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 07-cv-11446-NG (ORIGINAL DOCKET NUMBER)

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S CONDITIONAL MOTION TO COMPEL THE DEPOSITION OF MATTHEW OPPENHEIM

On January 20, 2009, Defendant filed a "Conditional Motion" seeking an order compelling a deposition of Matthew Oppenheim on January 22, 2009. (Dkt. No. 736.) Plaintiffs filed their response in opposition to the Conditional Motion on January 22, 2009 (Dkt. No. 739.) and Defendant filed his reply pursuant to order of this Court yesterday (Dkt. No. 758.) Plaintiffs are submitting this short response simply to respond to the new points raised by Defendant in his reply because it is replete with misstatements. As discussed below, Plaintiffs have no objection to coordinating discovery with Defendant, but that coordination must

follow the appropriate rules, must be for a proper purpose and must be done with appropriate decorum.

As an initial matter, Defendant's Reply argues that Matthew Oppenheim is a "plaintiff party to this case." (No. 758-2, at 2.) This argument is absurd. Mr. Oppenheim is not a party. Mr. Oppenheim is an attorney in private practice in Potomac, Maryland. He represents Plaintiffs in this case and in similar ones around the country and on occasion, such as in settlement conferences or other court proceedings, acts as the client representative. Performing these functions does not make him a party. Defendant does not, and could not, cite any authority to support the idea that an individual who is not himself a party to a lawsuit can be compelled to attend a deposition by way of notice under Rule 30. *See El Salto, S.A. v. PSG Co.*, 444 F.2d 477, 484 (9th Cir. 1971) ("[M]ere notice to attend is insufficient to compel the attendance of a person not a party; a subpoena is required.").

Second, as this Court knows, Defendant attempted to secure Mr. Oppenheim's deposition by mailing a Subpoena with an attachment labelled "Notice" to Mr. Oppenheim, apparently wanting to argue *both* that he complied with the subpoena process *and* that such compliance wasn't necessary. To the extent that Defendant's document is deemed a Notice, it is improper as Mr. Oppenheim is neither a party, as discussed above, nor an officer of any party. To the extent it is a Subpoena, it was improperly issued as discussed at greater length in Plaintiff's response filed on January 22. Most significantly, it was not personally served on Mr. Oppenheim, the required witness and mileage fees were not tendered, and it purports to set the location of the deposition in Massachusetts, even though Mr. Oppenheim lives and works in Maryland, more than 100 miles away. The subpoena, therefore, is invalid. *See Smith v. BIC Corp.*, 121 F.R.D. 235, 245 (E.D. Pa. 1988). *See also* Fed. R. Civ. P. 45(c)(3)(A)(ii) (a subpoena must be quashed

or modified if it purports to "require[] a person who is not a party or an officer of a party to travel more than 100 miles from the place where that person resides, is employed or regularly transacts business in person"). Moreover, it is simply not appropriate for Defendant to conduct the deposition in a moot courtroom at Harvard Law School (presumably before a throng of law students) in an apparent effort to enhance the spectacle of the event. In the event that the Defendant has a legitimate purpose in taking Mr. Oppenheim's deposition, it should be conducted in a conference room or other appropriate location with only the parties and their counsel present.

Third, Defendant's assertion that Defendant conferred with Plaintiffs regarding his "Conditional Motion" (Dkt. No. 758-2, at 3-4) is not accurate. Both Federal Rule 37 and this Court's Local Rule 37.1 require litigants to confer in good faith before filing discovery motions. Here, in the course of Plaintiffs' efforts to confer with Defendant concerning the requested deposition of Mr. Oppenheim, Defendant simply announced that he would file his Conditional Motion to compel the deposition for January 22. Defendant made no effort to confer with Plaintiffs about the Conditional Motion or even to explain the basis for such a motion given that no notice or subpoena had been issued for a deposition on January 22. Defendant cannot satisfy his obligation to meet and confer under Federal Rule 37 and Local Rule 37.1 by merely announcing the fact that a motion will be filed. *See Hasbro, Inc. v. Serafino*, 168 F.R.D. 99, 101 (D. Mass. 1996). This is not merely a procedural nicety. Indeed, had defense counsel met and conferred with counsel for the plaintiffs before filing the Motion to Compel many of the issues

currently being briefed to the Court may well have been resolved in advance of motion practice.[1]

Fourth, Defendant seeks to take the deposition before engaging in the mandatory Rule 26(a) conference, claiming that the obligation to provide Rule 26(a) disclosures is "irrelevant to Joel's Motion to Compel." Motion at 4. This is a clear misstatement of the law. Rule 26.2 of the Rules of this Court provides that "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)." D. Mass. L.R. 26.2. Accordingly, Defendant is precluded from initiating any discovery—including a deposition of Mr. Oppenheim—until he has satisfied this threshold obligation.

Finally, Mr. Oppenheim is Plaintiffs' lawyer. Before any deposition of him goes forward, the parties need to confer concerning its proposed scope. It is unclear whether there exist any non-privileged areas of testimony from Mr. Oppenheim that may be discoverable in this case. Plaintiffs's counsel have asked defense counsel on multiple occasions to identify the topics that he intends to cover during the proposed deposition, but defense counsel has thus far refused to confer with Plaintiffs on this issue. The need to identify and discuss the areas of testimony is all the more important given the Court's February 23, 2009 Order staying all discovery related to Defendant's counterclaims. *See* Order of February 23, 2009 at 2-3. It is unclear how, if at all, any testimony from Mr. Oppenheim would be relevant to the Plaintiffs' claims for relief. Once Defendant indicates the areas of testimony he wishes Mr. Oppenheim to

[1] Plaintiffs' counsel's efforts to confer with defense counsel regarding discovery matters in this case has been further complicated by the fact that defense counsel has announced that he will not confer with Plaintiff's counsel by telephone unless Plaintiffs' counsel consents to the recording of those calls. Defense counsel is apparently willing only to confer by e-mail, a practice which is inconsistent with the spirit of Local Rule 7.1(A)(2) and which limits the ability of counsel to engage in the type of unfettered give-and-take that is often necessary to resolve potential disputes.

cover, Plaintiffs may well have additional grounds to oppose the deposition, but will refrain from doing so until Defendant's intentions are explained.

Respectfully submitted,

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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Dated: February 27, 2009

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on February 27, 2009.

/s/ Daniel J. Cloherty