United States District Court
Western District of Michigan
Southern Division

LaFace Records LLC, et al
Plaintiffs.

Case No. 2:07-cv-187

-v-

HONORABLE PAUL L. MALONEY

DOES 1-5
Defendants.

DEFENDANT DOE #5'S MOTION FOR RECONSIDERATION OF THE MAGISTRATE'S OPINION AND ORDER DATED OCTOBER 14, 2008.

Doe # 5, a College Student at Northern Michigan University, Defendant herein, and in pro se, burdened by the expenses of College, and without the deep pockets and learned resources of plaintiff, respectfully Request this Honorable Court to Reconsider Magistrate Judge Timothy P. Greeley's order to Deny Defendant's request to Quash, Vacate and Amend the Rule 45 Subpoena issued to Northern Michigan University on September 27, 2007 seeking information sufficient to identify Does 1-5, including the name, current and permanent addresses, telephone numbers, email addresses, and Media Access Control addresses for each Defendant, and says in support as follows:

Introduction

It has been the standard practice of the Plaintiffs to present the Court with a request to issue a Subpoena upon Universities in this District. These subpoenas and the subsequent litigation is always based upon a sworn declaration of Carlos Linares, who states that he has "personal knowledge" of the facts alleged in this and every other case of this type in this district. The court has given sufficient weight to this document to allow for the exceptional issuance of an Ex Parte subpoena. Every lawsuit that the Plaintiffs file that request an Ex Parte subpoena is filed by several different recording companies collectively against several unidentified Doe Defendants. In this and every other case in this district the Plaintiff recording companies have hired a third party investigator

(MediaSentry) to gather information to be used in a court of law. In this, and every other case in this district, once the subpoena has been issued, and the personal information that the University (NMU in this case) associates with the Internet Protocol (IP address) address gleaned by these investigations, the plaintiffs will request that the case be dropped, so that they can file separate lawsuits against the individuals identified by the University or ISP.
The well-publicized litigation has been advertised by the Recording Industry Association of America ("RIAA") as ... "the RIAA's new deterrence initiative",[1] while the Federal Courts of this nation are being used as a hammer by the multi-billion dollar recording industry. [2]

Several issues were brought up by Doe #5 in two separate motions to quash vacate and amend the rule 45 subpoena. In a prior motion submitted by Doe # 4, several issues were addressed by the court and rejected as not being sufficient to quash the subpoena. Doe # 5 also voiced some of the same issues. Additionally, Doe # 5 brought to the court additional 1st Amendment and 4th Amendment concerns, as well as issues of Equal Protection, Due Process, and the creation of Undue Burden placed upon the Doe as a result of the questionable investigations and the potential for evidence to be manipulated by the conducted of the Plaintiff's third party investigator and Plaintiff's trade group, ("RIAA"). Specifically in Court documents #22, 28, 37. The Court was also notified of the Undue Burden placed on the University (NMU) by the insistence of the Plaintiffs counsel to convince the University to match the names of its network users to IP addresses it had gained via its investigations, (forcing the University from its mission, re: document #22). Additionally, Doe # 5 and all same situated Doe's have been subjected to feloniously behavior as a result of Plaintiffs third party investigator, MediaSentry, as submitted in court documents #28, 37, and in "Defendants Response to Plaintiffs' Objection to Supplemental Authority, Michigan Professional Investigators Act amended (Public Act 146 of 2008)." This act of deliberate indifference on behalf of Plaintiffs third party investigator (MediaSentry) and the access to the evidence by Plaintiff's Trade Group, "RIAA", as reported by Plaintiffs Counsel smacks of due process violations. The investigation reportedly took place at least 5 months before any litigation was filed. Magistrate Greeley did not address these arguments.

The court was also notified that the legal theory of this litigation had been rejected in at least two other recent cases involving essentially the same Plaintiffs. Those being Atlantic –v- Brennan (Hon. Janet Bond Arterton, USDC- District of Connecticut Feb. 13, 2008) and Atlantic-v-Howell. (Honorable Neil V. Wake, USDC-District of Arizona, April 29, 2008) (Document # 37)

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[1] http://www.riaa.com/newsitem.php?id=8E8AE31D-2CD9-5E90-8892-5FEBD3A603B9

[2] "The concern of this Court is that in these lawsuits, potentially meritorious legal and factual defenses are not being litigated, and instead, the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants."
-Hon. S. James Otero, District Judge, Central District of California, March 2, 2007, *Elektra v. O'Brien*, 2007 ILRWeb (P&F) 1555

Additionally because of the courts reliance upon the declaration of Carlos Linares (an out of court Declarant)[3] as prima facia authority to allow the issuance of the subpoena, the court relied upon hearsay evidence. (As brought up in Document #22.)[4]

The first motion also included the request of the court to Dismiss this case with prejudice and to have an injunction placed against the Plaintiffs and their agents seeking no contact. That issue was not address in the Magistrates opinion.

CONCLUSION

This and all similarly suited cases need to be reviewed through a "fresh set of eyes". The "unfairness" of this situation requires that it be revisited. Judicial equality and fairness are a cornerstone of our democracy. Without such, anarchy would reign. The central fact that the underlying factual premise upon which this entire case rests is an unsupported, unverified, uncorroborated batch of so-called "factual allegations" by a forensic investigative agent that will never be tested by any court is compelling. The subpoena was issued as a result of Plaintiffs indifference to the law. Lack of due diligence and disregard for Defendants rights based upon an illegal investigation undertaken months before any litigation was implemented. This is the true trademark of these suits. The Plaintiffs will never have to defend themselves because these same factual claims were obtained in an illegal manner. These illegal actions would subject the Plaintiff's agent to severe criminal sanctions, while at the same time providing them with an absolute iron-clad ability to refuse to discuss these findings under a legitimate refusal to incriminate themselves. This creates an absolutely absurd situation to a defendant having to fight against the apparent instinctive presumption of legitimacy and accuracy that the court seems to give these factual claims by Media Sentry and Carlos Linares. The Honorable Magistrate Judge Timothy P. Greeley's opinion also recognizes that the Plaintiffs only evidence was obtained through the use of a file-sharing network to download "music files made available by defendants". The legal theory of "making available for distribution" or "offering" for distribution has been rejected by several courts, and should have rendered the Subpoena moot. Magistrate Judge Greeley's opinion also states that the "Plaintiffs were then able to identify *each defendants'* internet protocol (IP) address". This is in error. The whole purpose of the subpoena was to identify each user through Northern Michigan University's matching IP addresses to individuals for the Plaintiffs, and that could not have happened until the subpoena was answered. Magistrate Judge Greeley give no indication of consideration to the obvious fact that these very same factual claims will never be verified, challenge or even examined in the course of this litigation. They will never be challenged because of the criminally illegal manner in

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[3] Mr. Linares may have personal knowledge abut what he was told, but his testimony as an out of court declaring is hearsay and should be inadmissible. F.R.Ev. 801(c).

[4] Assessment Techs. of WI, LLC v. WIREdata, Inc., 350 F.3d 640, 647 (7th Cir.2003)("for a copyright owner to use an infringement suit to obtain property protection...that copyright law clearly does not confer, hoping to force a settlement or even achieve an outright victory over an opponent that may lack the resources or the legal sophistication to resist effectively, is an abuse of process.").

which they were obtained, and because as soon as the Defendant's names are released by the court, the Plaintiffs will dismiss the case.

Personal information released to the public (tarnished by its purported link to illegal activity) is forever subject to abuse. As such, this information should only be made available under the greatest of care with all proper legal procedures followed and all legal protections in place. The use of ex parte hearings to get the identity of the Doe, based on grounds that don't exist (that data logs will be lost or destroyed), illegal investigations of dubious quality, hearsay testimony by RIAA vice presidents who have not overseen any aspect of the actual investigations, and unfounded legal theories on making available being equated to actual distribution absolutely do not qualify.

For the courts to allow and continue to allow this type of behavior against common citizens on behalf of the Recording Industry is even more of an injustice. To be rewarded for these actions is ridiculous and precedence setting.

The factual allegations supporting the request for a subpoena are inherently untrustworthy because:

1) They were obtained in an criminally illegal manner and,

2) They will never to subject to any meaningful examination or review given the alleged fact-finders' ability to invoke their rights against self-incrimination and...

3) That the underlying computer forensic statements are not so self-evident as to be trusted and relied upon without an opportunity for their accuracy and truthfulness to be demonstrated before the Court.

For all of these reasons, the initial factual premise necessary to support the requested subpoena in this matter has not been established by the plaintiffs in this action, and extensive undue burdens have been placed on all the Does. The Magistrate's Opinion and Order did not address this.

Thank You,

Doe #5 Doe #5

CERTIFICATE OF SERVICE

I certify that on October 28, 2008, I, Doe # 5, served the foregoing:
RE. Laface et.al v Does 1-5
2:07-CV-187

Doe #5's MOTION FOR RECONSIDERATION OF THE MAGISTRATE'S OPINION AND ORDER DATED OCTOBER 14, 2008

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DOE # 5 DOE #5