

**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. Geraldine S. Brown

**DEFENDANT'S SECOND MOTION FOR AN ORDER REQUIRING MALIBU MEDIA, LLC TO
SHOW CAUSE WHY IT SHOULD NOT BE HELD IN CONTEMPT**

JOHN DOE subscriber assigned to IP Address 24.14.81.195 ("Doe"), by and through counsel, Jonathan LA Phillips, moves this Court, for the second time, to Order Malibu Media, LLC ("Malibu") to show cause why it should not be held in contempt. In support of the same, Doe states as follows.

I. Introduction & relevant procedural history

For the second time, Malibu has thumbed its nose at this Court, and forced Doe to expend his resources – which are undoubtedly much less than those of Malibu – to secure compliance with this Honorable Court's order. Malibu should be ordered to explain itself, and in the likely case¹ that it has no justifiable reason for ignoring the Order, should be sanctioned. In what has becoming a disturbing trend in this case, Malibu has yet again refused to provide the very information this Court ordered it to turn over.

On January 7, 2014, Doe was forced to file a Motion to Compel in order to obtain discovery served nearly five months ago. (ECF Doc. 24). After hearing argument from both sides, and Doe

¹ Malibu regularly notes extremely high losses of revenue in its thousands of cases. Surely it has these figures, or it is filing frivolous suits, or making factual averments without any known basis to back them up.

prevailing on his Motion, this Court ordered certain information to be provided. (ECF Doc. 31).

Specifically, this Court ordered the following:

The motion is granted as to Interrogatory Nos. 7 and 8. The responsive information shall be held confidential “attorneys’ eyes only” by the defendant’s counsel, and if filed on the Court’s docket, shall be done so pursuant to Local Rule 26.2.

Order, p. 2. (ECF Doc. 31). The Court designated that the information was to be held as attorney’s eyes only until resolution of the anticipated motion for a protective order, which has since been entered. *Id.* Despite extensions of time and repeated promises of future compliance with the Court’s Order, the information has yet to be provided. This Court has ordered that any motions regarding compelling production on the first set of interrogatories be brought by today’s date. (ECF Doc. 63). Arguably, this Motion to for an Order to Show Cause fits into that category;² thus, this Motion is being filed.

II. Law

Civil contempt is meant to force a non-compliant party to comply with an order of the Court.” *Cunningham v. Hamilton County*, 527 U.S. 198, 207 (U.S. 1999), *citing*, *Willy v. Coastal Corp.*, 503 U.S. 131, 139 (1992). The Court’s civil contempt power is based in its inherent authority to enforce compliance with its orders and to conduct orderly proceedings. *United States v. Dowell*, 257 F.3d 694, 699 (7th Cir. 2001), *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 737 (7th Cir. 1999).

To prevail in this motion, Doe must establish that: “(1) a court order sets forth an unambiguous command; (2) the alleged contemnor violated that command; (3) the violation was significant, meaning the alleged contemnor did not substantially comply with the order; and (4) the alleged contemnor failed to make a reasonable and diligent effort to comply.” *Shales v. T. Manning*

² This motion is being filed at this time out of an abundance of caution, to ensure compliance with the Court’s Order (ECF Doc. 63). Doe does not admit, and does not believe, that this Motion is a “Motion to Compel” that would require personal consultation to resolve disputes, however, such consultations, by email and telephone calls, certainly has taken place.

Concrete, Inc., 847 F. Supp. 2d 1102, 1114 (N.D. Ill. 2012), *quoting*, *W. Bend Mut. Ins. Co. v. Belmont St. Corp.*, No. 09 C 354, 2010 U.S. Dist. LEXIS 136267, at *39 (N.D. Ill. Dec. 23, 2011); *see also Dowell*, 257 F.3d at 699.

III. Application

This Court could not have been more clear, and unequivocal, in its Order. Malibu was to answer Interrogatories 7 and 8. (ECF Doc. 31); See, ECF Doc. 65-1 for Defendant's First Set of Interrogatories. To assuage the concerns of Malibu, and keep this matter moving, the Court explicitly ordered that the information was to be held "Attorney's eyes only," pending entry of a protective Order, since entered.³ (ECF Doc. 31). Despite repeated inquiries by email, and in telephone conversations, the sought information has unquestionably not been provided.

A. Interrogatory 7

Interrogatory 7 sought "revenue figures for each month of Malibu's existence. . . [but] not . . . copyright infringement suits in federal courts, trespass to chattels or other suits in state courts, or settlements or verdicts regarding the same, whether had before or after the service of the summons." Malibu has unquestionably not provided this information, despite repeated statements in emails and personal consultations that it would do so, *for the year 2013*. As of the date of filing, Malibu has only provided profit and loss statements⁴ for January 2013 to July 2013, which *might* provide the information sought for only seven of the thirty-eight months; however, the statements do not clearly separate out suit revenue. It is important to note that Malibu has filed hundreds of Complaints and supporting exhibits crying out about massive amounts of revenue is being lost;

³ In open Court, prior to Excipo GmbH's Motion to Intervene, Doe's counsel stipulated to the entry of an agreed protective order.

⁴ These statements are not being provided due to the Court's Confidentiality Order, but it is counsel for Doe's intent to provide them to the Court at presentment of the Motion on April 22, 2014 and seek leave of Court to file the same under seal if this Honorable Court deems it necessary or appropriate.

yet, when asked for such figures, it appears the information has never been compiled, or reviewed, by anyone. See, Fed. R. Civ. P. 11.

According to the California Secretary of State, Malibu Media, LLC was created on February 8, 2011. Despite existing since that time, has failed to provide requested figures for February 2011 – December 2012. Despite repeated inquiry, no mention of any figures for this time period has been said to being compiled, let alone been provided. Further, those figures for August 2013 to present have apparently not been compiled, let alone provided. In total, thirty-one of the thirty-eight months covered by the interrogatory have not been provided. To be fair, Malibu's counsel has alleged, for some time, that the figures for August 2013 through December 2013 are being compiled. While this would still fall woefully short of complying with the Court's Order, and despite five months to gather and provide the information, even this sliver of compliance has not taken place.

This Court clearly, and unequivocally, ordered Malibu to provide revenue figures for each month of its existence. It undoubtedly has such information in its possession, but Malibu has contumaciously refused to obey this Court's Order.

B. Interrogatory 8

Interrogatory 8 sought "the total cost of doing business for each month of Malibu's existence. . . [but] not . . . [costs of]⁵ copyright infringement suits in federal courts, trespass to chattels or other suits in state courts, or settlements or verdicts regarding the same, whether had before or after the service of the summons." The exact same information as above was provided, to wit, profit and loss statements for January to July of 2013. At this time, five months after being asked for the information, a mere 18.4% of the information that this Court ordered to be provided has actually been provided.

⁵ To be fair, the interrogatory may have been unclear, having failed to use the words "costs of," but Malibu has not complained of a lack of clarity, or sought clarification from Doe.

IV. Conclusion

Malibu has utterly failed to comply with the Court's clear and unequivocal Order. Malibu has done so without justification. It has complained, hundreds of times over about lost revenues, but refuses to provide evidence of the same - despite this Court's Order. For the foregoing reasons, JOHN DOE subscriber assigned to IP Address 24.14.81.195 respectfully requests that this Honorable Court:

- A. Find Malibu Media, LLC in contempt of this Court's Order of January 22, 2014; and
- B. Order immediate compliance with the Court's previous Order as to Interrogatories 7 and 8;
and
- C. Award Doe the costs of bringing this Motion, the previous Motion for an Order to Show Cause, as well as the costs of bringing the two Motions to Compel; and
- D. Bar the entry of any evidence or mention of damages suffered by Malibu Media LLC as a result of alleged piracy and strike all references to the same from the pleadings; or
- E. Dismiss this case for Malibu Media LLC's serial failure to abide this Court's Orders, or otherwise participate in discovery to allow this case to progress; and
- F. Any other relief this Court deems equitable and just at this time.

Respectfully submitted,

/s/Jonathan LA Philips
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Certificate of Service

I certify that on April 17, 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