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, Defendant.	Civ. Act. No. 07-cv-11446-NG (ORIGINAL DOCKET NUMBER)

PLAINTIFFS' MOTION TO COMPEL DEFENSE COUNSEL TO CEASE UNAUTHORIZED RECORDING ACTIVITIES, TO CEASE PUBLICATION OF DISCOVERY MATERIALS AND FOR SANCTIONS AND REQUEST FOR EXPEDITED RULING

Shortly after entering his appearance as counsel for Defendant Joel Tenenbaum in this case, defense counsel Charles Nesson began a campaign to collect and publish unauthorized recordings of communications involving the various attorneys and parties in this case. As part of this campaign, Mr. Nesson has repeatedly engaged in non-consensual recording of communications between counsel in violation of Massachusetts law. Moreover, Mr. Nesson has persisted in publishing these recordings (including recordings of discovery materials) through his personal internet blog and the Berkman Center's website.

Indeed, just since the last hearing in this matter on June 29, 2009, and in direct contravention of the Court's orders and the participants' consent, defense counsel posted

portions of his audio recording of the deposition of Defendant's proposed expert John Palfrey on his website. Defense counsel also surreptitiously made a video recording of Plaintiffs' remote video deposition of Defendant's proposed expert Johann Pouwelse. This video recording was made without the prior notice required by the Federal Rules of Civil Procedure, without affording Plaintiffs any opportunity to object and without their consent.

While Plaintiffs have been attempting to focus on the case against Joel Tenenbaum which is set for trial on July 27, 2009, Defense counsel appears to be focused on distracting counsel and this court from the substance of that case in order to deal with his personal mission. Plaintiffs can no longer ignore defense counsel's continued and ongoing efforts to engage in this disruptive and illegal recording activity. Given the looming trial date, defense counsel's activities appear to be deliberately designed both to interfere with Plaintiffs' ongoing discovery efforts, and, more importantly, to influence potential jurors in any trial of this case.

For these reasons, Plaintiffs respectfully request that the Court issue a prompt order (1) forbidding defense counsel from creating any further recordings of any of the proceedings or communications relating to this case; (2) requiring defense counsel to remove unofficial recordings of discovery materials from his blog or website and any other affiliated website; (3) compelling defense counsel to destroy any and all copies of the surreptitious video recording made of Dr. Pouwelse's deposition; (4) requiring that any discovery materials in this case be used solely for the purposes of this litigation; and (5) sanctioning Defendant and his counsel for this deliberate, intentional and repeated misconduct.

I

BACKGROUND

A. The History of Defense Counsel's Recording Activities

Plaintiffs first became aware of defense counsel's proclivity for creating surreptitious recordings in this case during the September 24, 2008 deposition of the Defendant Joel Tenenbaum. At that deposition, without any prior authorization from Plaintiffs' counsel, Mr. Nesson used a personal recording device to record both on-the-record and off-the-record exchanges that occurred during the course of deposition. Remarkably, that surreptitious recording included a recording of various confidential communications between the attorneys involved in the case. Even more remarkably, Mr. Nesson proceeded to distribute that recording to the Internet at large by posting that entire recording (including the off-the record portions of the deposition) to the internet through the website of the Berkman Center for the Law and Internet at Harvard University, where it remains available to this day. See http://cyber.law.harvard.edu/~nesson (six entries labeled "tenenbaumdeposition").

Later in the litigation, Plaintiffs' counsel became aware that Mr. Nesson was surreptitiously recording telephone conversations between counsel without the prior consent of participants. Indeed, in one instance in January 2009, Mr. Nesson recorded, without the prior consent of the participants, a portion of a telephone conference that included the Court. Although Mr. Nesson disclosed the fact of his recording when asked, Mr. Nesson did not cease creating that recording until he was ordered by the Court to do so. Rather than destroy the recording since it was clearly done without the consent of the Court or the litigants, Mr. Nesson proceeded to distribute the recording to the Internet at large by posting it to his blog, where it remains available to the general public. See http://blogs.law.harvard.edu/nesson/2009/03/24

(reflecting the use of the recording as part of a law school exam); see also http://copyrightsandcampaigns.blogspot.com/2009_03_01_archive.html (third party blogger linking to same records).

B. The Court's Orders Regarding Defense Counsel's Recording Activities

On February 23, 2009, after repeated objections by Plaintiffs' counsel to Mr. Nesson's ongoing recording activities, the Court issued an Order stating as follows:

> An issue has arisen with respect to the recording of counsel communications. *The parties are advised that any such recording without permission of the participants, as well as the broadcast of such communications, runs afoul of Mass. Gen. L. c. 272, § 99.*

See Order of February 23, 2009 at 4 (emphasis added).

Unfortunately, this initial Order and admonishment by the Court was insufficient, as defense counsel continued to insist on the recording of conversations between counsel. Specifically, Mr. Nesson repeatedly refused to participate in any meet-and-confer conferences between counsel required by Rule 37 of the Federal Rules of Civil Procedure and/or Local Rule 7.1 unless Plaintiffs' counsel would consent to his recording of those conferences. Accordingly, on March 9, 2009, the Court issued a second Order addressing Mr. Nesson's conduct:

> *As before, the good faith meet-and-confer sessions required by Rule 37 must not be conditioned on Plaintiff's consent to the recording of those sessions.* Nothing entitles the Defendant to engraft his own conditions on the Federal Rules of Civil Procedure or the Local Rules of this Court, or to dispense with them where they fail to suit his counsel's teaching style.

See Order of March 9, 2009 at 2-3 (emphasis added).

On June 16, 2009, the Court had to address the issue of defense counsel's recording activities a third time, acknowledging that defense counsel had been "taping opposing counsel without permission (and in violation of law)." See Order of June 16, 2009 at 2. In that Order, the Court authorized defense counsel to record upcoming depositions "in any manner consistent

with the requirements of Fed. R. Civ. P. 30(b)(3)." Id. at 3. The Court continued, however, by stating:

> The parties are cautioned, however, that the decision to publish any recording, on the internet or otherwise, may be regarded as an effort to taint the jury pool in advance of trial. See Paisley Park Enterprises v. Uptown Productions, 54 F. Supp. 2d 347 (S.D.N.Y. 1999) (approving protective order where defendant had repeatedly sought publicity and notoriety by publishing litigation materials on line).

Id. at 3-4.

On June 26, 2009, the issue of Mr. Nesson's recording was yet again a subject of discussion. This time, the fourth instance that the Court addressed it, Mr. Nesson made a request to record another upcoming deposition. At that time, the following exchange occurred:

> MR. NESSON: May I record that deposition, your Honor? That was the issue, I was agreed to a telephonic deposition if I could record it.
>
> THE COURT: The question is what I said the last time, I don't have any problem with you recording it this time, but does recording it mean posting it on the Internet because discovery materials are intended for the parties and not for the world, and discovery materials are typically not disclosed to the media principally because we believe that that's trying your case in the media rather than at trial, so if you want to record this for your own purposes, that would be fine but not for posting on Internet sites.
>
> MR. NESSON: Okay. Thank you.

See Transcript of Proceedings, June 26, 2009, at 48.

C. The Palfrey Deposition

On July 1, 2009, the Plaintiffs convened the deposition of proposed defense expert, John Palfrey. At the start of the deposition, Mr. Nesson again announced his intent to record the proceedings:

> MR. NESSON: Can I make it clear to everyone that I am recording on a digital recorder?
>
> MR. OPPENHEIM: Mr. Nesson, I object to your use of a recorder. I understand you're going to go ahead and do it anyways. Just so we're clear on the ground rules under what Judge Gertner has indicated: A, we're not consenting to it, and we reserve

> our objections to it; B, we object to your distribution of this recording to anyone or anywhere or attempted distribution of this recording. So we don't want to see, in particular, this recording made available on the Web for others. This is a discovery matter, and not necessarily subject to public scrutiny, such that it might affect the jury pool. And last, but not least, I'm going to ask that if we go off the record discussion to have an off the record discussion that we also -- just as we'll ask the court reporter not to transcribe the discussion -- that we also turn off the recording device.
>
> MR. NESSON: As long as -- I note your objections. As long as your off the record discussion has nothing to do with the case, that is a private discussion unrelated to any business matter, I'm happy to have the recording off. But I object to any discussions of the case that are not digitally recorded.
>
> MR. OPPENHEIM: Well, as you may know, counsel frequently go off the record during the course of a proceeding to work through issues in a collegial and professional way. And during the course of that, they go off in order to have a dialogue that isn't part of a record, and that can be productive, and where people are not necessarily held accountable for their specific words. And it is common, and that is how professionals act in this setting. And I will ask that you turn it off. And if you don't, I will view it as a violation of the law. So we can get there when we get there, and maybe we won't. And if you don't want to participate in an off the record discussion that I may have with Mr. Palfrey, that's fine, and you're welcome to leave the room; but when we go off the record, I will ask you to turn it off. I will note that in prior depositions, you did not do that, and you surreptitiously recorded conversations among counsel that were privileged, and I found that highly objectionable, among other things.
>
> MR. NESSON: I will note that I did no such thing. At no point was anything I did surreptitious. The recorder that I had in that room was placed on the table, just as this one is, and you were perfectly well aware of it.

See Deposition of John Palfrey, at 5-6 (July 1, 2009) (excerpt attached hereto as Exhibit A).

During the deposition, Plaintiff's counsel became aware that Mr. Nesson was sending Twitter messages to the general public regarding the deposition. See http://twitter.com/_eon_ (entries of July 1, 2009). Accordingly, at that time, the following exchange occurred between counsel:

> MR. OPPENHEIM: Before we get into it, Charlie, I'm going to ask you not to Twitter as to the substance of the deposition during the deposition. The Judge has indicated that you can't distribute the recording. I also think it's improper for you to be making public on Blog sites, and Twitter sites, and whatnot, the substance of the deposition. It's [not] consistent with what the Judge previously ordered.

MR. NESSON: Your objection is on the record.

Id. at 75-76.

Thereafter, on July 2, 2009, in direct contravention to the Court's prior directives, Mr. Nesson posted recorded excerpts from the Palfrey deposition on *both* his internet blog *and* the Berkman Center's website See http://blogs.law.harvard.edu/nesson/2009/07/02/palfrey-deposition; see also http://cyber.law.harvard.edu/~nesson (entry of July 2, 2009, labeled "palfrey_deposition01.mp3). Those excerpts were thereafter picked up and further published by another website operated by a third party who has been closely following the progress of this lawsuit. See http://copyrightsandcampaigns.blogspot.com (posting dated July 2, 2009 at 11:21 a.m.).

D. The Pouwelse Deposition

On July 2 and 3, 2009, the Plaintiffs took the deposition of another of Defendant's proposed experts, Johann Pouwelse. Because Mr. Pouwelse resides in the Netherlands, and at the insistence of Defendant's counsel, Plaintiffs conducted the deposition through a video internet connection. Defense counsel participated in the deposition from Cambridge, Massachusetts through an internet connection.

At no time before or during the first day of the deposition did Mr. Nesson notify Plaintiffs' counsel that he was video recording any portion of the deposition. During the second date, however, Plaintiffs' counsel Timothy Reynolds noticed through his video hook-up that Mr. Nesson appeared to be using a camera to record the proceedings. When Mr. Reynolds objected to that recording, Mr. Nesson admitted that he was not only recording the proceedings, but that he had recorded the entire first day of the proceedings as well. The full exchange between counsel was as follows:

MR. REYNOLDS: Hold on one second. Professor Nesson, are you videotaping this conference? I just saw you with a video camera. Are you videotaping this conference? You're on mute, so I cannot hear you.

MR. NESSON: I was just taking a photograph of my screen.

MR. REYNOLDS: Okay. So you photographed the screen that we're using to videotape the conference.

MR. NESSON: No. This is just – I was just using it to take a photograph. This is not what I'm use to go videotape the conference.

MR. REYNOLDS: Are you videotaping this conference?

MR. NESSON: I am recording this conference.

MR. REYNOLDS: Are you recording it audio visually?

MR. NESSON: Yes.

MR. REYNOLDS: Okay. You do not have the plaintiff's permission to do that. You did not provide prior notice to do that, which is required by the rules, professor Nesson.

MR. NESSON: I believe I'm acting completely under the authority of the court. This was to be a recorded deposition.

MR. REYNOLDS: That's correct. And the court told you you could record it in any manner authorized by rule 30 B 3. Rule 30 B 3 specifically requires prior notice to the deponent and other parties before recording any deposition. You did not provide prior [notice] that you intended to videotape this deposition or video record it in any way.

MR. NESSON: The whole issue before the court was all about recording the deposition. You had full notice that I was intending to record this deposition.

MR. REYNOLDS: We had no [notice] –

MR. NESSON: And so did the court.

MR. REYNOLDS: We had no [notice] that you intended to use audio visual means to record this deposition, professor Nesson. And I'd ask that you stop, please.

MR. NESSON: I refuse to stop.

MR. REYNOLDS: Okay. Professor Nesson I also want to confirm the court's order, instruction to you specifically at the last hearing that you are not to post any of these deposition recordings online. Do you recall the court instructing you so.

MR. NESSON: The court's order stands as the court order made it, that the court made it.

MR. REYNOLDS: I will read it into the record so that we make sure we all understand it. Okay. The court said to you, the question is what I said the last time. I don't have any problem with you recording it this time, but does recording it mean posting it on the Internet because discovery [materials] are intended for the parties and not for the world and discovery materials are typically not disclose today the media principally because we believe that's trying your case in the media rather than at trial. So if you want to record this for your own purpose, that would be fine, but not for posting on Internet sites, end quote. Then your response, professor Nesson. Okay. Thank you. Now pro Nesson do you dispute that that's what the court instructed and that's what you agreed to at the last hearing.

MR. NESSON: No, I do not dispute that.

MR. REYNOLDS: Okay. We have a continuing objection to you recording this by video. In the interest of efficiency I will continue, but we object to it and we ask that you immediately provide a copy of this and we also ask that you not post this on the Internet pursuant to your -- pursuant to the court's direction and pursuant to your agreement at the last hearing.

MR. NESSON: I will not post any of this on the Internet at least until completion of the trial, and I will describe my limitations as limited to the substance of this, but those parts of our interactions that deal with the question of the very right to disclose to the Internet, I do not agree that I am bound to keep closed. In fact, that is essentially the dispute that's at the core of this case as far as I'm concerned.

MR. REYNOLDS: Professor Nesson, you are trying your case right now. You are not trying Joel Tenenbaum's case, and I think it is a distraction, and I think it's a waste of time, and the court has already told you that you are not to post this on the Internet. We will continue with our objection to your videotaping this, and I will ask that you provide me with a copy of the videotape. Will you do that.

MR. NESSON: It's not a videotape, first of all. It's a hard drive, I believe was nine gigabytes for yesterday's. I don't know what it is today. I am not going to be transmitting large files to you. If you want to come and get them, I'll delighted to have you do it or if you would like me to post them on the net so that you can get them that way, I suppose I can do that too, but that would be violating the court's order.

MR. REYNOLDS: I agree that it would be violating the court's order and you should not do that.

MR. NESSON: So the basic answer is no unless you want to come here and get them. The idea -- the idea that you would not consent to my audio participation in this by telephone even though that was perfectly open to you and no question whatsoever under Massachusetts law that if you consent there's no problem, the idea that you would withhold that and basically hold me up on that, it just shows me where you're coming from.

MR. REYNOLDS: Professor Nesson –

MR. NESSON: Cross your arms. I think my arms are crossed too.

MR. REYNOLDS: Professor Nesson, you have again misstated the facts. Again you have misstated the facts, Mr. Nesson. What I told you was –

MR. NESSON: The record will speak for itself. I believe the whole thing -- no, maybe it wasn't all recorded.

MR. REYNOLDS: You said it was earlier, and in fact what I said to you was I would consent to you participating by telephone provided you would agree not to post -- and that you could record it provided that you would agree not to post it on the Internet, and you, professor Nesson refused. Those are the facts. We will continue with the deposition now, and again we object to your videotaping it. Do not misstate facts again on the record, professor Nesson.

MR. NESSON: All right. Now, let me just clarify that. I think maybe you may be right on that. I said I wouldn't agree not to post it on the Internet. I was not intending to be in any violation of the court order. I was not intending to post immediately. I was just not intending to agree to mandates from you, but I can see where you're coming from, and I think I may even owe you an apology on that.

MR. REYNOLDS: Thank you, professor Nesson.

See Unofficial Transcript of Pouwelse Deposition at Day 2, 15-21 (July 3, 2009) (excerpt attached hereto as Exhibit B).

II

ARGUMENT

The Federal Rules of Civil Procedure prohibit a party's recording of a deposition without notice of that fact in advance. Rule 30(b)(3) provides that "[w]ith prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice." See Fed. R. Civ. P. 30(b)(3)(B). The absence of prior notice under Rule 30(b)(3)(B) bars any means of recording other than what is specified in the deposition notice. See Woods v. G.B. Cooley Hosp., 2009 WL 151078 (W.D. La., January 21, 2009).

Moreover, Massachusetts Gen. Law. Chapter 272, § 99 bars the interception of any oral communications by any persons (other than law enforcement personnel) who have not been "given prior authority by all parties to such communication." Mass. Gen. L. ch. 272, § 99(B)(4). That same statute forbids the publication of such interceptions.

This Court has broad authority to take action when a party fails to abide by its orders. See Johns Insulation, Inc. v. L. Addison & Associates, Inc., 156 F.3d 101, 108 (1st Cir. 1998); Robson v. Hallenback, 81 F.3d 1, 2 (1st Cir. 1996). The imposition of sanctions for discovery misconduct is particularly appropriate when a party has had prior warnings from the Court. See Robson, 81 F.3d at 3 ("Counsel's disregard of a prior warning from the court exacerbates the offense.").

In this case, defense counsel's repeated and ongoing violations of this Court's orders regarding the non-consensual recording and publication of communications between counsel as well as discovery materials merit the imposition of sanctions. Specifically, as explained above:

- Defense counsel has repeatedly and continuously failed to comply with the notice requirements of Rule 33(b)(3)(B) regarding the recording of depositions;
- As recently as July 2, 2009, and in direct contravention of the Court's prior orders, defense counsel posted excerpts from a deposition in this case on his blog site and on the Berkman Center's website;
- Defense counsel expressed during the Pouwelse deposition that he does not consider himself "bound" from publicizing certain portions of discovery materials in this case prior to trial;
- Defense counsel has expressed an intent to publish after trial his non-consensual recordings of discovery materials in this case; and
- Defense counsel has persisted in his insistence that any conferences relating to the meet and confer requirements of Rule 37 and Local Rule 37.1 be recorded.

Defendant's counsel's unauthorized video recording of Dr. Pouwelse's deposition is particularly troubling. This deposition was conducted by way of internet video conferencing over Plaintiffs' objection and at the insistence of Defendant's counsel. In seeking to compel the deposition by internet, Defendant's counsel never gave any hint to the Court or to Plaintiffs that he intended to make a surreptitious video recording of the deposition. Had Dr. Pouwelse appeared for his deposition in Boston as Plaintiffs had requested, Defendant's counsel would not have been able to make a secret video recording of this deposition. Moreover, Defendant's counsel's failure to provide "prior notice" of his intent to make a video recording of Dr. Pouwelse's deposition, as required by Rule 30(b)(3)(B), eliminated any possibility for Plaintiffs to object to, or prepare for, a video deposition. The law does not allow parties to make

surreptitious video recordings of court proceedings, and Defendant's counsel should be ordered to destroy the unauthorized and illegal video recording of Dr. Pouwelse's deposition.

Moreover, while the recent depositions recorded by defense counsel involve proposed experts, Plaintiffs have serious concerns regarding the upcoming deposition of the Defendant Joel Tenenbaum, which is currently scheduled for July 8, 2009. If past is prologue, defense counsel will undoubtedly attempt to record that deposition, after which defense counsel can be expected to post excerpts of that deposition on his blog or on the internet, notwithstanding any objections from counsel and any admonitions from the court. Indeed, notwithstanding the clear objection of the participants (and the provisions of Massachusetts law), defense counsel has expressed an intent to publicize all of his unauthorized recordings after the trial of this matter.

While Plaintiffs' counsel have attempted to remain focused on the preparations for the trial of this matter, defense counsel's ongoing disregard for the Court's orders regarding his recording activities can no longer be ignored. Indeed, the running dispute regarding these issues is proving to be extraordinarily time-consuming and distracting for counsel in this case. Plaintiffs and their counsel are happy to have the decisions of this Court educate the public and students regarding the legal issues at bar. Plaintiffs and their counsel, however, have no desire for their faces and voices to become part of a large web-campaign led by Mr. Nesson and the Berkman Center nor part of Mr. Nesson's future teaching materials. The law allows Plaintiffs to opt out of such spectacle, and the Plaintiffs and their counsel have repeatedly indicated that they do not consent to the recordings.

Enough is enough. For the past five months, this Court has repeatedly warned defense counsel regarding his insistence on engaging in unauthorized and illegal recordings of counsel and proceedings in this case. It has also reminded defense counsel of his obligations under Rule

30(b)(3). The Court has even directed defense counsel not to publish discovery materials on the internet. In the last week alone, defense counsel has repeatedly ignored each and every one of these warnings and directives. Accordingly, Plaintiffs respectfully suggest that the court take the only steps that might actually encourage compliance by defense counsel—an order (1) banning all further unofficial recordings by defense counsel, (2) requiring removal from defendant's website of all discovery materials, (3) compelling Defendant and his counsel to destroy any and all copies of any video recording made of Dr. Pouwelse's deposition and to certify such destruction to the Court, (4) imposing a protective order limiting the use of discovery materials to this litigation, and (5) the imposition of monetary sanctions.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court issue an Order the following steps relating to defense counsel's ongoing improper recording activities:

(1) Barring all further unofficial recordings by defense counsel of the discovery proceedings in the case;

(2) Ordering defense counsel to remove from his website and from the Berkman Center's website all discovery materials relating to this case;

(3) Compelling Defendant and his counsel to destroy any and all copies of any video recording made of Dr. Pouwelse's deposition and to certify such destruction to the Court;

(4) Imposing a protective order, consistent with the Order issued in Paisley Park Enterprises v. Uptown Productions, 54 F. Supp. 2d 347, 349-50 (S.D.N.Y. 1999) requiring that the discovery materials in this case be used by the parties solely for the purposes of this litigation; and

(5) Imposing an order of monetary sanctions on Defendant and his counsel in an amount that the Court deems sufficient to encourage compliance with its orders in this case.

Finally, Plaintiffs respectfully request expedited consideration of this Motion and the relief requested herein in light of the fact that the deposition of the defendant is currently scheduled for July 8, 2009.

Respectfully submitted,

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

By their attorneys,

By: /s/ Daniel J. Cloherty

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ATTORNEYS FOR PLAINTIFFS

July 6, 2009

RULE 7.1(A) CERTIFICATION

Undersigned counsel for the Plaintiffs hereby certifies that he has conferred with Charles Nesson, counsel for the Defendant, regarding the issues presented in the foregoing Motion and has attempted in good faith to resolve or narrow the issues presented herein. Counsel for Defendant has indicated that he opposes this motion.

/s/ Daniel J. Cloherty

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 July 6, 2009.

/s/ Daniel J. Cloherty