UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CAPITOL RECORDS, INC., et al., Plaintiffs, v. NOOR ALAUJAN, Defendant.	Civ. Act. No. 03-cv-11661-NG (LEAD DOCKET NUMBER)
SONY BMG MUSIC ENTERTAINMENT, et al., Plaintiffs, v. JOEL TENENBAUM, Defendant.	Civ. Act. No. 07-cv-11446-NG (ORIGINAL DOCKET NUMBER)

PLAINTIFFS' MOTION TO CONTINUE TRIAL DATE

Plaintiffs respectfully request that the trial date, currently set for December 1, 2008, be continued due to the extensive ongoing discovery, unresolved discovery disputes, and Defendant's belated efforts to amend counterclaims and add parties. Specifically, in light of the numerous ongoing and unresolved issues in the case, Plaintiffs ask that the pretrial conference set for November 18, 2008 be converted to a status conference to discuss a schedule for completing discovery and resolving outstanding issues, and that the jury trial currently set for December 1, 2008 be adjourned to a later date that is convenient for the Court and the parties.

BACKGROUND

On September 23, 2008, this Court held a hearing in the Joel Tenenbaum case. At that hearing, Defendant's counsel requested an immediate trial date. Plaintiffs' counsel expressed concern with such a schedule given the fact that discovery had just begun and that Plaintiffs intended to move for dismissal of Defendant's counterclaims. Plaintiffs' counsel explained that, in addition to Defendant's deposition, Plaintiffs would likely need other depositions as well as a computer forensic examination. Plaintiffs' counsel also expressed concern that, once Plaintiffs had filed their motion to dismiss, Defendant would likely seek to amend his counterclaims.

In response, Defendant's counsel stated unequivocally "No amendments, your Honor." (Sept. 23, 2008 hearing tr. at 14:17, Exhibit A hereto.) Defendant's counsel also stated that "there is no computer to inspect" because "it's been disposed of before this litigation was even initiated." (Sept. 23, 2008 hearing tr. at 15:15-19, Exhibit A.) The Court then set a deadline of October 6, 2008 for Plaintiffs to file their motion to dismiss and a trial date of December 1, 2008.

Plaintiffs moved to dismiss Defendant's counterclaims on October 6, 2008. (Doc. No. 670.) On October 27, 2008, Defendant filed his Opposition to Plaintiffs' Motion to Dismiss. (Doc. No. 676.) In that Opposition, Defendant did not even try to defend his existing counterclaims. Instead, and without seeking the Court's leave, he purported to file a new counterclaim (Doc. No. 675) and also sought, for the first time, to add a third-party, the Recording Industry Association of America ("RIAA") as a counterclaim Defendant (Doc. No. 677).

Moreover, despite Defendant's counsel's representation to the contrary, it now appears that there are *at least* two computers that require forensic examination. Specifically, Defendant testified that he installed and used the Limewire file sharing program to download music on his

"Gateway" computer, which he still possesses, and that he may have also installed the KaZaA file sharing program on the Gateway. (J. Tenenbaum Depo. at 92:5-94:20, Exhibit B hereto.) Indeed, Defendant testified that he used several peer-to-peer networks on multiple computers over a period of many years to download music over the Internet. Defendant also testified that he may have downloaded music onto an "eMachine" computer, which is currently in the possession of his parents, Arthur and Judith (aka Judie) Tenenbaum (the "Tenenbaums"), who reside in Providence, Rhode Island:

> Q. Where is that computer currently?
> A. In my former bedroom at my parents' house I believe.
> Q. So you still have it?
> A. Yes.
> Q. Did that have Kazaa on it?
> A. I don't know.
> Q. It may have?
> A. May have.
> Q. Did you ever use Sublimeguy14 on the E machine?
> A. Don't know.
> Q. It's possible?
> A. It's possible.
> ***
> Q. ... My question is do you believe that there were any other peer to peer programs on the Emachine at any time?
> A. No.
> Q. Just possibly Kazaa?
> A. Yes.

(J. Tenenbaum Depo. at 101:6-20, 103:2-7, Exhibit B.) Based on this information, Plaintiffs served a Rule 34 inspection request on Defendant for the Gateway computer, as well as a subpoena on the Tenenbaums for inspection of the eMachine. Defendant has since filed a Motion for Protective Order to prevent inspection of the Gateway, and that motion is pending. (*See* Doc. Nos. 672, 682.) After the Tenenbaums failed to produce the eMachine for inspection, Plaintiffs filed a motion to compel in the United States District Court for the District of Rhode Island. On October 9, 2008, Plaintiffs also served a second set of Requests for Production and

one additional Interrogatory on Defendant seeking, *inter alia*, copies of his CDRs and CDs. Defendant's responses were due November 11, 2008 and he failed to respond or otherwise object. Plaintiffs anticipate having to file a Motion to Compel his responses.

In addition, Defendant testified that he created homemade CDRs of music that he downloaded using KaZaA. Any homemade CDRs created by Defendant from music he downloaded over the Internet contain information that is directly relevant to Plaintiffs' claims in this case. Defendant's sister, Tova Tenenbaum, testified that she has possession of as many as 10 homemade CDRs that were created by Defendant. Despite being properly served with a subpoena, Ms. Tenenbaum has refused to produce these CDRs for inspection. Accordingly, Plaintiffs have filed a motion to compel production of the CDRs in the United States District Court for the Western District of Pennsylvania, where Tova Tenenbaum resides. Defendant's father, Arthur Tenenbaum, testified that there is a collection of CDRs at the Tenenbaum house, some of which Joel Tenenbaum left behind when he moved out. Plaintiffs have issued a subpoena for any homemade CDRs created by Defendant, and have sent a copy of the subpoena to Defendant's counsel, but the Tenenbaums have intentionally evaded service of this subpoena. (Exhibit C hereto.)

Finally, although Defendant never provided Plaintiffs with Rule 26 disclosures identifying any relevant witnesses, Defendant claimed at his deposition that he believes that as many as eight other individuals may have used KaZaA on his computer to download music. Accordingly, Plaintiffs have been forced to engage in the lengthy process of locating these numerous individuals (many of whom reside out of state) in order to preserve their testimony for trial.

ARGUMENT

This Court exercises discretion in setting a schedule for this case and can modify its scheduling orders upon a showing of good cause. Fed. R. Civ. P. 16(b). Here, Plaintiffs respectfully submit that the trial date in this matter should be continued due to the substantial discovery that needs to be completed, the significant number of outstanding discovery disputes that need to be resolved, and Defendant's belated efforts to amend his counterclaims and add new parties. Below is a list of items that need to be completed before trial:

Outstanding Discovery (Depositions and Written Discovery): Plaintiffs have acted diligently to complete their discovery, and have already deposed Defendant's family members, some of whom Defendant blamed for the infringement, and Defendant's Internet Service Provider, Cox Communications. Plaintiffs have also investigated and are continuing to investigate Defendant's claim that other individuals used his computer to download music. To date, each individual who Defendant suggested could have been responsible for the infringement has denied involvement. Plaintiffs, however, still need to depose these individuals, several of whom reside outside the Court's jurisdiction. Additionally, on October 9, 2008, Plaintiffs served a second set of Requests for Production and one additional Interrogatory on Defendant seeking, *inter alia*, copies of his CDRs and CDs. Defendant's responses were due November 11, 2008, yet Defendant failed to respond or seek an extension. Plaintiffs anticipate having to file a Motion to Compel Defendant's overdue responses.

Outstanding Discovery (Computer Forensics): Defendant based his request for the earliest possible trial date in part on his assertion that there was no computer to inspect. Plaintiffs now know that that statement was incorrect. Plaintiffs have learned that Defendant and his family have at least two computers, the Gateway and the eMachine, that are likely to contain

information directly relevant to Plaintiffs' claims. Plaintiffs have also learned that Tova Tenenbaum and Arthur Tenenbaum have CDRs created by Defendant that may contain copies of sound recordings that Defendant downloaded over the Internet. Plaintiffs require forensic examinations of these computer hard drives and CDRs to complete their discovery. Given Defendant's refusal to produce these items, and the time required to conduct such examinations, this discovery is not likely to be completed in advance of the current trial date.

Outstanding Discovery Disputes: The following discovery disputes are currently pending and do not appear likely to be resolved in advance of the current trial date:

- Defendant's motion for protective order concerning the forensic examination of his Gateway computer. (Doc. Nos. 672, 682.)
- Plaintiffs' motion to compel production of the eMachine computer, which motion has been filed in the United States District Court for the District of Rhode Island.
- Plaintiffs' motion to compel production of homemade CDRs created by Defendant which are now in the possession of Tova Tenenbaum, which motion has been filed in the United States District Court for the Western District of Pennsylvania. Defendant's response to this motion is due on or before November 21, 2008.
- Plaintiffs anticipate a motion to compel production of homemade CDRs created by Defendant which are now in the possession of Arthur and Judith Tenenbaum. As explained above, the Tenenbaums have evaded service of Plaintiffs' subpoena to produce these CDRs. Once service has been effected, Plaintiffs anticipate that a motion to compel will be necessary, which motion will be filed in the United States District Court for the District of Rhode Island, where the Tenenbaums reside.

Outstanding Motions and Briefing Related to Defendant's Counterclaims: Plaintiffs' motion to dismiss Defendant's counterclaims has been fully briefed. (Doc. Nos. 670, 676, 684.) As explained above, however, and contrary to Defendant's counsel's representations at the September 23, 2008 conference, Defendant now seeks to amend his counterclaims and to add the RIAA as a third party defendant. Although Defendant's purported new counterclaim and effort to join the RIAA are without merit, the briefing on these issues has only just begun, as Defendant failed to comply with his obligations under both Federal Rule 15 and Local Rule 15.1. Once these motions are properly before the Court, Plaintiffs intend to oppose them on multiple grounds. In particular, it appears that Defendant seeks to assert a claim for "federal" abuse of process, a cause of action that does not even exist under the law. In addition, although Defendant purports to challenge the constitutionality of Congress's scheme for statutory damages and private enforcement of copyrights, he has failed to file a "notice of constitutional question" as required by Rule 5(a). *See* Fed. R. Civ. P. 5.1(a). At this late date, it is not possible to complete briefing on Defendant's new counterclaim and effort to join the RIAA in advance of the current trial date.

WHEREFORE, because of the numerous ongoing and unresolved issues in the case, Plaintiffs ask that the pretrial conference set for November 18, 2008 be converted to a status conference to discuss a schedule for completing discovery and resolving outstanding issues, and that the jury trial currently set for December 1, 2008 be adjourned to a later date that is convenient for the Court and the parties.

SONY BMG MUSIC ENTERTAINMENT; WARNER BROS. RECORDS INC.; ATLANTIC RECORDING CORPORATION; ARISTA RECORDS LLC; and UMG RECORDINGS, INC.

By their attorneys,

Dated: November 13, 2008

By: s/Eve G. Burton

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF RUE 7.1 CONFERENCE

Counsel for Plaintiffs certify that they have conferred with Defendant's counsel by telephone regarding this motion. Defendant's counsel stated his intent to oppose the motion.

s/Eve G. Burton
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 13, 2008, a copy of the foregoing **PLAINTIFFS' MOTION TO CONTINUE TRIAL DATE** was served upon the counsel for Defendant via email and United States Mail at the following address:

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