

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND  
PROVIDENCE DIVISION

MSJ 08-1041

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

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)  
) Civ. Act. No. 03-cv-11661-NG  
) (LEAD DOCKET NUMBER)  
) FROM THE DISTRICT OF  
) MASSACHUSETTS  
)  
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SONY BMG MUSIC ENTERTAINMENT, et al.  
Plaintiffs,  
v.  
JOEL TENENBAUM  
Defendant.

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)  
) Civ. Act. No. 07-cv-11446-NG  
) (ORIGINAL DOCKET NUMBER)  
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**ARTHUR AND JUDITH TENENBAUM'S OPPOSITION TO PLAINTIFFS' MOTION TO  
COMPEL RESPONSE TO SUBPOENAS**

On November 13, 2008, Plaintiffs filed their Motion to Compel Response to Subpoenas Issued to Third-Parties, Arthur and Judith Tenenbaum ("Plaintiffs' motion"), demanding that Arthur and Judith permit Plaintiffs to copy and inspect the full contents of the Tenenbaums' family computer ("the eMachine"). The ground for Plaintiffs' demand is that the eMachine might contain information related to a pending music file-sharing lawsuit against Joel Tenenbaum, the Tenenbaums' son, in the United States Federal Court for the District of Massachusetts. However, the eMachine likely contains little or no information relevant to the Massachusetts case, while production of the eMachine would allow Plaintiffs access to a wide range of the Tenenbaums' privileged materials and private information.

Consequently, Plaintiffs' motion is improper pursuant to Rule 45(c)(3) of the Federal Rules of Civil Procedure, which requires that the Court quash or modify a subpoena if the subpoena "(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies" or "(iv) subjects a person to undue burden." Arthur and Judith Tenenbaum therefore respectfully request that the Court deny Plaintiffs' motion.

**I. PLAINTIFFS' MOTION REQUIRES DISCLOSURE OF PRIVILEGED AND OTHER PROTECTED MATTER**

Plaintiffs' motion would require Arthur and Judith to permit inspection of their family computer's entire hard drive, which contains a significant amount of privileged, private and otherwise protected materials that are not the proper subject of a subpoena pursuant to Rule 45(c)(3) of the Federal Rules of Civil Procedure ("FRCP 45(c)(3)") For instance, the eMachine contains confidential information and documents related to Judith Tenenbaum's law practice and clients. The eMachine also contains a wealth of private family materials, including private emails and other correspondence, photos, personal writings, Internet browsing information, and many other examples. A personal computer generates and contains an almost incalculable amount of private data, all of which would be available for Plaintiffs' inspection if Plaintiffs' motion were granted.

In contrast, Plaintiffs cannot claim that more than a few folders on the eMachine could be relevant to their lawsuit against Joel. Joel does not live in the house that contains the eMachine and has not lived there for the entire period in which the Tenenbaums have owned the computer. See Affidavit In Opposition to Motion to Compel Production/Copying of Home Computer, attached as Exhibit A ("Judith's affidavit"), at ¶ 2. Joel has not used the eMachine except to check his e-mail and execute other routine tasks on infrequent visits to his parents' house. See Judith's affidavit, at ¶ 3-4. It therefore is unlikely that the eMachine contains a significant amount of information related to Joel's file-sharing activities.

Additionally, Plaintiffs took no care to tailor their request to exclude the Tenenbaums' privileged

and private information. For instance, Plaintiffs could have asked solely for the specific information they believe might be relevant to their case, which presumably is limited to folders, files, and other information related to file-sharing programs such as KaZaA. Instead, Plaintiffs have crafted an overbroad motion that demands access to all of the Tenenbaums' privileged and private information in order to obtain the small amount of information that allegedly could have possible bearing on their lawsuit.

## **II. PLAINTIFFS' MOTION SUBJECTS THE TENENBAUMS TO UNDUE BURDEN**

A subpoena is improper under the FRCP where the requesting party's interest in receiving the information is not sufficient to warrant the burden placed on a third party. See Heidelberg Americas, Inc. v. Tokyo Kikai Seisakusho, Ltd., 333 F.3d 38, 41-42 (1st Cir. 2003) (affirming decision quashing third-party subpoena under FRCP 45 where the burden on the third party outweighed the requesting party's interest in receiving the information); FRCP 45(c)(3). Plaintiffs' motion places an undue burden on Arthur and Judith by seeking to invade the Tenenbaums' privacy in order to obtain at most a small amount of information relevant to Plaintiffs' case. As stated in the preceding section of this memorandum, Plaintiffs have asked to copy and inspect every piece of information on the Tenenbaums' family computer when they have an interest only in alleged information related to their case against Joel.

Plaintiffs attempt to explain away the issue of burden by insinuating that producing a computer for copying and inspection is not burdensome as a factual matter, thus equating burden with actual effort expended. See Plaintiffs' Memorandum in Support of Motion to Compel Response to Subpoenas Issued to Third Parties, Arthur and Judith Tenenbaum, filed November 13, 2008 ("Plaintiffs' memorandum") at 5. However, disruption of one's privacy can be just as burdensome as forced expenditure of time and effort. Plaintiffs motion would allow Plaintiffs to dig through all of the Tenenbaums' private information even though Plaintiffs cannot possibly have an interest in more than a minuscule portion of that information. Plaintiffs simply have asked for too much when they seek to

gain far too little.

### **III. THE TENENBAUMS DID NOT WAIVE THEIR OBJECTIONS TO PLAINTIFFS' MOTION**

Plaintiffs' memorandum argues that FRCP 45(c)(2)(b) mandates that a party waives any objections to a subpoena if he or she does not present objections during the stated response period. See Plaintiffs' memorandum at 6. However, FRCP 45 does not state explicitly that a party waives objections not presented during the stated period, and Plaintiffs have presented only foreign citations in support of their argument. Regardless, it is unlikely that the FRCP could require such a waiver in all cases, given that similar rules that do mention such waivers grant the Court discretion to consider objections filed after the stated objection period where good cause exists. See FRCP 33(b)(4) ("Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.").

Good cause exists here for the Court to consider the Tenenbaums' objections. The Tenenbaums, who are not parties to the underlying litigation, did not have assistance of counsel during the objection period set by FRCP 45(c)(2)(b). The Tenenbaums have timely responded with objections now that they have obtained counsel. Additionally, Plaintiffs' motion would constitute a serious breach of the Tenenbaums' privacy and their privileged information as stated in the preceding sections of this memorandum.

### **CONCLUSION**

For the foregoing reasons, Defendants Arthur and Judith Tenenbaum respectfully request that the Court deny Plaintiffs' Motion to Compel Response to Subpoenas Issued to Third-Parties, Arthur and Judith Tenenbaum.

Dated: January 02, 2009.

Respectfully submitted,

~~s/ Charles R. Nesson~~

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on January 02, 2009, a copy of the foregoing **ARTHUR AND JUDITH TENENBAUM'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL RESPONSE TO SUBPOENAS** was served via fax and First Class United States Mail to:

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