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May 17, 2007

By fax (718-613-2518) and electronic filing

Hon. David G. Trager
District Judge
U. S. District Court, Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

By fax (718-613-2345) 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 Trager and Judge Levy:

This is our reply to the May 14th response of plaintiffs to defendant's *in limine* motion. The opposition letter is a futile attempt to draw the Court's attention away from Dr. Jacobson's actual testimony, and to attempt to create factual issues – and force a *Daubert* hearing, thus saddling defendant with yet more expense – when none is merited.

1. The papers consist primarily of vague, unsworn *testimony* by plaintiffs' counsel which *directly conflicts with the testimony of Dr. Jacobson*, suggesting to the Court that there is a great body of "other" people out there doing work similar to that of Dr. Jacobson using similar techniques, and that there is a great body of prior caselaw finding Dr. Jacobson's techniques to be reliable. *Dr. Jacobson's testimony contradicts all of that.*

2. The papers are padded shamelessly with voluminous exhibits consisting of

doctored text “documents” prepared during, and for purposes of, the within litigation, years after the August, 2004, “investigation”, which plaintiffs’ counsel disingenuously pass off as “evidence” garnered during the investigation. *Dr. Jacobson’s testimony professes ignorance as to how these documents were created.*

3. Plaintiffs argue – repeatedly and nonsensically – that the testimony of Dr. Jacobson is “undisputed” and that the findings of MediaSentry are “undisputed”. As the Court knows, (a) counsel conducting a deposition is not there to “dispute” anything, but is there to ask questions; and (b) there is no need to “dispute” either if their testimony is inadmissible.

4. No amount of doubletalk by counsel, or reams of irrelevant exhibits, can ever alter the fact that Dr. Jacobson testified as follows:

-He developed “on [his] own” the process that he used to determine whether a particular computer had been used to upload or download copyrighted works. (T38).

-He has never submitted his method for testing by any testing body. (T40-41).

-He is not aware of anyone else ever having used his method. (T41).

-His method has no standards (T42).

-His method has no controls (T42).

-He is not aware of his method having been subjected to any form of peer review. (T41).

-His method has never been published (T41).

-He does not know what the rate of error is for his method, and “guesses” that there is a potential rate of error, but doesn’t know what it is (T41).

-His method has never even been vetted by the scientific community, let alone accepted by anyone in it other than himself, let alone generally accepted by others in the community. (T42).

-He does not know what processes or procedures were used by MediaSentry. (T31).

-He does not know what software MediaSentry used (T31).

-He does not know whether MediaSentry’s software was proprietary or off-the-shelf (T32).

-He does not know if MediaSentry’s software has been peer-reviewed or published (T32).

-He’s never before testified as an expert in any trial or deposition (T32)

-His methodology has never been found by any tribunal to be reliable (T33)

-His method is a year and a half old (T37).

-He does not know if the methods used by MediaSentry have ever been “tested by any testing body.” (T42).

-He does not know if MediaSentry’s methods have ever been subjected to any form of peer review, and as far as he knows, MediaSentry is not peer-regulated. (T42, 43).

-He does not know if MediaSentry’s methods have been published. (T42).

-He does not know if MediaSentry’s methods are secret or not (T42).

-He does not know if there is a known rate of error for MediaSentry’s methods, but assumes there is a potential rate of error. (T43).

-He does not know of any standards for MediaSentry’s methods (T43).

-He does not know of any controls over MediaSentry’s methods (T43)

-He does not know of MediaSentry’s methods being generally accepted in the scientific community. (T43).

- He just assumed the accuracy of the MediaSentry materials upon which he relies. (T43).
- He made no attempt at all to test alternate explanations, even though he can think of alternate explanation (T46-47).
- He made no attempt at all to analyze possible security vulnerabilities of the subject computer, even though he can think of such vulnerabilities (T47-48)

Under well settled principles, Dr. Jacobson's testimony is inadmissible as a matter of law.

Respectfully submitted,

/s/

Ray Beckerman

cc: Richard J. Guida, Esq.
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