

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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CAPITOL RECORDS, INC., et al.,)	
Plaintiffs,)	
)	Civ. Act. No. 03-cv-11661-NG
)	(LEAD DOCKET NUMBER)
v.)	
NOOR ALAUJAN,)	
Defendant.)	
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SONY BMG MUSIC ENTERTAINMENT,)	
et al.,)	
Plaintiffs,)	Civ. Act. No. 07-cv-11446-NG
)	(ORIGINAL DOCKET NUMBER)
v.)	
JOEL TENENBAUM,)	
Defendant.)	
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PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO COMPEL

On June 23, 2009, Defendant, without conferring, and in violation of Local Rules 37.1 and 7.1, as well as Federal Rule of Civil Procedure 37, filed his Motion to Compel Plaintiffs to Respond to Defendant's First Set of Interrogatories (Doc. 852). Defendant's Motion should be denied for three reasons: (1) Defendant failed to confer with Plaintiffs' counsel regarding the Motion to Compel; (2) Defendant's First Set of Interrogatories was untimely; and (3) the Interrogatories at issue are objectionable, and not reasonably calculated to lead to the discovery of admissible evidence.

For the foregoing reasons, and as explained in detail below, Defendant's Motion to Compel should be denied and Plaintiffs should be awarded their reasonable attorneys' fees incurred in responding to this baseless Motion.

ARGUMENT

A. Defendant Failed to Confer with Plaintiffs' Counsel as Required by Rule 37 and Local Rules 7.1 and 37.1.

Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, any motion to compel responses to discovery requests made under Rule 33, “must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.” *Ofoedu v. St. Francis Hosp. & Med. Ctr.*, 234 F.R.D. 26, 35 (D. Conn. 2006) (citing Fed. R. Civ. P. 37(a)(2)(A)). The Rule “requires litigants to seek to resolve the discovery disputes by informal means before filing a motion with the court.” Fed. R. Civ. P. 37, Advisory Committee Notes to the 1993 Amendments. The failure to meet and confer *mandates* denial of a motion to compel. *Prescient Partners, L.P. v. Fieldcrest Cannon*, 1998 U.S. Dist. LEXIS 1826, at *8 (S.D.N.Y. Feb. 18, 1998).

Similarly, Local Rule 7.1(a)(2) of the Rules of this Court states that “no motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue.” And Rule 37.1(a) and (b) of those same Local Rules specifically provide that:

Before filing any discovery motion . . . counsel for each of the parties shall confer in good faith to narrow the areas of disagreement to the greatest extent possible. It shall be the responsibility of counsel for the moving party to arrange for the conference. Conferences may be conducted by telephone.

The motion shall include a certificate in the margin of the last page that the provisions of this rule have been complied with. . .

The meet-and-confer requirements under Local Rule 37.1 are taken seriously and, without a meaningful conference to attempt to narrow or resolve the issues, as well as including the required certification in any Motion to Compel, the Motion should be denied. *Hasbro, Inc. v. Serafino*, 168 F.R.D. 99, 101-102 (D. Mass. 1996). Here, Defendant’s counsel did not meet and

confer prior to filing his Motion to Compel and did not include the required certificate of conference. Therefore, his Motion should be summarily denied.

B. Defendant's First Set of Interrogatories were Untimely

Defendant served his First Set of Interrogatories by U.S. Mail on May 8, 2009. Plaintiffs' responses and objections were therefore due on June 10, 2009, more than 10 days after the close of discovery. Fed. R. Civ. P. 33(b)(2). As such, they were untimely. (Doc. 759, February 23, 2009 Order, "All discovery . . . shall be completed on or before May 30, 2009"). See *Thomas v. Pacificorp*, 324 F.3d 1176, 1179 (10th Cir. 2003) ("requests must be served at least thirty days prior to a completion of discovery deadline.") (emphasis added); *Jones v. Hirschfeld*, 2003 U.S. Dist. LEXIS 10370, *17 n.13 (S.D.N.Y. 2003) (stating that the discovery deadline date is the "date on which discovery should be complete, not the last date on which a party can serve discovery requests"). Indeed, the thirty day requirement is dictated by common sense. *Northern Indiana Public Serv. Co. v. Colorado Westmoreland, Inc.*, 112 F.R.D. 423, 424 (N.D. Ind. 1986) ("Common sense dictates that any requests for discovery must be made in sufficient time to allow the opposing party to respond before the termination of discovery"). Thus, a discovery request filed less than thirty days before the close of fact discovery is untimely. *Gavenda v. Orleans County*, 182 F.R.D. 17, 20 (W.D.N.Y. 1997); *Hirschfeld*, 2003 U.S. Dist. LEXIS 10370, *17 n.13.

C. Defendant's Interrogatories were Objectionable and Related to Defendant's Purported Counterclaims, Which Have Been Rejected.

First, it should be noted that Defendant has only moved to compel responses to Interrogatories 1-3 and 6-8. Second, while Defendant sets out the text of the Interrogatories he proffered, he failed to address any of the basis upon which Plaintiffs objected to the Interrogatories. Plaintiffs objected to all Interrogatories as untimely, as discussed above. (Motion, Ex. A, General Objection 1, Doc. 852-2, p.2). However, Plaintiffs also objected to each

of the on substantive grounds, which Defendant's Motion fails to address. Moreover, Defendant's Motion, while setting forth the Interrogatories at issue, fails to explain the relevance of the requested information.

Interrogatory No. 1.¹

Interrogatory No. 1 asks Plaintiffs to "describe in detail the history of intellectual property surrounding" the "songs named in the Complaint." Plaintiffs have already provided extensive chain of title documentation, as well as certified copies of the Certificates of Registration for each copyrighted recording at issue. There is no good faith dispute as to Plaintiffs' ownership of the sound recordings at issue. Therefore, this Interrogatory is overly broad and unduly burdensome. Moreover, any additional information this Interrogatory requests, such as all licenses, is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence, since the chain of title and Certificates of Copyright Registration conclusively establish Plaintiffs' ownership. This Interrogatory seeks extensive confidential, proprietary information, with no value. Defendant's Motion to Compel fails to explain the relevance of this Interrogatory and how this additional licensing information could lead to the discovery of admissible evidence.

Interrogatories 2 and 3.

Interrogatories 2 and 3 seeks revenue information from both physical (No. 2) and digital media (No. 3) sales, by month, from the inception date of the Plaintiffs' copyrights to present. As explained in Plaintiffs' objections, these Interrogatories are overly broad, unduly

¹ While Defendant's Interrogatories seek information regarding songs named in Exhibit A to the Complaint, Plaintiffs long ago advised Defendant through Rule 26(a) disclosures that they are pursuing claims on songs listed in Exhibit A, as amended, as well as songs listed on an amended Schedule 1.

burdensome, and request confidential, proprietary information that is not reasonably calculated to lead to the discovery of admissible evidence.

Plaintiffs have stated from the beginning of this lawsuit, that they are seeking statutory damages, thus Plaintiffs' revenue is not relevant. Moreover, Defendant's request for information regarding Plaintiffs' revenue is not reasonably calculated to lead to the discovery of relevant information because the request seeks only revenue and not expenses. Determining net, as opposed to gross, revenue would require extensive expert analysis. Unless Defendant intends to retain an expert, for which the deadline is long past, any analysis of information produced under this request would be woefully inadequate and meaningless. Additionally, the revenue information Defendant seeks relate, if to anything, to Defendant's proposed counterclaims, which have since been rejected.

Defendant's Motion to Compel fails to explain the relevance of these Interrogatories, except to state that may show Plaintiffs suffered no actual damages. However, as Plaintiffs are seeking statutory damages, proof of actual damages is not required. *See Columbia Pictures Indus. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1194 (9th Cir. 2001) ('A plaintiff may elect statutory damages regardless of the adequacy of the evidence offered as to his actual damages and the amount of defendant's profits.');

see also Cable/Home Commc'n Corp. v. Network Prods., Inc., 902 F.2d 829, 843 (11th Cir. 1990) (citing Nimmer § 14.04[A],14-44-45).

Interrogatories 6 and 7.

Interrogatories 6 and 7 again seek information regarding revenues paid out to artists and the original copyright holder, on a monthly or quarterly basis, from the inception of Plaintiffs' copyrights to present. As explained in Plaintiffs' objections, this is highly confidential, proprietary information. Additionally, the Interrogatories are overly broad and unduly burdensome, especially in light of the rejection of Defendant's counterclaims, and the fact that

Plaintiffs have stated repeatedly that they are seeking statutory damages. Finally, there is no explanation, and Plaintiffs can think of none, why the amount paid to artists, authors or the original copyright holder, pursuant to a private contract between the parties, could have any relevance to whether Defendant infringed Plaintiffs' copyrights, or even the damage suffered by Plaintiffs as a result of Defendant's infringement. Again, Defendant's Motion to Compel does not even attempt to explain the possible relevance of these Interrogatories.

Interrogatory 8.

Finally, Interrogatory No. 8 seeks losses or gains due to p2p filesharing for the seven songs listed in the Complaint. Defendant is fully aware that it is impossible to calculate the loss from p2p filesharing, let alone for individual songs, on a monthly basis. The difficulty in calculating damages from copyright infringement is one of the primary justifications for statutory damages under the Copyright Act. See *Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) ("Because awards of statutory damages serve both compensatory and punitive purposes, a plaintiff may recover statutory damages whether or not there is adequate evidence of the actual damages suffered by plaintiffs or of the profits reaped by defendant, in order to sanction and vindicate the statutory policy of discouraging infringement."). Indeed, "[s]tatutory damages have been made available to plaintiffs in infringement actions precisely because of the difficulties inherent in proving actual damages and profits, as well as to encourage vigorous enforcement of the copyright laws." *Yurman Design, Inc. v. PAJ, Inc.*, 93 F. Supp. 2d 449, 462 (S.D.N.Y. 2000). Further, this Interrogatory is overly broad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence, given that Plaintiffs are seeking statutory damages.

CONCLUSION

Defendant failed to take any discovery in this case for nine months after being represented by counsel. Then, after the date on which Interrogatories could have been served in order to satisfy the Court-imposed deadline, he served overbroad, unduly burdensome and irrelevant Interrogatories. When Plaintiffs objected to those Interrogatories, both because the Interrogatories were untimely and on substantive grounds, Defendant, waited two weeks and then, without conferring and in violation of the clear directives in the both the Federal Rules of Civil Procedure and the Local Rules for the District of Massachusetts, filed a Motion to Compel in which he fails to address the untimeliness of his Interrogatories, or the substance of Plaintiffs' objections. For all of the foregoing reasons, Defendant's Motion to Compel should be denied.

Moreover, given Defendant's blatant failure to again follow the clear requirements of the Rules of this Court, Defendant, and/or his counsel, should be ordered to pay Plaintiffs' reasonable attorneys' fees in responding to this Motion.

Respectfully submitted this 26th 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,

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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 June 26, 2009.

s/ Eve G. Burton