

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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

**PLAINTIFFS' MOTION TO COMPEL DISCOVERY RESPONSES**

Plaintiffs respectfully request an order compelling Defendant, Joel Tenenbaum, to respond to Plaintiffs' Interrogatory No. 26 and Second Set of Requests for Production, without objection and within 10 days of this Court's Order.

**DEFENDANT FAILED TO RESPOND TO PLAINTIFFS' WRITTEN  
DISCOVERY REQUESTS**

On October 9, 2008, Plaintiffs served, by e-mail and U.S. Mail, on Defendant Interrogatory No. 26 and Plaintiffs' Second Set of Requests for Production, which included six additional Requests for Production. Defendant's Responses were due on or before November 11, 2008. Defendant failed to respond. On November 13, 2009, Plaintiffs' counsel emailed

Defendant's counsel, pursuant to Rule 37, reminding him of the outstanding discovery and asking that he provide responses by November 14, 2008. Again, Defendant's counsel did not respond to Plaintiffs' counsel's email or provide discovery responses. To date, Defendant has never responded to this outstanding discovery.

**PURSUANT TO RULE 37, DEFENDANT SHOULD BE COMPELLED TO  
RESPOND WITHOUT OBJECTION.**

A court may compel discovery responses when “a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested. . . .” FED. R. CIV. P. 37(a)(2)(B). As noted above, Defendant has failed to respond to Interrogatory No. 26 and Requests for Production of Documents 19-22. Defendant should therefore be compelled to respond and be deemed to have waived any potential objections. *See id.*; FED. R. CIV. P. 33(b)(4) (“Any ground not stated in a timely objection is waived. . . .”); *Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. Mass. 1991) (Under Rule 34, “[i]f the responding party fails to make a timely objection, or fails to state the reason for an objection, he may be held to have waived any or all of his objections.”); *Willard v. Constellation Fishing Corp.*, 136 F.R.D. 28, 31 (D. Mass. 1991) (“Failure to file a timely objection to a request for production of documents constitutes a waiver of any objections which a party might have to the requests.”); *Russo v. Geagan*, 1985 U.S. Dist. LEXIS 20518 (D. Mass. Apr. 22, 1985) (“If a party fails to file timely objections to interrogatories, such failure constitutes a waiver of any objections which a party might have to the request.”). As a result, Defendant must now answer Plaintiffs' discovery requests without objections.

**PLAINTIFFS' DISCOVERY REQUESTS ARE NARROWLY TAILORED, DIRECTLY  
RELEVANT AND NOT UNDULY BURDENSOME.**

Plaintiffs' discovery requests are narrowly tailored and seek information that is directly relevant to Defendant's copyright infringement. Plaintiffs' Second Set of Requests for Production sought the following documents<sup>1</sup>:

**REQUEST FOR PRODUCTION NO. 19:**

Any and all documents, communications and/or correspondence regarding copyright infringement over the Internet and/or this pending litigation (*Sony BMG Music Entertainment, et al. v. Joel Tenenbaum*, Civ. Act. No. 1:07-cv-11661-NG (consolidated)) in your possession, custody, or control.

Defendant stated in his deposition that he may have communicated over email with his family members, including his mother, and others regarding this lawsuit and the underlying copyright infringement at issue. (*See Joel Tenenbaum Depo. at 19:13-21:16; 23:17-24:19; 27:22-28:4, Exhibit A*). Therefore, this request is clearly reasonably calculated to lead to the discovery of admissible evidence and Defendant should be compelled to respond.

**REQUEST FOR PRODUCTION NO. 20:**

Every compact disc ("CD") that YOU have burned from sound recordings located in any share folder associated with any online media distribution system or peer-to-peer network from January 1, 2003 to date, including but not limited to Napster, KaZaA, and/or Limewire.

Defendant stated in his deposition that he burned between 50-600 sound recordings before leaving for college. (*Joel Tenenbaum Depo. at 211:8-211:18, Ex. A*). The computer from which those CDRs were burned has alleged been discarded and is unavailable. The content of the burned CDs from sound recordings located in a shared folder associated with an online media distribution system or P2P network is direct evidence of the sound recordings Defendant

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<sup>1</sup> Plaintiffs served two additional Requests for Production (Nos. 18 and 23) but are not seeking to compel responses to those at this time.

downloaded from these networks, as well as evidence of Defendant's music tastes. Additionally, this Request is not burdensome as it simply seeks burned CDs already in his possession, custody or control.

**REQUEST FOR PRODUCTION NO. 21:**

A photocopy of every CD YOU own.

This request is directly relevant to both Defendant's music tastes and his knowledge of and access to copyright notices and warnings. Information regarding Defendant's CD collection is also relevant to Defendant's contention that some of the sound recordings located in his KaZaA shared folder were not downloaded from other KaZaA users, but were uploaded from CDs he already owned. Asking Defendant to make photocopies of his CD collection imposes no undue burden on Defendant.

**REQUEST FOR PRODUCTION NO. 22:**

A photocopy of the front cover of every CD YOU own.

For the reasons outlined with respect to Request for Production No. 21, this Request is directly relevant, narrowly tailored and not unduly burdensome.

Similarly, **INTERROGATORY NO. 26** sought:

For each compact disc ("CD") produced in Response to Request for Production No. 20, IDENTIFY the date each sound recording contained on the CD was downloaded and the online media distribution system or peer to peer network used to download the sound recordings contained on the CD, including but not limited to Napster, KaZaA, and/or LimeWire.

As with Request for Production 20, this Interrogatory seeks information directly related to Defendant's downloading on P2P networks, including the date each sound recording was downloaded and from what P2P network. As Defendant admitted in the his deposition that he downloaded music using KaZaA and Limewire but claimed not to recall which recordings he downloaded or when, this Interrogatory is directly relevant to Plaintiffs' claims.

### **CERTIFICATE OF CONFERENCE**

On November 13, 2008, Plaintiffs' counsel sent Defendant's counsel an e-mail reminding Defendant of his discovery obligations and asking for him to provide responses. Defendant did not respond. On December 3, 2008, Plaintiffs' counsel telephoned Defendant's counsel to confer on this Motion and left a voicemail, as well as an e-mail, regarding the overdue responses and Plaintiffs' Motion, Defendant's counsel responded by stating that he would telephone Plaintiffs' counsel but the call would be recorded. Plaintiffs' counsel responded, asking Defendant's counsel to e-mail his position on the Motion to Compel and/or provide complete responses. Defendant's counsel never responded.

### **CONCLUSION**

WHEREFORE Plaintiffs respectfully request that the Court to compel Defendant to provide complete responses to Plaintiffs' interrogatories and requests for production of documents within ten days of the Court's Order,

Respectfully submitted this 11<sup>th</sup> day of December, 2008

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

By their attorneys,

By: s/ Eve G. Burton

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ATTORNEYS FOR PLAINTIFFS

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on December 11, 2008, a copy of the foregoing **PLAINTIFFS' MOTION TO COMPEL DISCOVERY RESPONSES** was served upon the counsel for Defendant via email and United States Mail at the following address:

Charles Nesson  
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s/ Eve G. Burton

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