



Motion to Compel. *See* Doc. 850. In its Order, the Court held that the discovery was relevant and ordered Defendant to respond. *Id.* at 4. The Court further found no justification for Defendant's failure. *Id.*

This is not the first time Defendant and his counsel have failed to satisfy their obligations to the Court and to Plaintiffs. To the contrary, throughout this litigation, Defendant and his counsel have treated the Rules as loose guidelines as opposed to dates by which compliance is required and information which Defendant is obligated to produce. As a result, Defendant and his counsel have delayed proceedings, caused needless motion practice, and substantially increased the cost of this litigation, all in contravention of the letter and spirit of the Rules. Indeed, the Court has repeatedly warned Defendant's counsel that he is expected to follow the Rules and that "[t]he Court will not hesitate to impose appropriate sanctions," if he continues to flout them. (March 9, 2009 Minute Order); *see also* Feb 23, 2009 Order (Doc. 759) ("familiarity with both the Federal Rules and the Local Rules of the District of Massachusetts is presumed and expected"). Plaintiffs respectfully request that the Court, pursuant to Rule 37(a)(5), require Defendant's counsel to pay the costs he needlessly caused Plaintiffs to incur in filing their Motion to Compel.

## II. ARGUMENT

### **PLAINTIFFS ARE ENTITLED TO COSTS AND FEES INCURRED IN FILING THE MOTION TO COMPEL**

Rule 37(a)(5) provides, in pertinent part, that the Court shall award the party whose motion to compel is granted "the reasonable expenses incurred in making the motion, including attorneys' fees, unless the court finds that...the opposing party's nondisclosure, response, or objection was substantially justified." F.R.C.R. 37(a)(5). Absent the finding that the opposing party's position was "substantially justified," an award is mandatory. *Midland-Ross Corp. v.*

*Ztel, Inc.*, 113 F.R.D. 664, 666 (D. Mass. 1987) (“the award of expenses, including attorneys’ fees, is mandatory unless the Court is able to make either of the two findings specified, i.e. either (1) that the opposition to the motion was substantially justified, or (2) that other circumstances make an award of expenses unjust”); *Global Petroleum Corp. v. Torco Oil Co.*, 1987 U.S. Dist. LEXIS 9843 (D. Mass. Apr. 30, 1987) (awarding fees under Rule 37(a)(4)(A)); *LFE Corp. v. Drytek, Inc.*, 1983 U.S. Dist. LEXIS 16098 (D. Mass. June 21, 1983) (“The great operative principle of Rule 37(a)(4) is that the loser pays.”) (citing Wright & Miller, Federal Practice And Procedure: Civil § 2288, p. 787).

Here, the Court held that the discovery requests were relevant and that Defendant had no valid objection, and therefore ordered Defendant to respond. *See* Doc. 850. Defendant’s extremely limited response (*see* Doc. 849) demonstrates the lack of any merit-based defense for not responding to the discovery requests. Accordingly, there was no justification for Defendant’s failure and no circumstances would make an award of costs incurred as a result of Defendant’s failure to fulfill his obligations unjust. Indeed, Defendant’s repeated failure to satisfy his discovery obligations, even after stern warnings from the Court, would make failure to award Plaintiffs their costs unjust.

### CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request an award of their costs and fees, including reasonable attorneys’ fees, incurred in filing their Motion to Compel. Plaintiffs will submit a verified Bill of Costs upon the Court’s Order.

Respectfully submitted this 22nd day of June 2009

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 June 22, 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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