

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 RE: MOTION TO STAY

February 23, 2009

This Order addresses the delay in the proceedings occasioned by (1) the Defendant's efforts to broaden the scope of the case via his abuse-of-process counterclaim and constitutional challenge, and (2) the Plaintiffs' decision to appeal this Court's Order allowing the hearing on these issues to be narrowcast over the internet. See January 14, 2009 Order (document # 730). Although the hearing in question is **STAYED** pending further notice while the narrowcast issue is resolved, both parties agree that other parts of the case should proceed.

Plaintiffs originally brought suit against Joel Tenenbaum for copyright infringement pursuant to 17 U.S.C. § 101 et seq. Defendant counterclaimed, alleging abuse of process, and has also challenged the constitutionality of the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, 17 U.S.C. § 504(c). While Defendant has raised this constitutional challenge as a counterclaim, see Def. Amended Answer and Counterclaim (document # 625),

Def. Opp. To Pl. Mot. to Dismiss at 3-13 (document # 676), it is in fact a defense more properly asserted in a motion to dismiss, as discussed below.

Accordingly, in this Order, the Court shall (a) bifurcate the claims for the purposes of discovery, permitting discovery on the Plaintiffs' original copyright claims while delaying motions related to Defendant's abuse-of-process counterclaim and constitutional challenge; (b) adopt a discovery schedule for the case as originally pled; (c) indicate which pending motions will be dealt with on the papers and without hearing; and (d) address several miscellaneous matters.

A. Bifurcation and Discovery Order

The Court hereby bifurcates the case for discovery purposes. Discovery relating to the claims originally filed by the Plaintiffs -- the copyright infringement allegations made in their August 7, 2007 Complaint -- will be bifurcated from discovery and other issues related to the Defendant's counterclaim(s), efforts to amend, and constitutional challenge.

1. Defendant's Counterclaim and Constitutional Challenge

All discovery relating to Defendant's counterclaim(s) and proposed addition of the Recording Industry Association of America ("RIAA") shall be **STAYED** pending this Court's ruling on Plaintiff's Motion to Dismiss Counterclaims (document # 670), Defendant's Motion to Amend Counterclaim (document # 686), and Defendant's Motion to Join the RIAA (document # 693).

To the extent that the Defendant's Second Counterclaim asserts a constitutional defense to the allegations in the Complaint, and thereby a constitutional attack upon the Copyright Act, it is more appropriately pled in a Motion to Dismiss. Accordingly, Defendant is to file such a

motion no later than **March 9, 2009**, so that those arguments are amenable to proper resolution by the Court before discovery, if any, is authorized. To the extent that the Plaintiffs' believe a response is required -- beyond the moving papers to dismiss the counterclaim already submitted - - they are to file such a response by **March 23, 2009**.

The hearing on Defendant's Motion to Amend Counterclaim (document # 686), Plaintiffs' Motion to Dismiss Counterclaims (document # 670), Defendant's Motion to Join the RIAA (document # 693) is **STAYED** until **April 30, 2009 at 10:00a.m.** The Pretrial Conference and Trial Date, currently scheduled for March 24, 2009 and March 30, 2009, respectively, are hereby **CANCELLED**. They shall be rescheduled at a later date.

2. Plaintiffs' Copyright Infringement Claims

Discovery relating to the Plaintiffs' pending claims against the Defendant shall proceed as follows:

1. Defendant shall produce initial Rule 26(a)(1) disclosures on or before March 30, 2009.
2. Initial expert disclosures under Rule 26(a)(2) are also due by March 30, 2009.
3. After service of the initial disclosures, each party may take up to five (5) additional depositions (not including expert depositions). Parties seeking to take any additional depositions must seek leave of court before doing so. Moreover, a party who seeks to re-depose any witness who has already been deposed must move for leave of court under Rule 30(a)(2).
4. Rebuttal expert disclosures under Rule 26(a)(2) are due by May 1, 2009.
5. All discovery including any expert discovery shall be completed on or before May 30, 2009.
6. Should the counterclaim be denied and constitutional challenge fail, the parties should expert a trial date by the end of June 2009.
7. Certain pending motions will be decided on the papers and without a hearing: Defendant's Motion to Compel the Deposition of Matthew Oppenheim

(document # 736), Plaintiffs' Motion for Sanctions Against Attorney Nesson (document # 739), Defendant's Motion for Protective Order [Relating to Proposed Computer Inspection] (document # 672), and Plaintiffs' Motion to Compel Discovery Responses from Defendant Joel Tenenbaum (document # 709) .

B. Miscellaneous Matters

1. Taping Conferences

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.

2. Compliance with the Federal Rules of Civil Procedure

For the period from August 7, 2007 until September 22, 2008, defendant Joel Tenenbaum was not represented by counsel. The Court understands that a pro se litigant may not be familiar with the Court's Rules and, during that time, took this into account in construing his submissions. Tenenbaum, however, is now represented by counsel -- accordingly, familiarity with the both the Federal Rules and the Local Rules of the District of Massachusetts is presumed and expected.

SO ORDERED.

Date: February 23, 2009

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