

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

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

DEFENDANT'S MOTION FOR LEAVE TO FILE SECOND AMENDED ANSWER AND COUNTERCLAIM

Pursuant to Fed. R. Civ. P. 15(a)(2), Defendant Joel Tenenbaum respectfully requests leave to file Defendant's Second Amended Answer and Counterclaim ("2d Amended Ans. and Countercl."). The proposed document is appended hereto as Exhibit A.

Until now, no single document has encompassed Joel's Answer and both counts of Joel's counterclaim. The proposed Second

Amended Answer and Counterclaim corrects this by compiling Joel's:

1. Answer, filed August 13, 2007 (Dkt. No. 5 in Civ. Act. No. 07-CV-11446-NG), which consists solely of Joel's answer to the Complaint;
2. Amended Answer and Counterclaim, filed August 19, 2008 (Dkt. No. 625), which consists solely of Joel's abuse of process counterclaim under Massachusetts law; and
3. Proposed Amended Counterclaim, filed November 5, 2008 (Dkt. No. 686), which consists solely of Joel's federal abuse of process counterclaim.

The appended 2d Amended Ans. and Countercl. also corrects minor errors in the above documents, clarifies the Massachusetts abuse of process claim, and asserts an affirmative defense of fair use.

For the foregoing and following reasons, Defendant respectfully requests that the motion be granted.

DISCUSSION

Infringement is the copying of a copyrighted work that is not a fair use. The Plaintiffs have the burden of proving infringement and, therefore, the burden of proving that Joel Tenenbaum's use was not fair.

Defendant Tenenbaum does not mean to compromise this fundamental procedural position imposing on the Plaintiffs the

burden of proving infringement by pleading fair use as an affirmative defense. Defendant Tenenbaum pleads fair use at this point and in this way only to make explicit his intention to contest the issue of fair use at trial. Joel Tenenbaum intends to put before a jury of his peers the issue of the fairness of his alleged acts. He calls the Court's attention to the presumption of fair use in favor of noncommercial copiers recognized by the Supreme Court in Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984), and to the defendant's unquestioned Seventh Amendment right to a jury trial on the issue recognized by the Supreme Court in Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998).

Any opposition by Plaintiffs to our motion to amend should be rejected. Fed. R. Civ. P. 15(a)(2) requires the Court to "freely give leave [to amend] when justice so requires" and "this mandate is to be heeded." Foman v. Davis, 371 U.S. 178, 182 (1962). Rule 15 embodies a "liberal" amendment policy, and "unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." Benitez-Allende v. Alcan Aluminio do Brasil, S.A., 857 F.2d 26, 36 (1st Cir. 1988). This liberal standard applies equally for amending counterclaims as it does for amending complaints. McMillan v. Massachusetts Soc. for Prevention of Cruelty to Animals, 168 F.R.D. 94, 97 (D. Mass. 1995).

The situations in which courts may deny a motion to amend are "limited" and include "undue delay, bad faith, futility and the absence of due diligence on the movant's part." Torres-Alamo v. Puerto Rico, 502 F.3d 20, 25 (1st Cir. 2007). None of these reasons provide a basis for denying leave to amend in this case. Defendant is requesting leave to amend within a sufficient period of time before the Court would hear argument on the pending Amended Counterclaim. Defendant is not acting in bad faith, but rather to clarify issues. See Spear v. Somers Sanitation Service, Inc., 162 F.R.D. 1, 2 (D. Mass. 1995).

Plaintiffs have no basis for asserting that this amendment would cause them prejudice. The original Answer and Counterclaim asserted abuse of process claims under federal and Massachusetts law based on illegitimate ulterior purposes. The inclusion of these claims should come as no surprise to Plaintiffs. While the Massachusetts abuse of process counterclaim was not repeated in the Amended Counterclaim, the attached 2d Amended Ans. and Countercl. does not add any new theory or cause of action. See McMillan v. Massachusetts Soc. for Prevention of Cruelty to Animals, 168 F.R.D. 94, 98 (D. Mass. 1995) (allowing defendant's motion to submit a counterclaim since plaintiff would not "suffer any prejudice if the amendment is allowed" because the "defendants do not seek to add any new theories or causes of action by way of their

amendment" and the counterclaim as amended "add[ed] very little, if anything, to their underlying claim."). Plaintiffs have ample opportunity to continue preparing their case as they see fit. See New Balance Athletic Shoe, Inc. v. Puma USA, Inc., 118 F.R.D. 17, 21 (D. Mass. 1987) (allowing a motion to amend because parties had completed "only initial discovery" and thus "should be able to prepare their defense to these new claims.").

CONCLUSION

Wherefore, Defendant respectfully requests that this Court grant Defendant leave to amend his counterclaim in accordance with the Amended Counterclaim appended hereto as Exhibit A.

JOEL TENENBAUM.

Dated: April 15, 2009

By his attorneys,

/s/Charles R. Nesson

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CERTIFICATE OF SERVICE

I, the undersigned hereby certify that on April 15, 2009, I caused a copy of the foregoing **DEFENDANT'S MOTION FOR LEAVE TO FILE SECOND AMENDED ANSWER AND COUNTERCLAIM** to be served upon the Plaintiffs via the Electronic Case Filing (ECF) system; first-class mail, postage pre-paid; and electronic mail (where available); at the following addresses:

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