

**UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF OHIO**

_____	)	
MALIBU MEDIA, LLC,	)	
	)	
Plaintiff,	)	
	)	Case No.: 2:14-cv-00821-ALM-TPK
v.	)	
	)	
DAVID RICUPERO,	)	
	)	
Defendant.	)	
_____	)	

**DEFENDANT’S MOTION TO SUPPLEMENT THE RECORD  
PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 10(c)**

Defendant/Appellant, David Ricupero, through counsel, and, pursuant to Rule 10(c) of the Federal Rules of Appellate Procedure, hereby moves this Court to supplement the record with statements made during a status conference which took place on April 16, 2015. This conference was unrecorded and untranscribed.

Rule 10(c) provides that if “the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant’s recollection.” Fed.R.App.P. 10(c). “This procedure affords the appropriate method to augment the record and to resolve any factual disputes as to the evidence or proceedings in the trial court.” *United States v. Mills*, 597 F.2d 693, 698 (9th Cir. 1979).

The statement is based on counsel’s contemporaneously-recorded notes from the April 16 conference, as well as counsel’s recollection of the conference. The contents of the statements are necessary for the proper adjudication of Mr. Ricupero’s appeal.

**STATEMENT OF PROCEEDINGS OF APRIL 16, 2015**

1. On April 16, 2015, the Honorable Terrence Kemp, U.S. Magistrate Judge, participated in a status conference. *See*, Doc. 46.
2. The conference was conducted via phone, beginning at 2:45 pm and ending at 3:20 pm.

3. To undersigned's knowledge, the only attendees were himself, Malibu's counsel Mr. Faroniya and Magistrate Judge Kemp.
4. At the time of the conference, ten motions were pending before the Court. Of those ten motions, only Malibu's Motion to Compel [Doc. 36]; Ricupero's Motion for Protective Order re: Neighbors' Depositions [Doc. 39]; and Ricupero's Motion to Exclude the Neighbors' Depositions [Doc. 49] were addressed.
5. Fact discovery had been set to close on April 15, 2015. *See*, Doc. 15 pg. 2.
6. On March 30, 2015 at 10:38 pm Malibu noticed depositions of Ricupero's neighbors for April 10, 2015. *See*, Docs. 32, 33, 34 & 35. The depositions were made without first conferring with counsel and with less than 14 days notice. *See* Doc. 39-2 pgs. 2-3 (*citing* Fed.R.Civ.P. 30(b)(1) & 32(a)(5)(A)).
7. On March 31, 2015, Ricupero informed Malibu his counsel would be unavailable for the date chosen. Ricupero requested the notices be voluntarily withdrawn and a mutually agreeable date be set. *See*, Doc. 39-2. When Malibu refused to reschedule, Ricupero filed for a protective order. *See*, Doc. 39.
8. On April 13, 2015, undersigned contacted the reporting service, confirmed that the April 10 depositions had occurred. *See*, Doc. 52-1. On April 16, 2015, Ricupero moved to exclude the neighbors' deposition testimony and for a show cause order of contempt against Malibu. *See*, Doc. 49.
9. At the conference, the Court declined to sanction or otherwise find Malibu in contempt "because no order had issued." Ricupero agreed to withdraw the pleading. *See*, Doc. 52.
10. Because the neighbors' depositions were held prior to a ruling on Ricupero's motion for a protective order, Ricupero agreed to withdraw the pleading as moot. In addition, the Court stated "whether I allow the depositions to be used is another story."
11. Both Ricupero and Malibu understood the Court's statement to mean that it would *not* allow the neighbors' depositions to be used as part of the proceedings. *See e.g.* Doc. 78-24 pg. 3.

**CONCLUSION**

Mr. Ricupero respectfully requests that the Court grant its Motion and enter an Order approving the Statement of Proceeding set forth above, and to make such Order and this Motion a part of the record on appeal and to certify and forward them to the U.S. Court of Appeals forthwith.

Respectfully submitted,


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*Counsel for Defendant-Appellant*

I declare under penalty of perjury and under the laws of the United States of America that the foregoing is true and correct.

This the 30<sup>th</sup> day of August, 2016.

  
\_\_\_\_\_  
Jason E. Sweet

On August 30, 2016, before me, Maria Fontello, Notary Public, personally appeared Jason E. Sweet, personally known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person or the entity upon behalf of which that person acted, executed the instrument.

WITNESS my hand and official seal:



  
*Maria Fontello*

**MARIA FONTELLIO**  
Notary Public  
Commonwealth of Massachusetts  
My Commission Expires  
April 13, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2016 I filed the foregoing document through the Court's CM/ECF system, which will serve it on all counsel of record who have consented to electronic service.

*/s/ Jason E. Sweet*