

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CAPITOL RECORDS, INC., *et al.*,)
)
)
 Plaintiffs,) Civ. Act. No. 03-CV-11661-NG
) (LEAD DOCKET NUMBER)
 v.)
)
 NOOR ALAUJAN,)
)
)
 Defendant.)

SONY BMG MUSIC ENTERTAINMENT, *et al.*,)
)
)
 Plaintiffs,) Civ. Act. No. 07-CV-11446-NG
) (ORIGINAL DOCKET NUMBER)
 v.)
)
 JOEL TENENBAUM,)
)
)
 Defendant.)

**MEMORANDUM IN SUPPORT OF DEFENDANT’S CONDITIONAL MOTION TO
COMPEL TO DEPOSITION OF MATTHEW OPPENHEIM ON JANUARY 22, 2009**

On November 10, 2008, Defendant informed Plaintiffs of his intent to depose Matthew Oppenheim. (Exhibit A.) Defendant reiterated his intent to depose Mr. Oppenheim in his Discovery Plan of November 24, 2008 (Dkt. No. 701), to which intent the Plaintiffs made no opposition in their Response. (Dkt. No. 707). On and after January 2, 2009, Defendant attempted to confer with Plaintiffs’ counsel on a mutually agreeable date and time for Mr. Oppenheim’s deposition. (Exhibit B.) On January 9, Defendant properly served Mr. Oppenheim with a subpoena ordering him to appear for a deposition on January 20 (Exhibit C) and provided notice

to Plaintiffs of Mr. Oppenheim's deposition. (Exhibit D.) Plaintiffs responded via e-mail expressing their displeasure with the date, but, despite Defendant's efforts to reach an agreement, refused to discuss a mutually agreeable date or method of taking the deposition. At no time did Plaintiffs express opposition to Mr. Oppenheim's deposition. Mr. Oppenheim then failed to appear at the appointed time for the deposition.

The deposition of Mr. Oppenheim is necessary to the Defendant's fair defense. In his capacity as client representative to the Plaintiffs, Mr. Oppenheim has assumed the central role in the prosecution of the instant action, and in the broader litigation campaign of which this action is a part. His deposition is therefore reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs' counsel recognized the relevance of Mr. Oppenheim's testimony by engaging Defendant's counsel on the deposition's scope immediately prior to the January 12, 2009 telephonic argument. The scope of information sought in this deposition includes, but is not limited to, Mr. Oppenheim's knowledge of the steps taken by Plaintiffs against Defendant before and after the commencement of this action; the formulation and execution of the litigation campaign of which this suit against Defendant is a part; the decision-making process that gave rise to the campaign; and the document flow and decision-making process among the four Plaintiffs and the RIAA.

Federal Rule of Civil Procedure 45(e) provides that the failure of "any person without adequate excuse to obey a subpoena served upon that person may be deemed in contempt of the court from which the subpoena issued." Fed. R. Civ. P. 45(e). If a person subject to a subpoena does not want to appear for some reason, he must reach an agreement to re-schedule or seek an order quashing or modifying the subpoena. See Fed. R. Civ. P. 45(c)(3). Mr. Oppenheim did neither, and was legally required, absent a protective order of this court, to appear at the

requested time. Defendant requests that the Court order Mr. Oppenheim to appear for a deposition in this judicial district on January 22, 2009.

JOEL TENENBAUM.

By his attorney,

Dated: January 20, 2009

/s/Charles R. Nesson
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 20, 2009, a copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT'S CONDITIONAL MOTION TO COMPEL TO DEPOSITION OF MATTHEW OPPENHEIM ON JANUARY 22, 2009** was served upon the Plaintiffs via first class mail, postage pre-paid, and electronic mail (where available), at the following addresses:

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