

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
Civil Action No. 1:08-CV-00135-UA-WWD

BMG MUSIC, <i>et al</i> ,	)	
	)	
Plaintiffs,	)	
	)	<b><u>RESPONSE OF DEFENDANT DOE NO. 4</u></b>
vs.	)	<b><u>TO PLAINTIFFS' RESPONSE</u></b>
	)	<b><u>TO ROBERTSON AFFIDAVIT</u></b>
DOE #1, <i>et al</i> ,	)	
	)	
Defendants.	)	

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NOW COMES Defendant, Doe No. 4, by and through counsel, responding to the Plaintiffs' Response to Affidavit of Stephen E. Robertson and Letter from the North Carolina Private Protective Services Board [docket no. 16].

Plaintiffs object because a copy of the letter from Defendant's counsel to the North Carolina Private Protective Services Board ("PPSB") was not attached to the Robertson Affidavit [docket no. 15]. Defendant attaches hereto the Second Affidavit of Stephen E. Robertson. It includes a true and accurate copy of the Robertson letter to the PPSB, and the attached Linares declaration from *BMG v. Does 1-14*, 07-CV-948 (MDNC, 2007) (Exhibit 1). The letter was written with reference to a nearly identical case in the U. S. Federal Court for the Middle District of North Carolina. The undersigned has redacted the Doe number of the client he represents in that suit because it has been the undersigned's experience that, once the Plaintiffs know that a given Doe Defendant has challenged an expedited discovery request, Plaintiffs grossly increase the amount of their settlement demand from that Doe Defendant.

Defendant draws the Court's attention to page 2 of the letter to the PPSB and the reference to the attachment of the Declaration of Carlos Linares. Where Plaintiffs claim

that Robertson misrepresented the nature of MediaSentry's activities (Pls' Resp. ¶4), Defendant notes that the entire Linares Declaration was provided to the PPSB. Far from trying to omit, dissemble or misrepresent Plaintiffs' investigative activities, Defendant provided to the PPSB Plaintiffs' entire story, as told from the Plaintiffs point of view in the Linares Declaration.

The PPSB, in its response, invited Defendants in these various cases to make formal complaints. The Defendant, through counsel, made a formal Complaint to the PPSB (Exhibit 2). Plaintiff says that the PPSB Director has not contacted MediaSentry (Pls' Resp. ¶¶ 4 & 6), but the Defendant believes that the PPSB will do so now that a formal complaint has been filed. The Commonwealth of Massachusetts and the State of Maine have issued letters in the nature of cease and desist orders to MediaSentry based upon similar concerns to those set out in Defendant's formal Complaint to the PPSB. Copies of the letters from the State Police of Massachusetts and Maine are attached to the Second Robertson Affidavit.

It is Plaintiffs who misrepresent the activities of MediaSentry, not the Defendant. In support of that contention, Defendant attaches hereto the Declaration of Elizabeth Hardwick in *Atlantic Recording et al., v. Pamela and Jeffrey Howell*, 2:06-cv-02076-PHX-NVW (U.S. Dist. Ct. AZ) (Exhibit 3). In this affidavit, executed approximately one year ago in a case nearly identical to this one, MediaSentry's representative states: "[o]nce connected to the user's computer ..." (Hardwick Aff. ¶ 6), "... MediaSentry captures as a text file all of the contents of the user's shared directory ..." And, "MediaSentry does nothing to create this text file; it exists on the user's **hard drive**." (Hardwick Aff. ¶ 7, emphasis added). In short, the Hardwick Declaration makes clear

that MediaSentry accesses the user's hard drive to, among other things, take "text files" from it. Plaintiffs' statement that MediaSentry does not access the hard drives of private citizens (Pls' Resp. ¶ 4) is contradicted by the Hardwick Declaration. Plaintiffs further and constantly complains that "[t]he information available to MediaSentry is readily available to any other user of the peer-to-peer network" (Pls' Resp. ¶ 4). Peer-to-peer networks, as the name implies, involve intrusion into one end of the connected computers by the other. Plaintiffs would have the Court believe that they access this information in the vast and nebulous world of the Internet. But, data can only reside on endpoint computers, or intermediary servers. Peer-to-peer networks have no intermediary servers where Plaintiffs can access the information they take. The difference between MediaSentry and all other users is that MediaSentry is engaged in the private investigation profession for the purpose of securing evidence to be used before a court. MediaSentry's intrusion into an endpoint computer, unless they are licensed to investigate, is unlawful.

Plaintiffs also contend that committing a misdemeanor is not grounds to exclude evidence in a civil case. Courts have excluded evidence for less egregious conduct. *Gallagher v. Van Lott, Inc.*, 2006 WL 3254464 (D.S.C., slip op., 2006) (Investigator, agent of defense counsel improperly represented himself in communicating with Plaintiff to get audiotape, audiotape excluded); *Rickenbaker v. Rickenbaker*, 290 N.C. 373, 226 S.E. 2d 347 (N.C. 1976) (Defendant's installation of recording device solely for purpose of obtaining evidence of adulterous relationship prohibited by federal law and excluded from evidence in divorce trial); *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (W.Va. 1994) (Evidence illegally obtained by private

investigator was within discretion of trial court to exclude); *Midwest Motor Sports, Inc., v. Arctic Cat Sales, Inc.*, 144 F. Supp. 1147 (D.S.D., 2001) (Defense counsel directed investigator to make ex parte contact with represented parties bringing about numerous evidentiary sanctions).

These Plaintiffs expect the Courts throughout the country to favor them with the extraordinary relief of *ex parte* discovery based upon their criminal conduct. Rule 12(f) allows for the striking of a pleading that is impertinent or scandalous. The criminal conduct of Plaintiffs' agent certainly qualifies as both impertinent and scandalous and the Linares Declaration should be stricken.

Respectfully submitted, this 20<sup>th</sup> day of June, 2008.

By: /s/ Stephen E. Robertson  
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## CERTIFICATE OF SERVICE

I hereby certify that on the 20<sup>th</sup> day of June, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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And I hereby certify that I will serve the document by e-mail to the following non-party:

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