. 104(a) and 601 barring any testimony or evidence from Media Sentry, plaintiffs' investigator, on the ground that Media Sentry is not a licensed private investigator, as required by the New York General Business Law;

b. An order permitting defendant to take the deposition of Matthew Oppenheim;

c. An order compelling plaintiffs to provide a full and complete response to an interrogatory which they refused to answer.

2. The cut-off date for discovery in this matter was November 30, 2007, and the parties appeared before the Court on December 14, 2007 for a status conference. We attempted to resolve the entire case at that time, as directed by the Court, but were unable to do so, and the parties agreed that any further motions that the parties wished to make be filed by January 28, 2008, with opposition papers due by February 11, reply papers by February 22, and oral argument on February

29. The Court accepted this schedule, although the minute entry erroneously states that motions were to be filed by January 7, 2008. On December 19, 2007, the parties submitted a joint letter to the Court requesting the correction, but I am unaware of a subsequent order or minute entry doing so. Accordingly, I am requesting that the Court correct the entry to reflect the parties' agreement as to the motion schedule, and that the discovery deadline be extended for the taking of a deposition.

3. First, with respect to Media Sentry, any testimony or evidence from them should be barred. Plaintiffs proceed in these copyright infringement cases based upon evidence of file-sharing or distribution derived from investigations conducted by Safenet, Inc., a private company operating under the name of Media Sentry. As I understand it, they search on the Internet for people who have files which they wish to share, including music files. They then use the information derived from those investigations to identify the Internet Protocol ("IP") address used from the computer, and then by a subpoena to the Internet Service Provider, identify the subscriber to that Internet account. That person then becomes the putative defendant and is sued, on the assumption that he or she is responsible for all activity occurring with that IP address, and that any music files which are available on the computer are infringing copies.

4. As set forth in the accompanying memorandum of law, under New York law, anyone engaged in the business of private investigator must have a license issued by the Secretary of State. The activities of Safenet and Media Sentry are within the definition in the statute, and the records of the Secretary of State do not show that they have a license. A private investigator who operates without a license commits a Class B misdemeanor. Accordingly, their testimony and evidence, being obtained in violation of New York law, should be excluded.

5. With respect to the deposition of Matthew Oppenheim, I only learned of his identity recently, on December 13, 2007. I had heard his name previously but was unaware of his authority until then. He had been identified variously as “the client,” a representative of the Recording Industry of America (“RIAA”), and other titles, all of which suggest that he has knowledge of the facts and significant authority in how these matters are being litigated. On December 13, Mr. Oppenheim participated personally as the client representative in settlement discussions in two other cases brought by the RIAA in which I have been involved, and exercised full authority to negotiate resolutions of them. Thus he has information relevant to the litigation of this matter, and I wish to take his deposition.

6. The final issue is an interrogatory which defendant propounded, but which plaintiffs refuse to answer. On October 19, 2007, defendant propounded the following interrogatory:

8. Set forth all expenses incurred by plaintiffs allocable to each of the song files identified in Exhibit A to the complaint, the actual damages claimed to be incurred for each because of defendant’s alleged infringements, and provide copies of all documents produced and kept in the ordinary course of business to support the statement of such expenses and damages.

Plaintiffs responded as follows:

Plaintiffs object to this Interrogatory on the grounds that the Interrogatory is vague and ambiguous. Plaintiff object to this Interrogatory on the grounds that it seeks information and documents that are not relevant to the claim or defense of any party, are not relevant to the subject matter involved in this action, and are not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff also object to this Interrogatory on the grounds that it is overly broad and unduly burdensome. Plaintiff object to this Interrogatory on the grounds that it is compound and on the grounds that it calls for highly confidential, proprietary business information and information protected by the attorney-client privilege and/or the work product doctrine. Finally, Plaintiffs object to this Interrogatory on the grounds that it calls for information that Plaintiffs do not maintain in the ordinary course of business, insomuch [sic] as Plaintiffs do not maintain records of the expenses that they incur per authorized song file downloaded and that, if those costs could even be

determined, which may not be possible, it would require enormous expenditures of time and money to do so.

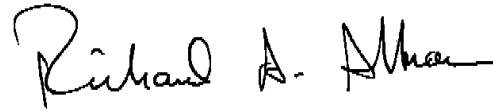
7. The Interrogatory is highly relevant and plaintiffs should be ordered to respond fully to it. Defendant's Fourth Affirmative Defense (Answer at 2) is that an award of statutory damages would be an unconstitutional violation of his due process rights, to the extent that such damages would be grossly disproportionate to plaintiffs' actual damages. In another music downloading case in the Eastern District of New York, plaintiff were ordered to respond to this Interrogatory; the result should be the same here. *UMG Recordings, Inc. v. Lindor*, CV-05-1095 (DGT)(copy of Magistrate Judge Levy's order is annexed). Moreover, in that case, Judge Trager had previously upheld the validity of the defense, allowing the defendant there to amend her answer to include it. *UMG Recordings, Inc. v. Lindor*, 2006 WL3335048 (copy annexed).

8. Plaintiffs' assertion that these publicly traded and audited multinational companies do not know what their expenses are in connection with individual song file downloads is inherently incredible, unsupported by any sworn statement of any person with knowledge, and in any event incomplete, since at least one expense, namely the royalties that are payable for each song file, is certainly within plaintiffs' knowledge. I certify that I have conferred in good faith with plaintiffs' counsel to secure the information without court action, but have been unsuccessful.

9. Accordingly, plaintiffs should be ordered to respond fully to Interrogatory No. 8.

10. I therefore respectfully request a ruling pursuant to F.R.E. 104(a), excluding any evidence or testimony from Media Sentry, an extension of the discovery deadline permitting defendant to take the deposition of Matthew Oppenheim, and an order compelling plaintiffs to respond fully to Interrogatory No. 8.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 28, 2008.

A handwritten signature in black ink that reads "Richard A. Altman". The signature is written in a cursive style with a large initial 'R' and a long horizontal stroke at the end.

RICHARD A. ALTMAN