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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 Magistrate Levy:

In connection with the plaintiffs' protective order motion regarding the MediaSentry agreements, Your Honor may recall that plaintiffs took the position in their reply papers and at oral argument on November 30th that MediaSentry's investigator was not an expert witness, but was a "fact witness" because he was using the Kazaa software in the same manner as any other Kazaa user.

A recent (November 15, 2006) decision of the United States Court of Appeals for the Sixth Circuit, USA v. Ganier, 468 F.3d 920 (6th Cir. November 15, 2006) is most instructive on this issue. A virtually identical argument was made and rejected there.

In Ganier it was argued that the witness's "proposed testimony is not based on scientific, technical, or other specialized knowledge, but is simply lay testimony available by "running commercially-available software, obtaining results, and reciting them" and this testimony is the same type as "facts...that could be observed by any person reasonably proficient in the use of commonly used computer software, such as Microsoft Word and Microsoft Outlook" 468 F.3d at 925-926.

The Court in Ganier rejected such an argument: "The reports generated by the forensic software display a heading, a string of words and symbols, date and time, and a list of words..... The government asserts that these reports reveal three different types of searches performed with particular search terms at particular times, but such an interpretation would

require [the witness] to apply knowledge and familiarity with computers and the particular forensic software well beyond that of the average layperson. This constitutes “scientific, technical, or other specialized knowledge” within the scope of [Rule 702](#). “ 468 F. 3d at 926.

Respectfully submitted,

/s/

Ray Beckerman

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