

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ATLANTIC RECORDING)
CORPORATION, a Delaware)
corporation; BMG MUSIC, a New York)
general partnership; VIRGIN RECORDS)
AMERICA, INC., a California)
corporation; CAPITOL RECORDS,)
LLC, a Delaware limited liability)
company; SONY BMG MUSIC)
ENTERTAINMENT, a Delaware general)
partnership; and UMG RECORDINGS,) Case No. 4:06-cv-01708-CEJ
INC., a Delaware corporation,)
)
Plaintiffs,)
)
v.)
)
JENNA RALEIGH,)
)
Defendant.)

PLAINTIFFS' MOTION TO COMPEL DISCOVERY AND BRIEF IN SUPPORT

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, Plaintiffs request an Order compelling Defendant Jenna Raleigh (“Defendant”) to provide full and complete responses to Plaintiffs’ First Set of Interrogatories. Specifically, Plaintiffs move that the Court order Defendant to provide the following information:

1) The names and contact information of Defendant’s roommates during the 2003–2004 academic year. (Interrogatory No. 5.) Plaintiffs seek the names of Defendant’s roommates because these individuals are most likely to have information relevant to Defendant’s alleged copyright infringement over the Internet using a computer in her residence.

2) The contact information, including the present or last known address, age, telephone number, and e-mail address/username for each of the individuals Defendant identified as a housemate in response to Interrogatory No. 4. Plaintiffs seek this information because

Defendant identified these individuals – in both her Rule 26(a) initial disclosures and in her Response to Interrogatory No. 6 – as among those that utilized Ms. Raleigh’s computer and that may have information relating to access and use of Ms. Raleigh’s computer. These individuals are Defendant’s sorority sisters and their contact information is readily available to Defendant.

3) The brand name, model number, serial number and MAC address of the computer Defendant identified in her Response to Interrogatory No. 1. Plaintiffs seek this information to conduct a computer inspection and to confirm that this computer was used to infringe Plaintiffs’ copyrights.

Plaintiffs have made a good faith effort to resolve this discovery matter before filing this motion by conferring with Defendant’s attorneys by letter dated November 21, 2008, and on the telephone on November 25, 2008. *See* November 21, 2008 Letter, attached as Exhibit A.

Because of the 15 day window to file motions regarding discovery disputes (*See* Doc. No. 49), Plaintiffs indicated to Defendant that they would accept written confirmation that Defendant would provide the above information in lieu of filing a motion to compel. Ex. A, p. 9.

Defendant did not respond to Plaintiffs’ letter and refused to provide additional information at the telephone conference. For the reasons stated below, this discovery should be compelled and Plaintiffs should be awarded their attorneys’ fees associated with this Motion.

INTRODUCTION

This action seeks redress for the infringement of Plaintiffs’ copyrighted sound recordings pursuant to the Copyright Act. Plaintiffs are recording companies that own or control exclusive rights to copyrights in sound recordings. Since the early 1990s, Plaintiffs and other copyright holders have faced a massive and exponentially expanding problem of digital piracy over the Internet. Today, copyright infringers use various online media distribution systems (so-called “peer-to-peer” or P2P networks) to unlawfully upload, download and distribute to others billions

of perfect digital copies of Plaintiffs' copyrighted sound recordings from their computers. As a result of the rise of peer-to-peer computer networks, Plaintiffs have sustained and continue to sustain devastating financial losses. Losses from copyright infringement have also resulted in layoffs of thousands of employees in the music industry.

On December 3, 2003, a third-party retained by Plaintiffs located an individual with the screen name "jenaRal" using the "KaZaA" file-sharing program to engage in copyright infringement on a massive scale. This individual had *1362 music files* on her computer and was distributing them freely to the millions of people who use similar peer-to-peer networks. In short, as an active user of a P2P network, this individual was downloading copyrighted sound recordings to her computer hard drive from other users of the P2P network, and was distributing the copyrighted sound recordings stored on her computer hard drive to other P2P users, all for free.

The third-party ("MediaSentry"), determined that this individual used Internet Protocol ("IP") address 12.218.124.35 to connect to the Internet. After filing a "Doe" lawsuit against the individual using that IP address, Plaintiffs subpoenaed her Internet Service Provider ("ISP") to determine her identity. The ISP – Mediacom Communications Corporation – identified Jenny Kopp as the individual responsible for the IP address. After Plaintiffs contacted Ms. Kopp, however, Ms. Kopp signed a sworn affidavit disavowing any involvement in the copyright infringement at issue and stating that she did not own or use a computer at the relevant address. (Ex. 1 to Doc. No. 26.) Moreover, Ms. Kopp, through her counsel, identified the Defendant as the individual that owned the computer and for whom Ms. Kopp obtained Internet access through MediaCom. (Ex. 2 to Doc. No. 26.) Based on counsel's identification, as well as on the

obvious username match to Defendant (Jenna Raleigh; jenaRal@KaZaA), Plaintiffs brought the present action against Defendant on November 28, 2006.

On October 15, 2008, Defendant served initial disclosures. In those, she identified approximately 120 sorority sisters that she claimed “may have information relating to the access and use of Ms. Raleigh’s computer at the sorority house.” Defendant’s Initial Disclosures, attached as Exhibit B. However, despite Rule 26(a)(1)(A)(i) requiring Defendant to provide contact information for these individuals, Defendant failed to do so. Plaintiffs sent Defendant’s counsel a letter pursuant to Rule 37 (a)(1) asking for these individuals’ contact information on or before November 19, 2008. November 6, 2008 Letter, attached as Exhibit C. Defendant did not respond to Plaintiffs letter and have not provided such contact information to date.

On October 6, 2008, Plaintiffs served their First Set of Interrogatories, as well as other written discovery requests. Plaintiffs’ First Set of Interrogatories, attached as Exhibit D. Defendant responded on November 7, 2008 with partial and inadequate responses, neglecting to provide contact information for individuals that she identified as having access to – and possibly using – Defendant’s computer, and neglecting to provide identifying information for the computer at issue. Defendant’s Responses, attached as Exhibit E. On November 21, 2008, Plaintiffs’ counsel requested that Defendant supplement her responses to provide the requested information, or in the alternative, confirm in writing that she would supplement her responses within a week. (Ex. A). Defendant did not respond to Plaintiffs’ letter. On November 25, 2008, Plaintiff’s counsel telephoned Defendant’s counsel to follow up on his letter and try to resolve this issue without court involvement. Defendant’s counsel refused to provide any additional information.

Pursuant to the Federal Rules, and for the reasons stated below, Plaintiffs are entitled to discover evidence directly relating to Plaintiffs' claims. Accordingly, this Court should compel Defendant to provide the following information:

- 1) The names and contact information for Defendant's roommates during the 2003–2004 academic year.
- 2) The contact information, including last known address, age, telephone number and e-mail addresses/usernames for the individuals the resided with Defendant during the three years preceding the date which the Complaint in this action was filed.
- 3) The brand name, model number, serial number and MAC address of the computer Defendant identified in response to Plaintiffs' Interrogatory No. 1.

ARGUMENT

1. The Court should Order Defendant to provide complete answers to Plaintiffs' interrogatories because Plaintiffs are entitled to this discovery under the Federal Rules.

Plaintiffs Interrogatories requested that Defendant provide the names and contact information for her roommates (who will likely have information concerning the infringing activity), contact information for individuals Defendant identified as residing in her house (same), and identifying information for the computer she owned at the time of the infringement. Defendant failed to comply with these requests. Because the information is relevant to the parties' claims and defenses and Plaintiffs' Interrogatories are narrowly tailored to discover this relevant information, Defendant should be compelled to provide complete answers to Plaintiffs' Interrogatories pursuant to Rules 33, 34 and 37.

(a) Statement of the law.

Under Rule 26(b)(1), a party is entitled to discovery on any matter that appears reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1);

See Crump v. Versa Prods., 400 F.3d 1104, 1110 (8th Cir. 2005). Further, Rule 33(a)(2) permits Plaintiffs to serve Interrogatories that “relate to any matter that may be inquired into under Rule 26(b).” Fed. R. Civ. P. 33(a)(2).

A Court may compel a party to answer an interrogatory submitted under Rule 33. Fed. R. Civ. P. 37(a)(3)(B)(iii). “Under the discovery rules, evasive or incomplete responses are treated as failures to respond.” *Kashlan v. TCBY Sys., LLC*, 2007 U.S. Dist. LEXIS 84337, *12 (E.D. Ark. Nov. 6, 2007). “The party resisting production bears the burden of establishing lack of relevancy or undue burden.” *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511 (N.D. Iowa 2000); *see also EEOC v. Klockner H & K Machs., Inc.*, 168 F.R.D. 233, 235 (E.D. Wis. 1996); *American Rock Salt Co., LLC v. Norfolk S. Corp.*, 228 F.R.D. 426, 440 (W.D.N.Y. 2004) (granting motion to compel discovery because the defendants had “failed to sustain their burden” with respect to their objections); 8A Wright, Miller, & Marcus, *Federal Practice and Procedure: Civil 2d* § 2173, at 291-92 (1994) (“The burden is on the objecting party to show why an interrogatory is improper.”)

(b) Plaintiffs’ Interrogatories are directly relevant, narrowly tailored, and not burdensome to Defendant.

Plaintiffs believe that Defendant’s housemates and roommates have direct evidence of the violations at the heart of this matter. This case involves the downloading and distribution of copyrighted sound recordings through a computer connected to the Internet. Defendant herself identified these individuals as persons “likely to have discoverable information” and that she “may use to support [her] claims and defenses.” Fed. R. Civ. P. 26(a)(1). Moreover, her roommates and sorority sisters likely have information regarding Defendant’s computer use, music tastes, and her use of the peer-to-peer network and username “jenaRal” at issue in this case. Furthermore, Defendant’s computer is the centerpiece of Plaintiffs’ claims, as the focus of

this case is on activities that allegedly occurred on this computer. For these reasons, the information requested by Plaintiffs is relevant to the claims and defenses involved in this case and discoverable under Rule 26(b)(1).

The Interrogatories at issue are narrowly tailored and seek only information directly relevant and easily produced by Defendant. Defendant's answers to the following

Interrogatories are at issue:

Interrogatory No. 1:

For each COMPUTER located at YOUR residence during the three years prior to the date the Complaint in this action was filed, IDENTIFY the COMPUTER by brand name; model number; serial number; and MAC address(s).

Defendant responded, "eMachine, model number, serial number and MAC address(s) unknown. Raleigh does not know the brand name, model number, serial number or MAC address(s) of any other computers located at her residences during the three years prior to the date of the Complaint in this action was filed."

Defendant's response is incomplete. Even if the computer is unavailable, which remains unclear, Defendant can obtain such information through sales records from the manufacturer/retailer or Defendant's purchase receipts.

Interrogatory No. 4:

IDENTIFY any and all PERSONS who resided with YOU during the three years prior to the date the Complaint in this action was filed.

Defendant responded with a list of 122 names, most of whom she identifies as living in her sorority house.

Defendant's response is insufficient. In Plaintiffs' Interrogatories, the term "IDENTIFY" is defined to include "the person's full name, present or last known address, and when referring to a natural person, additionally, their age, their relationship to YOU and their present or last known place of employment." Defendant failed to adequately identify the individuals she named in her response to Interrogatory No. 4. The individuals she named are sorority sisters and therefore

Defendant has access to the contact information requested by Plaintiffs. Additionally, Plaintiffs are skeptical that all the individuals identified by Defendant in response to Interrogatory No. 4 actually lived with Defendant in her sorority house. *See* Ex. E. Plaintiffs asked Defendant to clarify this in her response but she failed to do so.

Interrogatory No. 5:

IDENTIFY any and all PERSONS with whom you shared a room during the 2003-2004 academic year.

Defendant responded: “Defendant Raleigh shared a room with the following individuals during the 2003-2004 academic year,” and provided a list of 119 names.

Defendant’s response is inaccurate and inadequate. Plaintiffs Interrogatory is asking for the names and contact information for Defendant’s roommates during the 2003-2004 academic year. Plaintiffs do not believe it is plausible that Defendant shared a room with 119 women. The Court should Order Defendant to narrow her evasive response and provide the requested information, including contact information for the persons identified.

Accordingly, Plaintiffs’ Interrogatories request only relevant information and are narrowly tailored to information that is in the possession, custody, or control of – or easily obtained by – Defendant. Additionally, Plaintiffs’ counsel informed Defendant that Plaintiffs are willing to grant Defendant an additional week to produce the requested information. For the foregoing reasons, Defendant should be compelled to supplement her answers to Plaintiffs’ Interrogatories and provide the information requested above.

(c) Defendant has failed to forward objections to Plaintiffs’ Interrogatories.

As stated above, “under the discovery rules, evasive or incomplete responses are treated as failures to respond.” *Kashlan v. TCBY Sys., LLC*, 2007 U.S. Dist. LEXIS 84337, *12 (E.D. Ark. Nov. 6, 2007). To avoid being compelled to answer Plaintiffs’ Interrogatories, Defendant

must demonstrate to the Court “that the requested documents either do not come within the broad scope of relevance defined pursuant to Fed. R. Civ. P. 26(b)(1)” or specifically how each interrogatory is overly broad, burdensome or oppressive. *St. Paul Reinsurance Co.*, 198 F.R.D. at 511-12. Defendant has not, and cannot, make such demonstrations to the Court here. Indeed, it is well settled that Plaintiffs may “obtain discovery regarding . . . the existence and description . . . [of] tangible things . . . [and] the identity and location of persons having knowledge of any discoverable matter.” *Id.* at 511 (citation omitted). Both the description of Defendant’s computer and the identity and contact information for Defendant’s former housemates fall squarely within this definition of discoverable material. Moreover, Defendant herself identified these individuals as having discoverable information in her Rule 26 disclosures.

Finally, Defendant did not object to any of these Interrogatories, therefore any potential objections have been waived. Fed. Rule. Civ. P. 33(b)(4). Accordingly, Defendant did not—and can not—meet its burden for objecting or failing to adequately respond to Plaintiffs’ Interrogatories and the Court should compel Defendant to produce the requested information.

2. Defendant should be Ordered to pay Plaintiffs reasonable expenses in making this Motion.

Pursuant to Rule 37(a)(5), if Plaintiffs’ Motion is granted, “the Court must . . . require the party whose conduct necessitated the motion . . . to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees. Fed. R. Civ. P. 37(a)(5). In this case, fees are appropriate. Defendant did not provide the requested information as required in her initial disclosures or as requested in her discovery responses. She has acknowledged the information sought is relevant and discoverable. She failed to make any objections to the interrogatories and she ignored two written requests and one telephonic request for the requested information. *See GP Indus., LLC v. Bachman*, 2008 U.S. Dist. LEXIS 90292, *12-13 (D. Neb.

April 10, 2008) (holding that movant that filed a successful motion to compel was entitled to reasonable expenses pursuant to Fed. R. Civ. P. 37(a)(5)). Therefore, Defendant should be ordered to pay Plaintiffs' reasonable expenses in bringing this Motion.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court compel Defendant to provide adequate responses to Plaintiffs' Interrogatories as outlined above, and Order Defendant to pay Plaintiffs' reasonable expenses in bringing this Motion.

Respectfully submitted,

Dated: November 25, 2008

By: /s/ John D. Ryan

John D. Ryan, EDMO #447
Steven M. Wald, EDMO# 46465
LATHROP & GAGE L.C.
10 South Broadway, Suite 1300
St. Louis, MO 63102-1708
Telephone: (314) 613-2500
Facsimile: (315) 613-2550

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of November, 2008, a true and correct copy of the foregoing **MOTION TO COMPEL** was served via the Court's electronic filing system as follows:

Jonathan Andres
7733 Forsyth Blvd.
Suite 700
Clayton, MO 63105
Attorney for Defendant

/s/ John D. Ryan