

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

\_\_\_\_\_)  
CAPITOL RECORDS, INC., *et al.*, )  
 )  
Plaintiffs, ) Civ. Act. No. 03-CV-11661-NG  
 ) (LEAD DOCKET NUMBER)  
v. )  
 )  
NOOR ALAUJAN, )  
 )  
Defendant. )  
\_\_\_\_\_)

\_\_\_\_\_)  
SONY BMG MUSIC ENTERTAINMENT, *et al.*, )  
 )  
Plaintiffs, ) Civ. Act. No. 07-CV-11446-NG  
 ) (ORIGINAL DOCKET NUMBER)  
v. )  
 )  
JOEL TENENBAUM, )  
 )  
Defendant. )  
\_\_\_\_\_)

**MEMORANDUM IN SUPPORT OF DEFENDANT’S CONDITIONAL MOTION TO  
COMPEL TO DEPOSITION OF MATTHEW OPPENHEIM ON JANUARY 22, 2009**

On November 10, 2008, Defendant informed Plaintiffs of his intent to depose Matthew Oppenheim. (Exhibit A.) Defendant reiterated his intent to depose Mr. Oppenheim in his Discovery Plan of November 24, 2008 (Dkt. No. 701), to which intent the Plaintiffs made no opposition in their Response. (Dkt. No. 707). On and after January 2, 2009, Defendant attempted to confer with Plaintiffs’ counsel on a mutually agreeable date and time for Mr. Oppenheim’s deposition. (Exhibit B.) On January 9, Defendant properly served Mr. Oppenheim with a subpoena ordering him to appear for a deposition on January 20 (Exhibit C) and provided notice

to Plaintiffs of Mr. Oppenheim's deposition. (Exhibit D.) Plaintiffs responded via e-mail expressing their displeasure with the date, but, despite Defendant's efforts to reach an agreement, refused to discuss a mutually agreeable date or method of taking the deposition. At no time did Plaintiffs express opposition to Mr. Oppenheim's deposition. Mr. Oppenheim then failed to appear at the appointed time for the deposition.

The deposition of Mr. Oppenheim is necessary to the Defendant's fair defense. In his capacity as client representative to the Plaintiffs, Mr. Oppenheim has assumed the central role in the prosecution of the instant action, and in the broader litigation campaign of which this action is a part. His deposition is therefore reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs' counsel recognized the relevance of Mr. Oppenheim's testimony by engaging Defendant's counsel on the deposition's scope immediately prior to the January 12, 2009 telephonic argument. The scope of information sought in this deposition includes, but is not limited to, Mr. Oppenheim's knowledge of the steps taken by Plaintiffs against Defendant before and after the commencement of this action; the formulation and execution of the litigation campaign of which this suit against Defendant is a part; the decision-making process that gave rise to the campaign; and the document flow and decision-making process among the four Plaintiffs and the RIAA.

Federal Rule of Civil Procedure 45(e) provides that the failure of "any person without adequate excuse to obey a subpoena served upon that person may be deemed in contempt of the court from which the subpoena issued." Fed. R. Civ. P. 45(e). If a person subject to a subpoena does not want to appear for some reason, he must reach an agreement to re-schedule or seek an order quashing or modifying the subpoena. See Fed. R. Civ. P. 45(c)(3). Mr. Oppenheim did neither, and was legally required, absent a protective order of this court, to appear at the

requested time. Defendant requests that the Court order Mr. Oppenheim to appear for a deposition in this judicial district on January 22, 2009.

JOEL TENENBAUM.

By his attorney,

Dated: January 20, 2009

/s/Charles R. Nesson  
Charles R. Nesson, BBO# 369320  
Harvard Law School  
1525 Massachusetts Avenue  
Cambridge, MA 02138  
Email: nesson@law.harvard.edu  
Phone: (617) 495-4609  
Fax: (617) 495-4299

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on January 20, 2009, a copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT'S CONDITIONAL MOTION TO COMPEL TO DEPOSITION OF MATTHEW OPPENHEIM ON JANUARY 22, 2009** was served upon the Plaintiffs via first class mail, postage pre-paid, and electronic mail (where available), at the following addresses:

Claire E. Newton  
Robinson & Cole LLP  
One Boston Place  
Suite 2500  
Boston, MA 02108  
617-557-5900  
Fax: 617-557-5999  
Email: [cnewton@rc.com](mailto:cnewton@rc.com)

Eve G. Burton  
Holme Roberts & Owen LLP  
Suite 4100  
1700 Lincoln Street  
Denver, CO 80203-4541  
303-866-0551  
Email: [eve.burton@hro.com](mailto:eve.burton@hro.com)

John R. Bauer  
Robinson & Cole LLP  
One Boston Place, 25th Floor  
Boston, MA 02108  
617-557-5900  
Fax: 617-557-5999  
Email: [jbauer@rc.com](mailto:jbauer@rc.com)

Laurie Rust  
Holme Roberts & Owen LLP  
Suite 4100  
1700 Lincoln Street  
Denver, CO 80203-4541

Nancy M. Cremins  
Robinson & Cole LLP  
One Boston Place  
Boston, MA 02108-4404  
617-557-5971  
Fax: 617-557-5999  
Email: [ncremins@rc.com](mailto:ncremins@rc.com)

Timothy M. Reynolds  
Holme Roberts & Owen LLP  
1801 13th Street  
Suite 300  
Boulder, CO  
393-861-7000  
Email: [timothy.reynolds@hro.com](mailto:timothy.reynolds@hro.com)

Daniel J. Cloherty  
Dwyer & Collora LLP  
600 Atlantic Avenue  
12th Floor  
Boston, MA 02210  
617-371-1000  
Fax: 617-371-1037  
Email: [dcloherty@dwyercollora.com](mailto:dcloherty@dwyercollora.com)

Jeffrey C. Blair  
Holme, Roberts & Owen LLP  
1700 Lincoln Street  
Denver, CO 80203-4541  
303-866-0625

/s/Charles R. Nesson  
Charles R. Nesson  
Attorney for Defendant