

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

CAPITOL RECORDS, INC., et al.,)
 Plaintiffs,)
)
 v.)
)
NOOR ALAUJAN,)
 Defendant.)

**Case No. 03cv11661-NG
LEAD DOCKET NO.**

SONY BMG MUSIC ENTERTAINMENT, et al.,)
 Plaintiffs,)
)
 v.)
)
JOEL TENENBAUM,)
 Defendant.)

Case No. 07cv11446-NG
ORIGINAL DOCKET NO.

GERTNER, D.J.:

ORDER
March 9, 2009

Defendant's Conditional Motion to Compel the Deposition of Matthew Oppenheim (document # 736) is **DENIED**. Plaintiffs have represented that Mr. Oppenheim is neither an officer nor an employee, but "an attorney in private practice . . . who represents Plaintiffs in this case and in similar ones around the country and on occasion, such as in settlement conferences or other court proceedings, acts as the client representative." Pl. Supp. Mem. at 2 (document # 763-2). Although he attended a hearing in this case and has participated in conferences, Mr. Oppenheim has not entered an appearance before the Court. See, e.g., Clerk's Notes, September 23, 2008 Hearing; Clerk's Notes, January, 13, 2009 Telephonic Conference. Absent plain evidence to the contrary, and the Defendant has presented none, Plaintiffs must be taken at their word -- in which case Mr. Oppenheim is not a party to this case whose deposition may simply be noticed under Fed. R. Civ. P. 30(b)(1). Instead, he may only be deposed pursuant to a third-party subpoena that conforms to the requirements of Fed. R. Civ. P. 45 (requiring a more formal process for deposing

witnesses who are not parties in the case). For the very reasons stated by the Plaintiffs, the Defendant's subpoena fails to meet these requirements: it was not delivered through personal service; witness and mileage fees were not tendered at the time of service; and it was not served within the district of the issuing court or within 100 miles of the place specified for the deposition. See Fed. R. Civ. P. 45(b)(1)-(2). In addition, because Defendant has not made his initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1), D. Mass. Local Rule 26.2 bars him from initiating any discovery, including depositions, absent an order from the Court. This limitation is apparent on the face of the Local Rule.

Finally, even if these technical requirements should be met in the future, the subject-matter of any deposition of Mr. Oppenheim invites extremely close scrutiny, given both his role as an attorney for the Plaintiffs and the Court's stay of all discovery relating to Tenenbaum's abuse-of-process counterclaim and his constitutional challenge to the Copyright Act, 17 U.S.C. § 504(c). See February 23, 2009 Scheduling Order (document # 759). Those claims are scheduled for oral argument on April 30, 2009, and related discovery is stayed until at least that date.

The Court notes with displeasure the continuing difficulties with the meet-and-confer requirement imposed by Fed. R. Civ. P. 37(a) and D. Mass. Local Rule 37.1. These Rules require that the Defendant confer in good faith with opposing counsel prior to filing any discovery motion, in an effort to resolve discovery disputes without recourse to the Court, with the purpose of reducing litigation costs for all. Merely informing opposing counsel of the Defendant's intention to file a motion to compel does not meet this modest threshold, even if Oppenheim's deposition had been previously discussed between counsel. As before, the good faith meet-and-confer sessions required by Rule 37 must not be conditioned on Plaintiffs' 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.

More troubling still is the Defendant's filing of a motion to compel premised on a subpoena so clearly inconsistent with Fed. R. Civ. P. 45 and Local Rule 26.2, even after he was alerted to these defects by opposing counsel. While the Court understands that counsel for the Defendant is a law professor, and that he believes this case serves an important educational function, counsel must also understand that he represents a client in this litigation -- a client whose case may well be undermined by the filing of frivolous motions and the failure to comply with the Rules. Submission of a plainly flawed motion cannot be justified as a clinical exercise. The Court will not hesitate to impose appropriate sanctions, including potentially substantial costs, should the Defendant waste either the Plaintiffs' time and money or scarce judicial resources by filing frivolous motions in the future.

SO ORDERED.

Date: March 9, 2009

/s/ Nancy Gertner
NANCY GERTNER, U.S.D.C.