

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
CAPITOL RECORDS, INC., <i>et al.</i> ,)	
)	
Plaintiffs)	Civ. Act. No.
)	03-CV-11661-NG
v.)	(LEAD DOCKET NUMBER)
)	
NOOR ALAUJAN,)	
)	
Defendant.)	
_____)	
)	
SONY BMG MUSIC ENTERTAINMENT, <i>et al.</i> ,)	
)	
Plaintiffs,)	Civ. Act. No.
)	07-CV-11446-NG
v.)	(ORIGINAL DOCKET NUMBER)
)	
JOEL TENENBAUM,)	
)	
Defendant.)	
_____)	

**DEFENDANT'S MOTION TO WAIVE WITNESS FEES,
OR IN THE ALTERNATIVE,
FOR THE COURT TO CALL WITNESSES PURSUANT TO FED. R. EVID. 614(a)**

Now comes the Defendant, Joel Tenenbaum, and moves this Court for an order permitting him to serve trial subpoenas on the following individuals, waiving fees and expenses as set out in Civil Rule 45(b)(1) and 28 USC §1821:

Cary Sherman
President, RIAA

Mitch Glazer

Senior Vice Present of Government Affairs, RIAA

These witnesses are listed on the Plaintiffs' Supplemental Disclosure Statement as persons likely to have information that may support their claims. The Defendant is advised in the Disclosure Statement that they may be contacted through Plaintiffs' counsel.

The witnesses as to whom Joel seeks a waiver of fees have intimate knowledge of the recording industry. The Defendant believes they have information which will support his claims with respect to fair use and damages. On the issue of fair use they will testify regarding business decisions which created the environment in which the infringements alleged in this case occurred; particularly the decisions of the Plaintiffs to promote the copyrighted works to non-commercial teenage consumers, while failing to provide a reasonable digital distribution system as an alternative to the widespread availability of the works on p2p networks. On the issue of damages these witnesses can provide evidence regarding the true economic impact of Joel's alleged infringing activity, with respect to both decreased physical sales, and increased digital sales.

The Defendant is represented by volunteer counsel and lacks the means to pay the fees associated with summoning witnesses to

trial. See, Civil Rule 45(b)(1); 28 USC §1821. Without these witnesses however, he will be unable to fully and fairly present his fair use defense to the jury; nor will he be able to challenge the Plaintiffs' claim to crushing, unconstitutional, statutory damages.

The due process clause guarantees every person the right of access to the courts notwithstanding his inability to pay court-imposed costs. See, *Boddie v. Connecticut*, 401 U.S. 367 (1971) (filing fees in divorce cases must be waived for indigent persons); See also, *Bounds v. Smith*, 430 U.S. 817, 828 (1977), reaffirming the "fundamental constitutional right of access to the courts." A litigant's right to access to the courts, unimpeded by his inability to pay court-imposed fees, is most critical where, as here, the litigant's participation in the case is involuntary. This is not a situation where a litigant seeks dispensation from the court to pursue a claim personal to himself. Rather, this is a case where Joel Tenenbaum, as a defendant in suit, brought by an industry with enormous financial resources, and in which damages on an unconstitutional scale are sought, lacks the means to present his defense to the jury. In fairness, the Defendant should not be required to pay fees to compel their attendance at trial. To rule otherwise would render Civil Rule 45(b)(1) and 28 USC §1821 unconstitutional as applied to the Defendant.

In the alternative, should the Court decline to issue an order waiving witness fees and expenses, the Defendant moves this Court to call the witnesses listed above on its own. Fed. R. Evid. 614(a) provides that,

The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

The Court clearly has discretion to order the appearance of these witnesses. And to proceed under Rule 614(a) would avoid the constitutional question. This is precisely the situation that arose in *Hadsell v. Comm'r Internal Revenue Serv.*, 107 F. 3d 750 (9th Cir. 1977). Here, an indigent tax payer sought a waiver of fees necessary to compel the presence of a police witness who could provide testimony and documents which would support his claim that the tax due was overstated. Reviewing the Tax Court's denial of a waiver, the Ninth Circuit recognized that the tax payer's inability to pay witness fees created a potential constitutional problem under *Boddie* and *Bounds*. To avoid the question, the Court ordered the matter remanded with instructions that the Tax Court, "to consider its power to call Detective Menzies as a witness, bringing with him the requested tax documents, under Federal Rule of Evidence 614(a)." *Hadsell*, supra at 754.

To both avoid the constitutional problem as well as to ensure that the issues in this case are fully and fairly presented, this Court should exercise its power under Rule 614(a), and order that the individuals listed above be compelled to appear as witnesses.

Date: July 14, 2009

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CERTIFICATE OF SERVICE

I, Matthew A. Kamholtz, hereby affirm that the within document was this day filed through the ECF system and will be sent electronically to the registered participants as identified in the Notice of Electronic filing, and that paper copies will be sent to those indicated as non-registered participants.

Date: July 14, 2009

/s/ Matthew A. Kamholtz
Matthew A. Kamholtz