

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SONY BMG MUSIC ENTERTAINMENT,
et al.,

Plaintiffs,

vs.

KIMBERLY ARELLANES,

Defendant.

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CASE NO. 4:05-CV-00328-RAS

JUDGE RICHARD A. SCHELL

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DISCOVERY

Plaintiffs respectfully submit this reply in support of their motion under Rule 37 for an Order compelling Defendant to produce her computer hard drive for a forensic inspection.

INTRODUCTION

Plaintiffs in this case allege that Defendant used her computer and Internet account to illegally download and distribute Plaintiffs' copyrighted sound recordings over a peer-to-peer ("P2P") file sharing network. Defendant denies that she violated Plaintiffs' copyrights. As part of their discovery, Plaintiffs seek a forensic examination of Defendant's computer hard drive. As explained recently by the United States District Court for the Western District of Texas, "[t]he best proof of whether [the defendant engaged in the alleged copyright infringement] would be to examine her computer's hard drive which would show, among other things, the existence of any P2P file-sharing programs and the presence of plaintiffs' copyrighted sound recordings." *Arista Records, LLC et al. v. Tschirhart*, Cause No. SA-05-CA-372-OG, at 4-5 (W.D. Texas August 23, 2006) (granting terminating sanctions when a court-ordered computer inspection revealed that a defendant intentionally removed material evidence from her computer before producing it for inspection) (a copy of this opinion included in the Appendix to this Reply).

Defendant seeks, alternatively, to deny outright Plaintiffs' request for a forensic examination, or, to limit the examination to specified keyword searches by a "neutral" expert. Defendant's proposed alternatives are unacceptable. An outright denial would, of course, deny Plaintiffs access to the "best proof" of the parties' claims and defenses. *See Tschirhart*, No. SA-05-CA-372-OG, at 4. Defendant's proposed "keyword" examination by a neutral expert would deprive Plaintiffs of both their right to full discovery of relevant forensic information and to rely on an expert of their own choosing. For these and other reasons more fully explained below and in Plaintiffs' Motion to Compel, Defendant should be ordered to produce her computer hard drive for inspection subject to Plaintiffs' proposed protective order.¹

ARGUMENT

1. Plaintiffs should not be deprived of their right to retain their own expert.

Rule 706 of the Federal Rules of Evidence allows a court to appoint an expert agreed upon by the parties or of its own selection. Rule 706(d) specifically states that "nothing in this rule limits the parties in calling expert witnesses of their own selection." Because Plaintiffs have a right to select their own expert even where another expert has been appointed, it stands to reason that their expert must be given, with an appropriate protective order in place, access to the evidence which needs to be inspected to render an expert opinion. Otherwise, Plaintiffs' right to select their own expert would be rendered meaningless.

A proper forensic examination of Defendant's computer hard drive will reveal the best evidence of the parties' claims and defenses and will likely help resolve this case. However, it will only help to resolve this case if done by someone who Plaintiffs have confidence will

¹ The introduction to Defendant's response contains numerous baseless accusations against the Plaintiff record companies, all of which have no relevance to the discovery request at issue and do not merit any response from Plaintiffs.

determine whether a peer-to-peer network was used, regardless of whether those files remain. An additional expert, who Defendant suggests should be paid by Plaintiffs, is an unnecessarily expensive exercise when Plaintiffs have a right to call an expert of their own selection.

Defendant's authority for appointing a neutral expert is easily distinguished. Those cases involve business litigants seeking to protect specific proprietary or confidential information. Here, Defendant raises only generalized privacy concerns such as the disclosure of "potentially privileged information." (Response 4)(emphasis added.) If any such privileged information exists, a privilege log more than adequately protects Defendant's interests. Plaintiffs' proposal balances their need to obtain the best evidence while ensuring that non-relevant, private information is not disclosed and privileged correspondence not subject to review.

For these reasons, Plaintiffs request that their expert, Dr. Doug Jacobson, conduct an forensic inspection of Defendant's hard drive under an appropriate protective order. Dr. Jacobson also serves as a law enforcement officer. Plaintiffs suggest that, as a law enforcement officer, this expert should not give Defendant any reason not to trust him to fully comply with a protective order entered by this Court. Accordingly, Defendant should be ordered to produce her computer hard drive for inspection by Dr. Jacobson, subject to Plaintiffs' proposed order

2. Merely searching for file names and keywords is not enough.

Defendant proposes limiting Plaintiffs' forensic examination to a search for file names and keywords. However, a computer forensic inspection is not simply a matter of looking at files or doing keyword searches. It requires one to look at certain characteristics of the hard drive to determine if peer-to-peer networks were used, what sound recordings were downloaded and when, whether sound recordings were being distributed and when, etc.

Moreover, forensic evidence may show more than the mere existence of specified software or files. A forensic examination often also provides supportive evidence such as

indicating who was involved in downloading, what screen names have been used, and what attempts might have been made to hide or destroy incriminating evidence. A forensic examination requires meticulous and detailed examination of the remnants of files that have been deleted or applications that have been removed from the computer. This often involves following the trail of digital evidence, one shred at a time, to construct the evidentiary support. Keyword searches simply miss this point and are inadequate.² Accordingly, the Court should permit a complete forensic examination by Dr. Jacobson under Plaintiffs' proposed order.

3. Several federal courts have already vetted Plaintiffs' proposed protective order and concluded that it properly balances privacy and discovery interests.

The related cases that are cited by Defendant demonstrate that multiple federal courts have assessed and approved of this discovery request and Plaintiffs' proposed protective order. In three such cases, these federal courts, including Judge Orlando Garcia of the U.S. District Court for the Western District of Texas, entered protective orders nearly identical to the one proposed by Plaintiffs here. *See Tschirhart*, Cause No SA-05-CA-371-OG (W.D. Texas Jan 25, 2006); *Atlantic Recording Corp. et al. v. Anderson*, CV No. 05-933-AS (D. Ore. July 10, 2006); *Motown Record Co. L.P. et al. v. Nelson*, CA No. 04-cv-73646 (E.D. Mich. July 21, 2005). Similarly, a fourth case involved no court-appointed expert and no restrictive keyword searching. *See UMG Recordings, Inc. et al. v. Lindor*, Case No. 05-cv-1095 (E.D.N.Y. July 26, 2006). These orders show that Plaintiffs' discovery request is valid and that Defendant's privacy interests are appropriately protected by Plaintiffs' proposed order.

In *Tschirhart*, the defendant made essentially the same privacy argument that Defendant is making here. *Tschirhart* argued that Plaintiffs should not be given access to either non-relevant

² In *Tschirhart*, a mere keyword search would not have revealed critical evidence. Only though a full forensic examination did both parties' experts find remnants of files linking defendant to P2P copyright infringement and revealing the extent of her spoliation attempts.

personal information or to e-mails between Tschirhart and her attorney. The court ordered Tschirhart to produce her computer for a mirror imaging, and entered a Protective Order to protect her confidentiality interests. Specifically, the court ordered that Plaintiffs' expert "will keep confidential all non-relevant information regarding Defendant's computer hard drive and will disclose such information to counsel for Defendant or to the Court as appropriate." More importantly, the court ordered that Tschirhart prepare a privilege log for documents only subject to *in camera* review by the Court.

Those provisions were deemed sufficient in *Tschirhart, Anderson, Nelson and Lindor* to protect the confidentiality of non-relevant personal information and privileged information and Defendant has shown no reason why they would not equally protect her interests in this case. Equally important, Plaintiffs' proposed protective order still permits Plaintiffs to properly inspect the hard drive contents for "the best proof" of the parties' claims and defenses using the most reliable and widely accepted computer forensics procedures available. For these reasons, the Court should compel Defendant to make her computer available for a mirror-imaging under the provisions in Plaintiffs' proposed protective order.

CONCLUSION

If Defendant did not use a peer-to-peer network as she claims, it is vital to her interests and to a resolution of this matter that Plaintiffs use an expert in whom they have confidence to conduct a complete forensic examination without limitation to keyword searches. Moreover, the Protective Order proposed here appropriately balances Plaintiffs' right to discovery and Defendant's concerns regarding privacy. Plaintiffs, therefore, request that this Court enter Plaintiffs' proposed protective order and command Defendant to produce her hard drive so that a mirror image may be made and inspected.

Respectfully submitted,

/s/Lisa L. Honey

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing PLAINTIFFS' MOTION TO COMPEL DISCOVERY was forwarded in accordance with the Federal Rules of Civil Procedure on this 25th day of August, 2006, via Regular U.S. Mail as follows:

John G. Browning Browning & Fleishman, P.C. 701 Commerce Street, Suite 510 Dallas, TX 75202
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/s/ Lisa L. Honey