

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

MALIBU MEDIA, LLC

Plaintiff,

v.

JOHN DOE subscriber assigned to IP Address
24.14.81.195,

Defendant.

Case No. 1:13-cv-06312

The Hon. Thomas M. Durkin

MOTION TO COMPEL PURSUANT TO FED. R. CIV. P. 37

NOW COMES Doe 24.14.81.195, (“Doe”) by and through counsel who moves this Honorable Court for an Order Compelling the Plaintiff, Malibu Media, LLC, (“Malibu”) to comply with the Federal Rules of Civil Procedure and to respond to appropriately issued discovery requests. In support of the same, Doe states:

I. Introduction

This is the second Motion to Compel that is being filed with regards to Doe’s first set of interrogatories to Malibu. See Exh. A. The first eventually resulted in Malibu being ordered to show cause why it should not be held in contempt. Malibu’s most recent response to the Interrogatories is attached as Exhibit B. During discussions to resolve this dispute, Malibu indicated that it believes the information to be irrelevant. Previously,¹ it had indicated that the information was too difficult to compile and search, with Malibu’s burden purportedly outweighing the value to Doe. Both reasons for refusal are addressed below, and shown to be unavailing.

II. Local Rule 37-1

Lead counsels for Doe and Malibu have consulted repeatedly – by email and telephone – in an attempt to resolve this discovery dispute. Emails have occurred throughout the past several

¹ Alleviating the other previous concern of Malibu, this Court has entered a confidentiality order. (ECF Doc. 63).

weeks and personal consultations place on April 7, April 9, and April 10, 2014. Unfortunately, these efforts have failed to resolve the dispute. Per this Court's Order (ECF Docs. 63, 64), Defendant brings this Motion to Compel with regards to Interrogatories 3 and 5.

III. Governing Law

A. Liberal Discovery Rules

Under Rule 37, a party may move to compel discovery where another party is being evasive or failing to respond to a discovery request. Fed. R. Civ. P. 37(a)(3)-(4). Courts have typically adopted liberal interpretation of the discovery rules. *Kodish v. Oakbrook Terrace Fire Prot. Dist.*, 235 F.R.D. 447, 450 (N.D. Ill. 2006); *see also Cannon v. Burge*, 2010 WL 3714991, at *1 (N.D. Ill. Sept. 14, 2010) ("The federal discovery Rules are liberal in order to assist in trial preparation and settlement."). Courts look negatively on significant restrictions being placed upon discovery, and the burden is upon the objecting party to show why a particular request is improper. *Kodish*, 235 F.R.D. at 450.

IV. Application

Interrogatories 3 and 5 seek information that is highly probative and relevant to factual and damage defenses in this action. Malibu undoubtedly has this information, has it in a high level of detail, has it in an easily searchable format, and has the tools to easily search it. Its refusal to provide the information is improper and Malibu should be ordered to comply with the Rules of Civil Procedure, for the second time.

A. The information sought in Interrogatory 3 and 5 is relevant

Malibu has brought suit against Doe for his participation in twenty-four so-called swarms, represented by the HASH numbers provided in Exhibit A to the Complaint. Undoubtedly, Malibu has brought suit against dozens of other individuals in the complained of swarms. Interrogatory 3 seeks a listing of each Malibu case involving the HASH numbers in this case; Interrogatory 5 seeks

the status of those suits. As the Court is aware, it ordered Malibu to provide a small sample of its suits, which was provided, and reviewed by Doe. (ECF Doc. 31). As discussed below, Doe's review of those suits, along with other recent filings by Malibu, make it clear that a more complete picture is not only highly relevant, but can easily be provided.

After having to fight to get the information for a small sample set, it became evident that many cases in that sample were settled, presumably some in exchange for money.² This conclusion is backed by a recently filed document wherein Malibu indicates that approximately 17.1% of its defendants in the Northern District of Illinois, or 174 individuals, have settled. *Malibu Media, LLC v. Doe*, Pltf's Status and Info. Report for its Cases in the N.D. Ill, Case No. 14-cv-00693, p. 6 (ECF Doc. 17) (N.D. Ill. Apr. 6, 2014) (the "Malibu Status Report"). See, Exh. C, p. 6. Eight more are being litigated and 30 are still being negotiated. *Id.* Notably, no defendant had to expend great deals of resources to obtain that information.

The information sought is relevant to Doe's defenses. It remains so even after Malibu has attempted to dodge discovery by stipulating to damages of \$750.00 for each alleged infringement, but suggesting that tens of thousands of dollars in attorney's fees may remain appropriate. (ECF Doc. 61). Of the films in question, many do not have copyright notices. Those that do, have notices that are arguably ineffective due to misnomer. These defects extinguish presumption of willful infringement, especially when coupled with the fact that Malibu uploaded many of its works for free on various "tube sites." Accordingly, Doe should be allowed to seek evidence to support an appropriate innocent infringer defense.

If Doe is found to have infringed, which should not occur, as an innocent infringer, Malibu would be entitled as little as \$200.00 per work. Additionally, this Court may wish to consider innocent infringer status as a factor when/if determining the reasonableness of any attorney's fees,

² To be fair, this is an assumption made from the notice-dismissals filed in those cases under Rule 41(a)(1)(A)(i).

especially if Malibu has already settled dozens of identical, boilerplate complaint based, cases for the same HASH value(s).

Furthermore, the information is relevant due to the fact that many of the dismissals in the Malibu Status Report were due to lack of evidence. A pattern nationwide dismissals due to insufficient evidence for any particular HASH value would indicate a known lack of reliability in Malibu's investigations. This information is not only relevant to an outright factual defense, but calls into question the propriety of seeking tens of thousands of dollars in attorney's fees for a case Malibu had no *reliable* evidence to bring. For these reasons, the information sought in Interrogatories 3 and 5 is highly probative to defenses that Doe is entitled to explore and assert.

- B. The Malibu Status Report and the answer to Interrogatory 3 and 5 indicate that it is not unduly burdensome to provide the relevant information sought

There is no reason to believe that the information sought is unduly burdensome to compile and provide. It should go uncontroverted that Malibu has the information sought, unless Malibu simply does not know who it is suing, or why it is suing them. See *also*, Fed. R. Civ. P. 11.

The Malibu Status Report belies any argument³ that Malibu keeps sloppy records, or cannot search its records. For example, Exhibit B to the Report is a table that includes case numbers correlated to HASH values for Northern District of Illinois cases; a subset of the very information sought by Interrogatory 3. Exh. C, p. 43. Exhibit G to the Malibu Status Report indicates that Malibu keeps detailed, searchable data for its cases nationwide. Exh. C., p. 111 - 112. Indeed, it keeps such detailed records that Malibu was able to provide 53 pages of HASH→Work correlation data. Exh. C., pp. 57 – 110. Even Malibu's answer to Interrogatory 3 indicates that scripts have been developed to cull such information. Exh. B, p. 3.

³ Notably, Malibu's prior argument that such records are not kept appears to have been insincere.

Malibu has the information sought, as well as a great deal of other information. It is able to produce this information in an astonishing level of detail, as indicated by the Malibu Status Report. Malibu can simply run a computer script, already developed, to search for and report the information sought. This is not unduly burdensome.

V. Conclusion

Malibu is in possession of relevant evidence needed for Doe to defend himself. It is incontrovertible that Malibu has the information. In fact, it has it in an easily searchable format, in an astounding level of detail. Malibu even has computer scripts that enable it to search this data. Accordingly, its refusal to provide the information is inappropriate. Having repeatedly refused to comply with discovery, it should also be compelled to pay the fees that Doe has incurred in attempting to secure compliance. For the foregoing reasons, it is respectfully requested that this Honorable Court:

- A. Order Malibu Media, LLC to respond to the discovery requested – namely, Interrogatories 3 and 5, without objection within seven days;
- B. Order Malibu Media, LLC to pay the costs of bringing this Motion, and the previous Motion to Compel, including attorney's fees, as authorized by Federal Rule of Civil Procedure 37(a)(5); and
- C. Any other relief the Court deems just and equitable.

Respectfully submitted,

/s/Jonathan LA Philips
Jonathan LA Phillips
One of Doe's Attorneys
456 Fulton St.
Ste. 255
Peoria, IL 61602
309.494.6155
jphillips@skplawyers.com
ARDC No. 6302752

Table of Exhibits

Exhibit	Description
A	Defendant's First Set of Interrogatories
B	Plaintiff's Second Amended Response to Defendant's First Set of Interrogatories
C	The Malibu Status Report

Certificate of Service

I certify that on April 14, 2014 a copy of the foregoing has been filed with the Clerk of the Court via the Court's ECF filing system, thereby serving it upon all counsel of record.

/s/ Jonathan LA Phillips