

**UNITED STATES DISTRICT COURT**  
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MALIBU MEDIA, LLC,	:	
Plaintiff	:	
vs.	:	NO.: 2:12-CV-02078-MMB
	:	
JOHN DOE 16	:	
Defendant	:	

**DEFENDANT, JOHN DOE 16’S REPLY TO PLAINTIFF’S MOTION TO COMPEL  
DISCOVERY RESPONSES**

Defendant, John Doe #16, by and through his/her undersigned counsel, hereby replies to Plaintiff’s Motion to Compel. In response to the numbered paragraphs and sentences of the Motion, Defendant admits, denies or otherwise responds as follows:

1. Admitted.
2. Admitted.
3. Admitted in part; denied in part. It is admitted that Plaintiff withdrew

Interrogatories 10, 12 and 20, but Plaintiff never scheduled or held any type of good faith conference related to this Motion with Defendant, John Doe 16. In fact, Defendant’s only notice of the filing of a Motion is by email dated December 20, 2012 where he gave the undersigned and other counsel much less than a full day or he would file a Motion. Defendant, John Doe 16, as well as other counsel for Defendant’s requested a several day extension, which Plaintiff’s counsel would not grant, since he was leaving on vacation in less than 24 hours and wanted the responses immediately. See attached Exhibits “A”, “B”, “C” and “D”.

4. Denied. Defendant, John Doe 16 promptly provided Answers to Interrogatories that same day, and informed Plaintiff’s counsel that the Reply to Plaintiff’s Request to Produce

would be forwarded in several days. In fact, such Reply to the Request to Produce was forwarded at expense by Fed Ex on Thursday, December 27, 2012. See attached Exhibit “D” and “E”.

5. Denied. In fact, Plaintiff’s counsel has not been prejudiced since he indicated that he would be away the week of December 24, 2012 on vacation.

**DEFENDANT’S AVERMENTS REGARDING PLAINTIFF’S MOTION**

6. Plaintiff’s counsel indicated to this Court, that a “Good Faith” Conference was held prior to filing its Motion. It was not.

7. Plaintiff’s counsel prepared its Motion prior to the date of December 20, 2012 with the full intention of filing same whether or not it had received any discovery response prior to filing.

8. Plaintiff’s counsel’s only motivation for filing such a frivolous Motion is a disingenuous attempt to compel the Court to extend the date for trial. See Exhibit “C”.

9. As of December 27, 2012, Defendant, John Doe 16, has filed in fact a full and complete Reply to Plaintiff’s discovery response while Plaintiff’s counsel enjoys his vacation. See attached Exhibits “D” and “E”.

**MEMORANDUM OF LAW**

Plaintiff’s counsel’s recital of Fed. R. Civ. P. is correct. Unfortunately, he omits, whether intentionally or negligently, Rule 37(a)(1), where a moving party must have a “good faith” conference with opposing counsel to attempt to resolve the problem prior to filing what we believe to be a duplicitous Motion. If Plaintiff’s counsel believe that his email message to Defendant’s counsel satisfied the Rule 37(a)(1) requirement, then he has made a mockery of the Rule.

The fact remains that Defendant, John Doe 16's counsel filed and forwarded Defendant's Answers to Interrogatories that day, prior to the bad faith deadline set arbitrarily by Plaintiff's counsel and received the full and complete Response to Plaintiff's Request to Produce several business days later.

Plaintiff's counsel indicates to the Court that he has been prejudiced, when in fact, he is away, out-of-town, on vacation. Plaintiff's counsel also indicates in Exhibit "C" that his true motivation by filing said Motion is merely to reinforce his goal of delaying the Bellwether trial. See attached Exhibit .

Fed. R. Civ. P. 37(5)(B) allow this Honorable Court to award reasonable counsel fees when circumstances permit. Defendant, John Doe 16 had fulfilled Plaintiff's draconian requirement regarding Interrogatories prior to the filing of the Motion and forwarded the balance four business days later. Where "Good Faith" Conference was scheduled or held other than an "I want it now or by noon tomorrow", before Plaintiff's counsel left on vacation and an indicated duplicitous reasons other than discovery; Defendant's counsel would request reasonable counsel fees and costs.

Respectfully submitted,

/s/ Ronald A. Smith

RONALD A. SMITH, ESQUIRE  
1617 John F., Kennedy Boulevard, Suite 355  
Philadelphia, PA 19103  
(215) 567-1200

**CERTIFICATE OF SERVICE**

I, hereby certify that on December 31, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all counsel of record and interested parties through this system.

BY: /s/Ronald A. Smith  
RONALD A. SMITH, ESQUIRE

**Ronald A Smith Esquire**

---

**From:** "Keith Lipscomb" <KLipscomb@LEBFIRM.COM>  
**To:** "Leonard J. French" <ljfrench@leonardj french.com>; "Keith Lipscomb" <KLipscomb@LEBFIRM.COM>  
**Cc:** <ronaldasmithesq@aol.com>; <ct@thomastrials.com>; <tgelsinger@LeisawitzHeller.com>; "Chris Fiore" <cfiore@fiorebarber.com>; "copyright" <copyright@LEBFIRM.COM>; "Jose Talavera" <JTalavera@LEBFIRM.COM>  
**Sent:** Thursday, December 20, 2012 12:26 PM  
**Subject:** RE: Bellwether Cases -- Discovery Responses  
Leonard, Ronald, Charles and Thad:

Your clients' discovery were due on 12/13/12. To date, we have not received any responses. As you know, "[t]he Federal Rules of Civil Procedure, as well as case law, have [further] established that when a party fails to serve objections to [discovery] within the time required, in absence of good cause or of an extension of time to do so, they have [] waived the right to raise objections later." *Coregis Ins. Co. v. Baratta & Fenerty, Ltd.*, 187 F.R.D. 528, 529 (E.D. Pa. 1999).

Please know that unless your clients serve their responses to Plaintiff's discovery by mid-day tomorrow, my Client will file a motion to compel. This email is intended to comply with Fed.R.Civ.P. 37(d)(1)(B). If there is any reason you can think of why Plaintiff should not or is not legally required to file a motion to compel, please advise. Also, kindly note that we cannot wait longer than mid-day tomorrow because I am going out of town. Finally, be advised if your clients make objections, Plaintiff will move compel and argue that your clients waived any objections they may have had under well-settled black letter law. As you know, there is a prevailing party's attorneys' fee clause governing motions to compel.

Best regards,  
Keith

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**From:** Leonard J. French [mailto:ljfrench@leonardj french.com]  
**Sent:** Tuesday, November 27, 2012 3:44 PM  
**To:** Crystal Sebastian  
**Cc:** ronaldasmithesq@aol.com; ct@thomastrials.com; Jordan@FishtownLaw.com; mjr@randazza.com; tgelsinger@LeisawitzHeller.com; Keith Lipscomb; Chris Fiore  
**Subject:** Re: Bellwether Cases - 26(f) Report Teleconference

I'll be on.

LJF

On Nov 27, 2012, at 3:41 PM, Crystal Sebastian wrote:

Good afternoon,

We have not heard back from anyone other than Mr. Gelsinger, Mr. Rushie and Mr. Thomas regarding their availability for a phone call this afternoon. Will anyone else be available at 4:00 pm for the teleconference? Keith will be on the call at that time.

Here is the information for the conference:



Conference dial-in number: (866) 576-7975  
Participant access code: 104524#

Per Keith, if we do not hear from anyone regarding the 26(f) reports by close of business today, they will be filed as unilateral reports.

Regards,

LIPSCOMB,  
EISENBERG &  
BAKER, PL

**Crystal Sebastian**

Paralegal

Lipscomb, Eisenberg & Baker, PL

One Biscayne Tower

2 South Biscayne Boulevard

Suite 3800

Miami, FL 33131

Telephone: (786) 431-2228

Facsimile: (786) 431-2229

Email: [CSebastian@LEBFIRM.com](mailto:CSebastian@LEBFIRM.com)

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Este mensaje incluido los documentos adjuntos, está destinado a la(s) persona(s) o compañía(s) indicadas y puede contener información confidencial y/o legalmente privilegiada. Se prohíbe la publicación, reproducción o divulgación de esta información. Si usted no es el destinatario de este correo, por favor notifique respondiendo a este mensaje y proceda a borrarlo. Gracias.

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**Ronald A Smith Esquire**

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**To:** "Keith Lipscomb" <KLipscomb@LEBFIRM.COM>  
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**Sent:** Thursday, December 20, 2012 12:55 PM  
**Subject:** Re: Bellwether Cases -- Discovery Responses

Keith,

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Thank you,  
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**Sent:** Thursday, December 20, 2012 1:11 PM  
**Subject:** RE: Bellwether Cases -- Discovery Responses  
Leonard,

I appreciate that. What I will do is withdraw the motion and not seek fees if your responses are ok. But, I need to file a motion to compel so the judge knows I am proactively pushing the case as fast as I can and so he understands why the schedule may need to be pushed when it comes time for that. Also, all be advised, that Plaintiff's 3<sup>rd</sup> party discovery is going out tomorrow. You will all get copies of what we propound. Unfortunately, it took longer than I thought to finish it because I got distracted by the memos in opp and motions in this case. Then when that project was done, the paralegal who is charged with the 3<sup>rd</sup> party discovery had a family member die, her mom had a stroke, she was in a car accident, and she is getting teeth pulled this afternoon – no fibs, really, all that happened. Needless to say, she missed some work, but she is great so this is just life. Anyway, she promised it is going out really early tomorrow and you will all be cc-ed.

Best regards,  
Keith

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**From:** Leonard J. French [mailto:ljfrench@leonardj french.com]  
**Sent:** Thursday, December 20, 2012 12:56 PM  
**To:** Keith Lipscomb  
**Cc:** ronaldasmithesq@aol.com; ct@thomastrials.com; tgelsinger@LeisawitzHeller.com; Chris Fiore; copyright; Jose Talavera  
**Subject:** Re: Bellwether Cases -- Discovery Responses

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**To:** "Keith Lipscomb" <KLipscomb@LEBFIRM.COM>  
**Cc:** "Leonard J. French, Esq." <ljfrench@leonardj french.com>; <CT@thomastrials.com>; "Thad Gelsinger" <TGelsinger@leisawitzheller.com>; "Chris Fiore" <cfiore@fiorebarber.com>  
**Sent:** Thursday, December 20, 2012 3:22 PM  
**Attach:** Answers to Plaintiff's Interrogatories.pdf  
**Subject:** Re: Bellwether Cases -- Discovery Responses  
Keith,

Attached please find Defendant's Answers to Interrogatories. Due to the holiday and some family issues in my client's household, we will forward all responses to documents that are in my client's possession by mid-week. I trust that will not cause complications to your travel plans or holiday vacation which you indicate is scheduled to commence tomorrow.

I would also direct your attention to the several occasions where you have asked for an extension and my office has graciously agreed to same.

Ron

----- Original Message -----

**From:** Keith Lipscomb  
**To:** Leonard J. French ; Keith Lipscomb  
**Cc:** ronaldasmithesq@aol.com ; ct@thomastrials.com ; tgelsinger@LeisawitzHeller.com ; Chris Fiore ; copyright ; Jose Talavera  
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12/31/2012

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**edEx** *NEW Package*  
Express *US Airbill*

FedEx Tracking Number **8007 1268 6316**

Form ID No. **0200**

Sender's Copy

**From** Please print and press hard.  
Date **12/27/12** Sender's FedEx Account Number **2159-722008**

Sender's Name **Ronald A. Smith, Esq** Phone **(215) 567-1200**

Company  
Address **1617 JFK Blvd SE 3535** Dept./Floor/Suite/Floor  
City **Phila.** State **Pa** ZIP **19103**

**Your Internal Billing Reference**  
First 24 characters will appear on invoice.

To Recipient's Name **CHRISTOPHER P. FIONE Esq** Phone

Company  
Address **425 MAIN ST SE 200** Dept./Floor/Suite/Floor  
We cannot deliver to P.O. boxes or P.O. ZIP codes.

Address  
Use this line for the HOLD location address or for continuation of your shipping address.  
City **Hanleysville** State **PA** ZIP **19438**

**HOLD Weekday**  
FedEx location address REQUIRED. NOT available for FedEx First Overnight.  
 **HOLD Saturday**  
FedEx location address REQUIRED. Available ONLY for FedEx Priority Overnight and FedEx 2Day to select locations.

**4 Express Package Service** \* To most locations. NOTE: Service order has changed. Please select carefully. **Packages up to 150 lbs.** For packages over 150 lbs., use the new FedEx Express Freight US Airbill.

Next Business Day	2 or 3 Business Days
<input type="checkbox"/> <b>FedEx First Overnight</b> Earliest next business morning delivery to select locations. Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.	<input type="checkbox"/> <b>FedEx 2Day A.M.</b> Second business morning.* Saturday Delivery NOT available.
<input type="checkbox"/> <b>FedEx Priority Overnight</b> Next business morning.* Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.	<input type="checkbox"/> <b>FedEx 2Day</b> Second business afternoon.* Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
<input checked="" type="checkbox"/> <b>FedEx Standard Overnight</b> Next business afternoon.* Saturday Delivery NOT available.	<input type="checkbox"/> <b>FedEx Express Saver</b> Third business day.* Saturday Delivery NOT available.

**5 Packaging** \*Declared value limit \$500.  
 FedEx Envelope\*  FedEx Pak\*  FedEx Box  FedEx Tube  Other

**6 Special Handling and Delivery Signature Options**

**SATURDAY Delivery**  
NOT available for FedEx Standard Overnight, FedEx 2Day A.M., or FedEx Express Saver.

**No Signature Required**  
Package may be left without obtaining a signature for delivery.

**Direct Signature**  
Someone at recipient's address may sign for delivery. Fee applies.

**Indirect Signature**  
If no one is available at recipient's address, someone at a neighboring address may sign for delivery. For residential deliveries only. Fee applies.

**Does this shipment contain dangerous goods?**  
One box must be checked.  
 **No**  **Yes** As per attached Shipper's Declaration.  **Yes** Shipper's Declaration not required.  **Dry Ice** Dry Ice, 9, UN 1845 \_\_\_\_\_ x \_\_\_\_\_ kg  
Dangerous goods (including dry ice) cannot be shipped in FedEx packaging or placed in a FedEx Express Drop Box.  **Cargo Aircraft Only**

**7 Payment Bill to:** Enter FedEx Acct. No. or Credit Card No. below.  
 Sender Acct. No. in Section 1 will be billed.  Recipient  Third Party  Credit Card  Cash/Check  
FedEx Acct. No. Credit Card No. Exp. Date

Total Packages **1** Total Weight **5** lbs. Total Declared Value! **\$ 100.00**

\*Our liability is limited to US\$100 unless you declare a higher value. See back for details. By using this Airbill you agree to the service conditions on the back of this Airbill and in the current FedEx Service Guide, including terms that limit our liability.

**Easy new Peel-and-Stick airbill. No pouch needed.**  
Apply airbill directly to your package. See directions on back.



**RONALD A. SMITH**  
ATTORNEY AT LAW



ONE PENN CENTER AT SUBURBAN STATION 1617 JOHN F. KENNEDY BOULEVARD, SUITE 355 PHILADELPHIA, PA 19103  
(215) 567-1200  
FACSIMILE (215) 557-2439  
BUCKS COUNTY OFFICE (215) 493-1268

December 27, 2012

Christopher P. Fiore, Esquire  
425 Main Street  
Suite 200  
Harleysville, PA 19438

*Re: Malibu Media, LLC. Vs. John Doe 16*  
*Civil Action Number: 2:12-cv-02078-MMB*

Dear Mr. Fiore:

Enclosed please find Defendant's Response to Plaintiff's First Request for Production of Documents. Furthermore, included in this package is a true and correct copy of the hard drive(s) concerning my client's computers/laptops.

Additionally, this will acknowledge that Answers to Interrogatories have been forwarded previously by email on December 20, 2012

I trust that you will be withdrawing your Motion to Compel.

Very truly yours,

RONALD A. SMITH

RAS/bjp  
Enc.(s)