

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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CAPITOL RECORDS, INC., et al.)	
Plaintiffs,)	
)	Civ. Act. No. 03-CV-11661-NG
v.)	(LEAD DOCKET NUMBER)
)	
NOOR ALAUJAN,)	
Defendant.)	
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SONY BMG MUSIC ENTERTAINMENT)	
et al. Plaintiffs,)	
)	Civ. Act. No 1:07-cv-11446-NG
v.)	(ORIGINAL DOCKET NUMBER)
)	
JOEL TENENBAUM,)	
)	
Defendants.)	
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PLAINTIFFS' EMERGENCY MOTION FOR ORDER PERMITTING TELEPHONIC DEPOSITION AND REQUEST FOR STATUS CONFERENCE

On Wednesday, May 6, 2009, Plaintiffs intend to depose a third party witness, pursuant to a valid subpoena and notice of deposition.¹ The deponent is located in Chicago, Illinois, and Plaintiffs expect the deposition will last approximately 90 minutes. In an effort to save money and time in a case where costs are quickly mounting, Plaintiffs sought Defendant's counsel's consent to take the deposition telephonically, pursuant to Fed. R. Civ. P. 30(b)(4). Plaintiffs'

¹ Because of the efforts by the Defendant and his legal team to widely publicize every document that is filed in this case, out of respect for the deponent's privacy, Plaintiffs have not used the deponent's name in connection with this filing. To the extent that the Court requires information relating to the identity of the deponent, Plaintiffs are prepared to provide that information to the Court in a filing under seal. There is no dispute, however, that the witness possesses information that is potentially relevant to the Plaintiff's claims for relief in this case.

counsel also understands that Defendant's counsel does not intend to attend the deposition in person. Despite the obvious merits of a telephone deposition, Defendant's counsel stated that he would only consent to a telephonic deposition "on condition that you assent to its being audio recorded" and presumably posted on the Internet. Email from Charles Nesson to Eve Burton, April 29, 2009, **Ex. A.**²

Plaintiffs cannot consent to the creation of an audio recording (and posting) of any deposition. As this Court noted at its February 9, 2009 conference, it is critical to the judicial process that a single official transcript be created of the court proceedings. Moreover, counsel for the third party deponent also objects to the deposition being audio recorded. Plaintiffs therefore are seeking a Court order, pursuant to Fed. R. Civ. P. 30(b)(4), allowing the May 6, 2009 deposition to take place telephonically. In fact, Defendant's counsel stated "depo by phone is fine with us" before placing this unreasonable condition of allowing the deposition to be audio recorded (and presumably posted on the Internet) on his consent. (Email from Charles Nesson to Eve Burton, **Ex. A.**).

Plaintiffs have established a legitimate reason for seeking to take the deposition telephonically – namely, the deposition will be short, will likely not involve any documents, and flying to Chicago to conduct the deposition is an unnecessary expense.

Once the party seeking to take a deposition telephonically has established a legitimate reason for its motion, "the party opposing depositions by telephone ha[s] the burden to establish good cause as to why they should not be conducted by telephone." *Brown v. Carr*, 236 F.R.D.

² In this vein, Plaintiffs also bring to the Court's attention that counsel for Defendant has posted to the Internet an audio recording of the hearing on February 9, 2009. The Court explicitly instructed counsel not to record the hearing. See, <http://blogs.law.harvard.edu/nesson/>. Defendant's counsel has also posted to the Internet his private recording of a prior deposition in this case – a recording that includes off-the-record discussion between counsel. See, <http://blogs.law.harvard.edu/cyberone/2008/09/25/thoughts-on-joel-tenenbaums-deposition/>.

311, 312 (S.D. Tex. 2006); *see also Loughlin v. Occidental Chem. Corp.* 234 F.R.D. 75, 76 (E.D. Pa. 2005). “Generally, leave to take depositions by telephone should be granted liberally.” *Brown*, 236 F.R.D. at 312; *see also* James Wm. Moore et al., *Moore’s Federal Practice* § 30.24 (3d ed. 1999) (“Leave to take a telephonic deposition should be liberally granted. The burden is on the party opposing the deposition to establish why it should not be conducted by telephone.”). Here, it is clear that Defendant has no good cause for his unwillingness to consent to this short preservation deposition being conducted by telephone.

Plaintiffs request a short status conference to discuss this upcoming deposition, as well as other outstanding discovery issues, with the Court. While Plaintiffs are mindful of the Court’s ruling resetting the April 30, 2009 hearing to June 5, 2009, there are several discovery-related issues, including this telephonic deposition, the scheduling of the June 5, 2009 hearing, expert discovery schedule, and the outstanding motions relating to computer inspections (Doc. No. 672, Oct. 15, 2008) and production of CD-Rs (Doc. 709), that could be resolved through a short status conference. A number of these discovery disputes have been pending for over six months and are in desperate need of resolution. Plaintiffs do not believe that these issues need to or should be delayed until the rescheduled June 5, 2009 hearing. Alternatively, in light of the First Circuit’s recent decision denying Defendant’s petition for rehearing en banc, Plaintiffs are available to go forward with the omnibus hearing next week, rather than the current June 5, 2009 hearing date.³

Plaintiffs further respectfully request that national counsel, located in Denver, Colorado, be allowed to participate in any such status conference by telephone.

³ Plaintiffs note that their counsel currently has a conflict on June 5, 2009 and will seek an alternate date from the Court after conferring with Defendant’s counsel.

WHEREFORE, Plaintiffs respectfully request that the Court set a status conference at the Court's earliest convenience to resolve these outstanding discovery issues and issue an order allowing Plaintiffs to conduct the May 6, 2009 deposition by telephone.

Dated: April 30, 2009

Respectfully submitted,

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

By their attorneys,

/s/ Eve G. Burton

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 30, 2009, the foregoing document was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF). A copy of the foregoing was also served by United States Mail on the following:

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