

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UMG RECORDINGS, INC., et al.,

05 CV 1095 (DGT)(RML)

Plaintiffs,

- against

MARIE LINDOR,

Defendant

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**DECLARATION OF RICHARD L. GABRIEL, ESQ. IN SUPPORT OF  
PLAINTIFFS' MOTION FOR PROTECTIVE ORDER**

I, RICHARD L. GABRIEL, ESQ., declare:

1. I am a partner in the law firm of Holme Roberts & Owen LLP. I serve as lead counsel for plaintiffs in the above-captioned case.
2. On or about March 9, 2006, defendant served her first set of interrogatories and first requests for production of documents to plaintiffs (true and correct copies of these interrogatories and requests for production are attached, respectively, as Exhibits A & B) In these requests, defendant demanded, among other things, that plaintiffs produce all documents in their possession, custody, or control concerning their investigation of this case, as well as their agreement with MediaSentry. Media Sentry Managed Services unit of Safenet, Inc. f/k/a MediaForce ("MediaSentry") is an investigative firm retained by the Recording Industry Association of America ("RIAA"), on behalf of its members (including plaintiffs), to investigate copyright infringement on the Internet.

3. The relationship between MediaSentry and the record companies is defined in a Service Agreement, dated June 26, 2002, a Service Addendum, dated January 28, 2003, and an Amendment to Service Agreement, effective as of March 18, 2005. The June 26, 2002 Service Agreement and the January 28, 2003 Service Addendum are both signed by Gary Millin, President of MediaSentry, and Francis M. Creighton, Executive Vice President and Director of Anti-Piracy for the RIAA. The March 18, 2005 Amendment to Service Agreement was signed by Mr. Millin, on behalf of MediaSentry, and Jonathan Whitehead, Vice President, Online Copyright Protection, for the RIAA. These documents, collectively, comprise the record companies' agreement with MediaSentry, and I refer to them herein, collectively, as the "MediaSentry Agreement" (pursuant to this Court's August 28, 2006 bench ruling, contemporaneously herewith, a true and correct copy of the MediaSentry Agreement is being provided to the Court in camera).

4. On April 18, 2006, plaintiffs responded to defendant's discovery requests and produced hundreds of pages of documents, including copies of all of the data that MediaSentry provided to plaintiffs, as well as a sampling of sound recordings that MediaSentry downloaded from the "share" folder of defendant's computer (a true and correct copy of plaintiffs' discovery responses is attached as Exhibit C).

5. Plaintiffs produced everything in their possession, custody, or control that MediaSentry downloaded and that relates to this defendant. There is nothing that plaintiffs have regarding what they found on defendant's computer that defendant does not have. With respect to the request for the MediaSentry Agreement itself, however, plaintiffs objected on the grounds that the request for that document is not reasonably calculated to lead to the discovery of

admissible evidence and that discovery of this document is barred by the attorney-client and work-product privileges and on the grounds that the document is highly confidential and proprietary. See Exh. C.

6. On June 20, 2006, defendant filed a letter motion to compel, seeking an order requiring plaintiffs to produce, among other things, documents among the RIAA, plaintiffs, and MediaSentry, which plaintiffs understood to include the MediaSentry Agreement. See Defendant's June 20, 2006 letter (Docket No. 29).

7. Plaintiffs responded by letter, dated June 23, 2006 (Docket No. 33), in which plaintiffs reiterated their objections to defendant's request for the MediaSentry Agreement. In their letter, plaintiffs noted that Magistrate Judge Fox found in the substantially similar case of Elektra Entertainment Group Inc. v. Santangelo, No. 05-cv-2414 (CM)(MDF) that these documents are not possibly relevant. Plaintiffs further noted that the contractual relationship that plaintiffs have with MediaSentry, as their investigator, is no more relevant than the contractual relationship that plaintiffs have with undersigned counsel's law firm. In addition, plaintiffs demonstrated that defendant's assertion that this contractual relationship is somehow relevant to a defense of copyright misuse is baseless. Finally, plaintiffs reiterated their objections on the grounds of the attorney-client and work-product privileges. See Plaintiffs' June 23, 2006 letter (Docket No. 33).

8. On July 25, 2006, this Court held a telephonic hearing on the various open discovery disputes. The Court denied defendant's motion to compel in relevant part. At that hearing, the Court and the parties also discussed the form of plaintiffs' privilege log, and plaintiffs agreed to produce such a log within 30 days of the hearing.

9. On August 24, 2006, plaintiffs provided their privilege log.

10. On August 28, 2006, defendant wrote to this Court complaining that the designation of the MediaSentry Agreement was improper, because such documents were not, in fact, privileged. See Defendant's August 28, 2006 letter (Docket No. 62). Notably, defendant never took issue with plaintiffs' assertion that these documents were confidential. Nor did defendant seriously urge that these documents were somehow relevant.

11. On August 28, 2006, just hours after defendant filed her letter, the Court convened a telephonic conference, at which the parties discussed the various issues. At that conference, the Court ordered further briefing as to the discovery issues concerning the MediaSentry Agreement and set a schedule for such briefing.

12. Since defendant submitted her August 28, 2006 letter (Docket No. 62), she has worked very hard to limit discussion on the discovery issues relating to the MediaSentry Agreement to the issue of privilege. Thus, as the Court will recall, during the August 28, 2006 hearing, defendant asked the Court to limit the present briefing to privilege issues. The Court refused to do so.

13. As counsel for plaintiffs, I do not believe that a protective order allowing for some level of disclosure to defendant, even on an attorneys' eyes only basis, would suffice to protect plaintiffs here, because I believe that defense counsel has already violated prior protective orders of this Court. Specifically, as the Court is aware, defense counsel runs an anti-RIAA blog called "Recording Industry vs. The People." This blog is highly critical of the recording industry's lawsuits against on-line infringers, and it is devoted, in part, to putting an end to these lawsuits (defense counsel also frequently speaks publicly on these issues). Defense

counsel also has ties to numerous others who run blogs that have been highly critical of the recording industry's anti-piracy efforts. As the Court will recall, on August 28, 2006, this Court entered a protective order concerning the depositions of plaintiffs' representatives. The order provides, in relevant part, that the depositions would be treated as confidential for a certain period of time, in which time frame plaintiffs would have the opportunity to designate certain portions of the deposition transcripts as confidential. Notwithstanding this clear and unambiguous protective order, just four days after JoAn Cho was deposed as a Rule 30(b)(6) witness on behalf of plaintiffs UMG Recordings, Inc., Interscope Records, and Motown Record Company, L.P., defense counsel was quoted in a blog called Ars Technica discussing the testimony that Ms. Cho had provided. Specifically, in this blog, defense counsel referred to the people with whom plaintiffs communicated in responding to defendant's discovery requests regarding the alleged use of P2P networks to get sound recordings to radio stations (a true and correct copy of the relevant portions of this blog is attached as Exhibit D). This information was only provided in Ms. Cho's deposition, which was subject to the above-described protective order at the time defense counsel was quoted.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 26th day of September, 2006, at Denver, Colorado.

  
RICHARD L. GABRIEL, ESQ.