

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

ARISTA RECORDS, LLC, et als,)
)
 Plaintiffs)
 v.) **CIVIL ACTION FILE NO. 07-162**
)
 DOES 1-27,)
)
 Defendants.)
 _____)

DEFENDANTS' POST HEARING MEMORANDUM ON EVIDENCE

During argument the Court inquired why it did not have discretion to consider whatever evidence it decided was appropriate in determining whether plaintiffs' ex parte discovery motion should be granted. The response given by the undersigned was incomplete.

I argued that all motions had to be supported by both facts and law. However more should have been said and defendants will do that below.

F.R.Civ. P. 7 requires that the grounds for obtaining an order by motion shall be stated with "particularity." Professor Moore instructs that a motion must have "evidentiary support." 2-7, Moore's Federal Practice, Civil §7.03. Local Rule 7 requires affidavits or other documents to provide that evidentiary support. Defendants cited to McCann v Doe, 259, 265 (D. Mass. 2006), in their Motion to Vacate the Discovery Order, to Quash and to Take Discovery, Document 63. That was a case not unlike this as there the plaintiff sought a subpoena to learn the identity of the defendant. That case suggests that admissible evidence in affidavit form is required.

Perhaps more compelling is the fact that in this case, plaintiffs' discovery motion is not unlike a motion for summary judgment.¹ If granted (or, in this instance if the order granting it is not vacated), the plaintiffs win the litigation. They will obtain the names and addresses of the defendants and dismiss this action.

Finally, F.R.Civ. P. 43(c) suggests that admissible evidence is required. It reads as follows: “**(c) Evidence on a Motion.** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.” There is no indication that a factual predicate is not required. There is no indication that the rules of evidence do not apply to affidavits or testimony developed in the resolution of a contested motion.

Rule 43 instructs the court to allow affidavit evidence, to resolve motions, unless the factual conflict cannot be resolved without a hearing. Professor Moore says, “When hearing motions based on facts "outside the record," the trial court has discretion (1) to hear the matter on affidavits, or (2) to direct that the matter be heard wholly or partly on oral testimony or depositions. 8 Moore's Federal Practice, Civil §43.05. One of the motions referenced is a Motion to Quash a Subpoena duces tecum. *Id.* That is, of course, part of the relief that defendants seek with the Motion under consideration. Neither the rule nor the commentary suggests that the Court has *carte blanche* as respects the contents of the affidavit. Indeed, F.R.Ev. 1101 teaches us that the hearsay rule, and all the other rules of evidence, apply to all civil and criminal proceedings except a few special proceedings which are enumerated in the rule. F.R.Ev. 1101(d)(3) specifically excludes criminal sentencing from the scope of the Rule.

¹ If it were a motion for summary judgment, F.R.Civ. P. 56(f)(2), empowers the Court to allow defendants to take the type of discovery they suggested in their Motion to Vacate the Discovery Order, to Quash and to Take Discovery, Document 63.

Plaintiffs' discovery motion is not one that relies on facts in the record. It is not one addressed to the essentially unlimited discretion of the Court such as a motion to continue. It is one that seeks, essence, a final judgment. Defendants believe that it would be error to allow plaintiffs to win this case on the basis of the Linares Affidavit which is replete with inadmissible hearsay.

Dated: September 15, 2008

/s/Robert E. Mittel
Robert E. Mittel

MITTELASEN, LLC
85 Exchange Street
P.O. Box 427
Portland, ME 04112-0427
(207) 775-3101

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2008, I electronically filed Defendants' POST HEARING MEMORANDUM ON EVIDENCE with the Clerk of Court using the CM/ECF system which will send notification of each filing to the following: James S. LaMontagne, Esq.; Deirdre Smith, Esq.; Katheryn Coggon, Esq.; Jayson Rayne, Law Student; John Osborn, Esq.

/s/Robert E. Mittel, Esq.
MITTELASEN, LLC
85 Exchange Street
P.O. Box 427
Portland, ME 04112-0427
(207) 775-3101
Email: rmittel@mittelasen.com
Attorney for Defendants

