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, Defendants.	Civ. Act. No 1:07-cv-11446-NG (ORIGINAL DOCKET NUMBER)

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S CONDITIONAL MOTION TO COMPEL DEPOSITION

Plaintiffs respectfully submit this opposition to Defendant Joel Tenenbaum's "Conditional Motion to Compel Deposition of Matthew Oppenheim" ("Motion" Docket No. 736) and state as follows.

INTRODUCTION

Defendant's Motion seeks an order compelling a deposition of Matthew Oppenheim on January 22, 2009. The Motion to Compel lacks any legal or factual basis and should be denied. Defendant has come to the Court to compel a deposition that was never subpoenaed, never noticed, and never conferred about. Defendant's failure to abide by simple rules for discovery and motions practice is needlessly complicating this proceeding and should not be countenanced.

First, Defendant failed to confer with Plaintiffs regarding the Motion as required by Rule 37 and by the Local Rules of the District of Massachusetts. This alone requires that the Motion be denied. Fed. R. Civ. P. 37(a)(2)(B).

Second, Defendant has not noticed any deposition for January 22 and has failed to issue a valid subpoena for any deposition. Since Defendant has neither noticed a deposition for January 22 nor subpoenaed anyone for that date, there is nothing to compel.

Third, under the Local Rules of the Court, Defendant is prohibited from initiating any discovery in this case until he provides his initial Rule 26(a)(1) disclosures, which Defendant was ordered to produce long ago and which Plaintiffs have asked for repeatedly.

For all of these reasons, and those set forth below, Plaintiffs request that Defendant's Motion be denied. Plaintiffs further request entry of an order requiring Defendant's counsel, Charles Nesson, to pay Plaintiffs' costs, including reasonable attorney fees, incurred in opposing Defendant's Motion. Rule 37(a)(5)(B) requires the imposition of costs against a moving party were, as here, Defendant's Motion has no factual or legal basis whatsoever and Defendant failed to confer before filing it.

STATEMENT OF RELEVANT FACTS

Defendant's Motion seeks an order compelling a deposition of Mr. Oppenheim on January 22, 2009. Defendant, however, has not noticed any deposition for January 22 and has failed to issue a valid subpoena for any deposition. To the extent Defendant predicates his Motion on the subpoena that Defendant mailed and emailed to Mr. Oppenheim on January 9, purporting to set a deposition on January 20, that subpoena is facially invalid for many reasons.

Specifically, it was not properly served on Mr. Oppenheim,[1] failed to include the witness and mileage fees required by Rule 45(b)(1), and sought to compel Mr. Oppenheim, a resident of Maryland, to attend a deposition in Massachusetts. The subpoena was also in violation of this Court's Local Rule 26.2(a), which prohibits a party from initiating any discovery until that party has made the disclosures required by Rule 26(a)(1). Defendant was ordered to provide his Rule 26(a)(1) disclosures to Plaintiffs long ago (*see* January 29, 2008 Procedural Order Re: Discovery, Doc. No. 513), but has failed to do so despite repeated requests from Plaintiffs. Plaintiffs also informed Defendant that Mr. Oppenheim was not available for a deposition on January 20.

During subsequent telephone conversations, Plaintiffs reiterated that Mr. Oppenheim was not available on January 20 and that Defendant's subpoena was facially invalid. Plaintiffs also advised Defendant of their willingness to cooperate regarding deposition schedules, but that Defendant could not initiate any discovery without complying with Local Rule 26.2(a). On January 19, Plaintiffs followed up this conversation with an email reiterating that neither Mr. Oppenheim nor Plaintiffs' counsel would appear for the January 20 deposition as Mr. Oppenheim was not available and Defendant's subpoena was invalid.

On January 20, Defendant responded via email and stated, for the first time, that he would file a motion to compel Mr. Oppenheim's appearance at a deposition on January 22 if the hearing scheduled for that day were postponed. Defendant, however, never noticed any deposition for January 22, nor served any subpoena for that date. Plaintiffs have since requested that Defendant withdraw his Motion to Compel, and instead comply with the Court's procedural rules and work with Plaintiffs to complete this discovery, but Defendant refused. (*See* Plaintiffs'

[1] The subpoena was emailed and mailed to Mr. Oppenheim, but never served on him as required by Rule 45(b)(1).

Letter of January 21, 2009 and Defendant's Email response, attached as Exhibit A.) Plaintiffs also pointed out that, as Defendant likely knows, Mr. Oppenheim is an attorney who has represented Plaintiffs, and that any potential deposition of him presents a myriad of privilege and work product issues that are likely to lead to a host of subsidiary disputes. A conference among the parties is, thus, required to determine whether there exist any non-privileged areas of testimony from Mr. Oppenheim that may be discoverable in this case.

ARGUMENT

I. DEFENDANT'S MOTION TO COMPEL SHOULD BE DENIED FOR FAILURE TO COMPLY WITH FED. R. CIV. P. 37(a) AND MASS. LOCAL RULE 37.1.

Federal Rule 37 "requires litigants to seek to resolve the discovery disputes by informal means before filing a motion with the court." Fed. R. Civ. P. 37, Advisory Committee Notes to the 1993 Amendments. Local Rule 37.1 also requires a conference "[b]efore filing any discovery motion." LR. 37.1(a). Federal Rule 37 further requires that any motion to compel disclosure or discovery "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party not making the disclosure or discovery in an effort to obtain it without court action." *Hasbro, Inc. v. Serafino*, 168 F.R.D. 99, 101 (D. Mass. 1996); Fed. R. Civ. P. 37(a)(1). Local Rule 37.1 contains the same certification requirement. LR. 37.1(b). The failure to meet and confer mandates denial of a motion to compel. *Prescient Partners, L.P. v. Fieldcrest Cannon*, 1998 U.S. Dist. LEXIS 1826, at *8 (S.D.N.Y. Feb. 18, 1998).

This Court routinely denies motions which fail to comply with Local Rule 37.1. *Hasbro*, 168 F.R.D. at 101 (denying motion to compel due to procedural errors, including failure to comply with Local Rule 37.1); *Prozina Shipping Co. v. Thirty-Four Autos.*, 179 F.R.D. 41, 49 (D. Mass. 1998) (inviting the defendant to seek its expenses and attorneys fees "[g]iven the

cavalier nature of the plaintiff's motion, filed without regard to Local Rule 37.1, and without any serious attempt to offer particular facts in its support); *Syrjala v. Total Healthcare Sols., Inc.*, 186 F.R.D. 251, 255 (D. Mass. 1999) (assessing $1,500 sanction against attorney and local counsel for violating Local Rule 37.1). Similarly, the First Circuit recognizes the importance of complying with local rules. *Gwyn v. Loon Mt. Corp.*, 350 F.3d 212, 218 (1st Cir. 2003) (affirming district court's denial of motion to amend for *inter alia*, disregard of Local Rule 15.1's requirements); *3,888 Pounds of Atlantic Sea Scallops*, 857 F.2d 46 (1st Cir. 1988) (district court granted motion to strike, based on defendant's failure to respond within ten days as required by local rules); *Corey v. Mast Road Grain & Bldg. Materials Co., Inc.*, 738 F.2d 11 (1st Cir. 1984) (demanding adherence to specific mandates contained in the local rules).

Here, despite the certificate in Defendant's Motion, Defendant did nothing more than send an email to Plaintiffs announcing the fact that the Motion would be filed. Defendant made no effort to confer with Plaintiffs, in good faith or otherwise, before filing his Motion. For this reason alone, Defendant's Motion should be denied. *See Hasbro*, 168 F.R.D. at 101.

Moreover, this is not the first time Defendant's counsel has failed to confer before presenting matters to the Court. Defendant also failed to confer with Plaintiffs before filing his motion to allow Courtroom View Network to narrow cast these proceedings over the Internet. (*See* Doc. No. 728 at 2.)

II. DEFENDANT'S MOTION TO COMPEL SHOULD BE DENIED BECAUSE THERE IS NOTHING TO COMPEL; DEFENDANT HAS NEITHER NOTICED A DEPOSITION FOR JANUARY 22 NOR SERVED A VALID SUBPOENA.

Defendant's Motion seeks an order compelling a deposition of Mr. Oppenheim on January 22, 2009. Defendant, however, has not noticed any deposition or served any subpoena for January 22. Therefore, there is nothing to "compel" and Defendant's Motion should be denied.

To the extent Defendant relies on his subpoena of January 9, purporting to set a deposition for January 20, that subpoena fails to comply with Rule 45 in multiple, fundamental respects, and is facially invalid. To begin with, service of a subpoena under Rule 45 "requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law." Fed. R. Civ. P. 45(b)(1). Service by mail is not valid. *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683, 686 (D. Kan. 1995) (service of subpoena by certified mail improper); *In re Johnson & Johnson*, 59 F.R.D. 174, 177 (D. Del. 1973) (personal service required for subpoena directed to corporate officers in individual capacities). In addition, tender of witness and mileage fees must be simultaneous with service of the subpoena, and the failure to tender the fees required by Rule 45 invalidates the subpoena. *In re Dennis*, 330 F.3d 696, 704-705 (5th Cir. 2003); *see also Judicial Watch, Inc. v. United States DOC*, 212 F.R.D. 429, 431 (D.D.C. 2003) (rule requires payment of witness fees or subpoena is invalid). Here, Defendant never properly served any subpoena on Mr. Oppenheim. Nor did Defendant tender the required witness and mileage fees. Thus, Defendant's January 9 subpoena is invalid.

Rule 45 further requires that any subpoena issuing from a federal district court be served within the territorial confines of the district or within 100 miles of the place specified in the subpoena. Fed. R. Civ. P. 45(b)(2)(B). The 100-mile rule is designed both to protect witness from long, tiresome trips, and to minimize costs of litigation. *See Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 234 (1964). Where a witness resides outside the issuing district and more than 100 miles from the deposition location, the deposition subpoena is invalid. *Smith v. BIC Corp.*, 121 F.R.D. 235, 245 (E.D. Pa. 1988). Here, Mr. Oppenheim resides in Maryland, outside

the District of Massachusetts and well more than 100 miles from the location specified in Defendant's January 9 subpoena. For this reason, too, Defendant's subpoena is invalid.

III. DEFENDANT'S MOTION TO COMPEL SHOULD BE DENIED BECAUSE DEFENDANT HAS YET TO PROVIDE RULE 26(a)(1) DISCLOSURES TO PLAINTIFFS.

This Court's Local Rule 26.2 provides that "[u]nless otherwise ordered . . . , before a party may initiate discovery, that party must provide to other parties disclosure of the information and materials called for by Fed. R. Civ. P. 26(a)(1)." LR. 26.2(a). Although this case has been pending for years, Defendant has failed to produce any Rule 26(a)(1) disclosures to Plaintiffs, despite repeated requests from Plaintiffs. The Court's January 29, 2008 Procedural Order Re: Discovery (Doc. No. 513) specifically ordered Defendant to provide Rule 26(a)(1) disclosures to Plaintiffs, but Defendant has failed to do so. Since Defendant retained counsel, Plaintiffs have repeatedly requested Defendant's Rule 26(a)(1) disclosures (*see, e.g.*, Doc. No. 707 at 3, suggesting the Defendant provide initial disclosures not later than December 15, 2008), but none have been provided. Until Defendant provides his Rule 26(a)(1) disclosures to Plaintiffs, which he should have done long ago, Local Rule 26.2 does not permit Defendant to initiate *any* discovery, including the deposition of Mr. Oppenheim.

IV. DEFENDANT'S COUNSEL SHOULD BE ORDERED TO PAY PLAINTIFFS' COSTS, INCLUDING REASONABLE ATTORNEY FEES, INCURRED IN OPPOSING DEFENDANT'S MOTION.

Rule 37 provides that, if a motion to compel is denied, the court "must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5)(b). This Rule "requires that expenses be awarded" to Plaintiffs unless the Court finds that Defendant was "substantially

justified" in bringing his motion. *See* Fed. R. Civ. P. 37, Advisory Committee Notes to the 1970 Amendments.

Here, Defendant's Motion has no factual or legal merit at all. Defendant has never served a valid subpoena, and has never served any subpoena or any notice of deposition for January 22, the date requested in his Motion. Even more egregious, Defendant failed to confer with Plaintiffs before filing his Motion, and refused to withdraw the Motion even after Plaintiffs pointed out its multiple deficiencies.

Plaintiffs have repeatedly advised Defendant of their willingness to cooperate in scheduling depositions and completing discovery in this case. Defendant must, however, abide by the Court's rules and must provide his initial disclosures to Plaintiffs. Defendant's repeated failure to follow basic rules of procedure, including specifically the failures noted above concerning Defendant's Motion, have unnecessarily complicated these proceedings. It is also apparent that Defendant's counsel, rather than Defendant, is responsible for these failures to confer and to follow simple rules. Accordingly, Plaintiffs ask that Defendant's counsel be ordered to pay Plaintiffs' costs, including reasonable attorney fees, incurred in filing this opposition to Defendant's Motion. Defendant's counsel is not above the rules and, absent such sanction, Defendant's counsel's blatant disregard for fundamental court procedure will only continue.

CONCLUSION

WHEREFORE, Plaintiffs request that Defendant's Motion to Compel be denied and that Defendant's counsel be ordered to pay Plaintiffs' costs, including reasonable attorney fees, incurred in opposing Defendant's Motion, as required under Rule 37(a)(5)(B).

Respectfully submitted this 22d day of January 2009.

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

By their attorneys,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 22, 2009, a copy of the foregoing **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S CONDITIONAL MOTION TO COMPEL DEPOSITION** was served upon the counsel for Defendant via email and United States Mail at the following address:

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