

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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CAPITOL RECORDS, INC., <i>et al.</i> ,		)	
		)	
	Plaintiffs,	)	Civ. Act. No. 03-CV-11661-NG
		)	(LEAD DOCKET NUMBER)
v.		)	
		)	
NOOR ALAUJAN,		)	
		)	
	Defendant.	)	
_____		)	

_____		)	
SONY BMG MUSIC ENTERTAINMENT, <i>et al.</i> ,		)	
		)	
	Plaintiffs,	)	Civ. Act. No. 07-CV-11446-NG
		)	(ORIGINAL DOCKET NUMBER)
v.		)	
		)	
JOEL TENENBAUM,		)	
		)	
	Defendant.	)	
_____		)	

**DEFENDANT’S REPLY TO PLAINTIFFS’ OPPOSITION TO DEFENDANT’S  
CONDITIONAL MOTION TO COMPEL DEPOSITION**

Defendant Joel Tenenbaum respectfully submits the following Reply supporting his Conditional Motion to Compel Deposition of Matthew Oppenheim on January 22, 2009 (“Joel’s Motion to Compel”), Dkt. No. 736, responding to the arguments contained in Plaintiffs’ Opposition to Defendant’s Conditional Motion to Compel Deposition, Dkt. No. 739 (“Plaintiffs’ opposition”).

**I. MATTHEW OPPENHEIM IS A PARTY TO THE PRESENT ACTION.**

Plaintiffs' objections to Joel's Motion to Compel are irrelevant given that Matthew Oppenheim is himself a plaintiff party to this case. Mr. Oppenheim has consistently and affirmatively assumed the role of stand-in for the five corporate plaintiffs and therefore is a Plaintiff for the purposes of this suit. Mr. Oppenheim has identified himself as acting "on behalf of the plaintiffs" at Joel's deposition and identified himself to the Court's reporter as the "client representative" in open court. See Deposition of Joel Tenenbaum at 3, attached hereto as Exhibit A; see also Transcript of September 23, 2008 Hearing, attached hereto as Exhibit B. He has also identified himself as the "client" or "client representative" in prior and ongoing cases brought by the same plaintiffs and under the same statute as in this case against Joel. Plaintiffs' attorneys routinely use the phrase "my client" to refer specifically to Mr. Oppenheim. See E-mail Correspondence, attached hereto as Exhibit D, at 3 ("Charlie: I will consult with my client and let you know.") (e-mail statement of Plaintiffs' attorney Timothy Reynolds noting that he would confer with Matthew Oppenheim about his availability for deposition). In this case, Mr. Oppenheim is neither a third party nor Plaintiffs' counsel: he is Mr. Tenenbaum's opponent party.

## **II. MATTHEW OPPENHEIM WAS DULY NOTICED OF HIS DEPOSITION.**

A party to a lawsuit is obligated to attend a deposition upon due notice, absent a protective order obtained pursuant to Fed. R. Civ. P. 26. Fed. R. Civ. P. 30(b)(1). Notice delivered to a party's attorney is sufficient for this purpose. Fed. R. Civ. P. 5(b)(1). Counsel for the Defendant delivered notice to Plaintiffs' counsel by certified mail and electronic mail on January 9, 2009. See Notice of Deposition at 3, attached hereto as Exhibit C. Notice was delivered after three months' advance notice of Defendant's intent and three attempts by the Defendant's counsel to negotiate with Plaintiffs' counsel to establish a mutually agreeable time

and location for the deposition of Mr. Oppenheim. See Correspondence with Eve G. Burton and Timothy M. Reynolds, attached hereto as Exhibit D.

**III. THE DISTRICT OF MASSACHUSETTS IS AN APPROPRIATE VENUE FOR MATTHEW OPPENHEIM'S DEPOSITION.**

A plaintiff party is required to be available for deposition in the district in which the suit was brought, unless the plaintiff can show good cause for the Court to require otherwise. See Wright & Miller, Federal Practice and Procedure, § 2112 (2008) (“As a normal rule plaintiff will be required to make himself or herself available for examination in the district in which suit was brought. Since plaintiff has selected the forum, he or she will not be heard to complain about having to appear there for a deposition.”) See also U.S. v. Rock Springs Vista Dev., 185 F.R.D. 603, 604 (D. Nev. 1999) (“The plaintiff... has not only taken the volitional step of initiating the lawsuit or claim, he or she stands to gain a substantial monetary sum and/or other beneficial relief as a result of suing a defendant. A plaintiff, therefore, cannot invoke the mere fact inconvenience or expense as a legitimate reason to refuse to appear and submit himself or herself to questioning by the defendant regarding the basis for the claim”).

The objections Plaintiffs raise against the deposition under Fed. R. Civ. P. 45, including the territorial restrictions on depositions carried out under subpoena, are immaterial. The deposition of Mr. Oppenheim does not require a subpoena because he is an opponent party.

**IV. DEFENDANT'S COUNSEL CONFERRED WITH PLAINTIFFS' COUNSEL BEFORE INITIATING THIS MOTION.**

Defendant's counsel conferred with Plaintiffs' counsel on several occasions prior to filing Joel's Motion to Compel. See Memorandum in Support of Defendant's Conditional Motion to Compel Deposition of Matthew Oppenheim (Dkt. No. 737) at 1-2 and accompanying Exhibits A-

B. In fact, Plaintiffs' counsel admits that Joel's counsel informed Plaintiffs of Joel's intent to file the motion during an ongoing e-mail discussion. Plaintiffs' opposition at 3 ("On January 20, Defendant responded via email and stated ... that he would file a motion to compel Mr. Oppenheim's appearance at a deposition on January 22 ...."). Consequently, Plaintiffs' argument that Joel's motion must be dismissed for non-conferral is disingenuous.

**V. THE DISPUTE OVER RULE 26(a) DISCLOSURES IS IRRELEVANT TO JOEL'S MOTION TO COMPEL.**

The Court acknowledged in the November 18<sup>th</sup> hearing that the Parties await determination of a discovery schedule that takes into account the fact that Joel proceeded *pro se* during the majority of the action. Plaintiffs cannot claim that Joel has violated any discovery rule prior to the Court's establishment of said discovery schedule.

**CONCLUSION**

Wherefore, Defendant respectfully reaffirms his Motion to Compel the Deposition of Matthew Oppenheim and requests that the Court disregard Plaintiff's demand for sanctions against defense counsel

JOEL TENENBAUM.

By his attorney,

Dated: February 23, 2009

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<sup>1</sup> Assisted by students Isaac Meister, James E. Richardson, and Matthew C. Sanchez.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on February 23, 2009, a copy of the foregoing **DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S CONDITIONAL MOTION TO COMPEL DEPOSITION** was served upon the Plaintiffs via first class mail, postage pre-paid, and electronic mail (where available), at the following addresses:

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