

1 **BACKGROUND**

2 The underlying case involves alleged copyright infringement. In the motion
3 before the Court, Defendant Lamberson moves for attorney fees and costs pursuant
4 to 17 U.S.C. § 505, RCW 4.84.250, and Fed. R. Civ. P. 54(d)(2)(A).

5 In its previous order, this Court granted in part and reserved in part
6 Defendant’s motion for fees. ECF No. 99. This Court determined that Defendant
7 is entitled to “reasonable” attorney fees; however, the Court directed Defendant to
8 file detailed time records to justify his proposed attorney fees. *Id.* Defendant
9 submitted this proof on November 21, 2014, to justify his previously submitted fee
10 request. ECF Nos. 100, 100-1. Plaintiff continues to oppose the proposed fees,
11 contending that they lack sufficient detail and reliability and fail to exclude
12 improper entries. ECF No. 101.

13 **FACTS AND PROCEDURAL HISTORY**

14 Plaintiff Elf-Man, LLC, is a limited liability company that produced the
15 motion picture at issue in this matter, *Elf-Man*. Plaintiff originally sued Defendant
16 Lamberson, along with twenty-eight other defendants,¹ on March 22, 2013, in

17 _____
18 ¹ Defendants, originally identified as “Does,” are individual computer users,
19 identified by their IP addresses assigned by Internet Service Providers (“ISPs”) on
20 the date and time at which the infringing activity was observed.

1 Cause No. 13-CV-0115-TOR. On October 18, 2013, Defendant Lamberson moved
2 to sever the claims against him. The Court granted the motion on November 21,
3 2013, and opened the above-captioned case.

4 The First Amended Complaint alleges that Defendants, including
5 Lamberson, used BitTorrent, an interactive peer-to-peer file transfer technology
6 protocol to copy, download, share, and upload Plaintiff's motion picture, or
7 permitted, facilitated, or promoted such conduct by others. Plaintiff sued
8 Defendants, claiming copyright infringement, contributory infringement, and
9 indirect infringement of copyright, requesting statutory damages of \$30,000 for its
10 claims of infringement and contributory infringement, \$750.00 on its indirect
11 infringement claim, as well as injunctive and declaratory relief and reasonable
12 costs and attorney fees.

13 Defendant filed an Answer to Plaintiff's Amended Complaint on December
14 17, 2013, without awaiting a ruling on the motions to dismiss pending in Cause
15 No. 13-CV-0115-TOR. The Court held a telephonic scheduling conference on
16 December 19, 2013, and issued a Scheduling Order later the same day. ECF Nos.
17 16, 17. Defendant filed an Amended Answer on January 3, 2014. ECF No. 18.

18 On January 17, 2014, Plaintiff moved to dismiss several of the counterclaims
19 and affirmative defenses asserted in Defendant's Amended Answer. ECF No. 20.
20 Incorporated into this motion was a special motion to strike Defendant's state law

1 counterclaims for defamation, tortious interference with business relationships, and
2 for violations of the Washington Consumer Protection Act. Three days later,
3 Defendant filed a motion seeking to (1) withdraw its Amended Answer; (2)
4 dismiss Plaintiff's Amended Complaint for failure to state a claim under Rule
5 12(b)(6); and (3) as an alternative to dismissal of the Amended Complaint, for
6 leave to file a Second Amended Answer. ECF No. 21.

7 On January 22, 2014, the Court granted in part and denied in part the
8 motions to dismiss in Cause No. 13-CV-0115-TOR. This ruling dismissed, with
9 prejudice, Plaintiff's alternative cause of action for "indirect infringement" of its
10 copyright. *Elf-Man, LLC v. Charles Brown, et al.*, No. 13-CV-0115-TOR (E.D.
11 Wash. Jan. 22, 2014). In light of this ruling, Defendant withdrew the portion of his
12 motion to dismiss (ECF No. 21) seeking to withdraw his Amended Answer and
13 dismiss Plaintiff's Amended Complaint. Defendant did, however, indicate that he
14 still sought leave to file a Second Amended Answer. ECF No. 22.

15 On March 17, 2015, this Court denied Plaintiff's motion to strike as moot
16 considering that Defendant's Amended Answer eliminated the state law claims that
17 were the subject of the motion and granted Defendant leave to file a Second
18 Amended Answer. ECF No. 35. Immediately thereafter, Defendant filed his
19 Second Amended Answer, which alleged two counterclaims: (1) declaration of
20 non-infringement, and (2) declaration of copyright invalidity and unenforceability.

1 ECF No. 35. On March 31, 2014, Plaintiff moved (1) to dismiss Defendant's
2 counterclaims pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon
3 which relief can be granted; (2) to dismiss counterclaims and/or strike affirmative
4 defenses based upon allegations of fraud pursuant to Fed. R. Civ. P. 9(b); and (3)
5 to strike pursuant to Fed. R. Civ. P. 12(f) material in Defendant' Second Amended
6 Complaint on grounds that it is redundant, impertinent, and/or scandalous. ECF
7 No. 37.

8 Before the Court ruled on Plaintiff's motion, Plaintiff's initial counsel,
9 Maureen VanderMay, moved to withdraw as attorney. ECF No. 55. Shortly
10 thereafter, Plaintiff's new counsel, David A. Lowe, moved to dismiss with
11 prejudice all Plaintiff's claims asserted in this case. ECF No. 59. In response,
12 Defendant Lamberson consented to dismissal with prejudice, provided that
13 Plaintiff pay costs and reasonable attorney fees in advance. ECF No. 67. The
14 Court dismissed all claims with prejudice and all counterclaims without prejudice,
15 but noted that it would consider Defendant's timely filed motion for attorney fees
16 and costs, if any. ECF No. 73.

17 Defendant subsequently moved for attorney fees and sanctions under Rule
18 11 and 28 U.S.C. § 1927. ECF Nos. 75, 78. In its Order, this Court granted in part
19 and reserved in part Defendant's motion for fees and denied Defendant's motion
20 for sanctions. ECF No. 99. This Court determined that Defendant is entitled to

1 “reasonable” attorney fees; however, without detailed time records, the Court was
2 unable to verify the reasonableness of the proposed fees. *Id.* at 9-11. The Court
3 directed Defendant to file detailed time records to justify his proposed attorney
4 fees. *Id.* at 11. Defendant submitted these records on November 21, 2014, along
5 with a lengthy narrative to justify the hours expended. ECF Nos. 100, 100-1.

6 DISCUSSION

7 A. Motion for Attorney Fees (ECF No. 75)

8 The Copyright Act contemplates an award of attorney fees and costs:

9 In any civil action under this title, the court in its discretion may allow
10 the recovery of full costs by or against any party other than the United
11 States or an officer thereof. Except as otherwise provided by this title,
the court may also award a reasonable attorney's fee to the prevailing
party as part of the costs.

12 17 U.S.C. § 505. Prevailing defendants as well as prevailing plaintiffs may be
13 awarded attorney fees. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

14 However, “attorney’s fees are to be awarded to prevailing parties only as a matter
15 of the court's discretion.” *Id.* ““There is no precise rule or formula for making
16 these determinations,’ but instead equitable discretion should be exercised ‘in light
17 of the considerations we have identified.’” *Id.* (quoting *Hensley v. Eckerhart*, 461
18 U.S. 424, 436-437 (1983)).

1 As stated in its previous Order, ECF No. 99, this Court determined
2 Defendant is entitled to an award of fees. Thus, this Court need only consider
3 whether Defendant's proposed fees are reasonable.

4 In calculating the reasonableness of attorney fees, the Ninth Circuit uses the
5 "lodestar" method, which involves multiplying the number of hours reasonably
6 expended on the claim or motion by a reasonable hourly rate. *Camacho v.*
7 *Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). When determining the
8 reasonableness of the attorney's proposed hourly rate, the district court looks to
9 hourly rates prevailing in the relevant legal community for similar work performed
10 by attorneys of comparable skill, experience, and reputation. *Ingram v. Oroudjian*,
11 647 F.3d 925, 928 (9th Cir. 2011) (per curiam). The "relevant legal community" is
12 generally the forum in which the district court sits. *Mendenhall v. NTSB*, 213 F.3d
13 464, 471 (9th Cir. 2000), *overruled on other grounds by Gonzalez v. Arizona*, 677
14 F.3d 383 (9th Cir. 2012). When determining the reasonableness of the hours
15 expended, a court should not consider hours that are "excessive, redundant, or
16 otherwise unnecessary." *See Hensley*, 461 U.S. at 434.

17 "Although in most cases, the lodestar figure is presumptively a reasonable
18 fee award, the district court may, if circumstances warrant, adjust the lodestar to
19 account for other factors which are not subsumed within it." *Camacho*, 523 F.3d at
20 978 (internal quotation marks and citation omitted). "The factors enunciated by

1 [the Ninth Circuit] in *Kerr* were intended to provide district courts with guidance
2 in making the determination of the number of hours reasonably expended on
3 litigation and the reasonable hourly rate.” *Chalmers v. City of L.A.*, 796 F.2d 1205,
4 1211 (9th Cir. 1986). Thus, once the court calculates the initial lodestar figure,
5 “the district court may consider other factors in determining whether to adjust the
6 fee upward or downward.” *Id.* at 1212 (citing *Hensley*, 461 U.S. at 434).² The
7 district court is guided by the following non-exclusive *Kerr* factors: (1) the time
8 and labor required; (2) the novelty and difficulty of the questions involved; (3) the
9 skill required to perform the legal service properly; (4) the preclusion of other
10 employment by the attorney due to acceptance of the case; (5) the customary fee;
11 (6) whether the fee is fixed or contingent; (7) time limitations imposed by the
12 client or the circumstances; (8) the amount involved and the results obtained; (9)
13 the experience, reputation, and ability of the attorneys; (10) the ‘undesirability’ of
14 the case; (11) the nature and length of the professional relationship with the client;

15 ² Although several *Kerr* factors may be relevant to determine whether to adjust a
16 fee award after the initial lodestar calculation, “[t]he Supreme Court has noted . . .
17 that the *Kerr* factors are largely subsumed within the initial calculation of
18 reasonable hours expended at a reasonable hourly rate, rather than the subsequent
19 determination of whether to adjust the fee upward or downward.” *Chalmers*, 796
20 F.2d at 1212 (citing *Hensley*, 461 U.S. at 434 n. 9).

1 and (12) awards in similar cases. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67,
2 70 (9th Cir. 1975); *Jordan v. Multnomah Cnty.*, 815 F.2d 1258, 1264 n.11 (9th Cir.
3 1987) (noting that the district court need not address every *Kerr* factor).

4 The calculation of reasonable hours and hourly rate is entrusted to the
5 discretion of the Court applying the principles set forth in *Hensley v. Eckerhart*, in
6 light of the court's first-hand contact with the litigation and attorneys involved.
7 *Costa v. Comm'r of Soc. Sec. Admin.*, 690 F.3d 1132, 1135 (9th Cir. 2012). Where
8 the Court reduces the requested fees by a significant amount, it should "provide a
9 specific articulation of its reasons for reducing the award." *Id.* at 1135, 1136.

10 Here, Defendant requests a total fee award of \$217,880. *See* ECF No. 106 at
11 7. Defendant requests 450.2 hours for attorney Mr. Lynch at an hourly rate of
12 \$400; 87 hours for attorney Mr. Smith at an hourly rate of \$300, and 46.8 hours for
13 attorney Mr. Barney at an hourly rate of \$250.³ *Id.* Defendant's counsel reports
14 that they spent 584 total hours on this case, *id.*, which includes, among other tasks,
15 interviewing and conferring with Mr. Lamberson; reviewing relevant pleadings,
16 briefs, and other court documents; outlining strategy, motions, and supporting
17 documents; conducting research; drafting answers, motions, and accompanying

18 ³ Defendant's counsel acknowledges that Mr. Lamberson was billed at the
19 following reduced rates: \$250 per hour for Mr. Lynch, and \$200 per hour for
20 Messrs. Smith and Barney. ECF No. 75 at 7.

1 documents; complying with discovery; investigating other copyright cases; and
2 generally investigating the merit of Plaintiff's claims. *See* ECF No. 100-1.

3 Plaintiff sets forth the following points in opposition to Defendant's motion.
4 First, it faults Defendant for not providing reliable, contemporaneous time records;
5 instead, Plaintiff asserts that Defendant's counsel reconstructed their work based
6 on "ECF records" and the "court docket." ECF No. 101 at 4-6. Second, Plaintiff
7 faults Defendant's counsel for failing to provide time actually billed to the client,
8 such as proof of actual invoices. *Id.* at 6. Third, Plaintiff faults Defendant's
9 counsel for using "block billing,"⁴ which prevents the Court from separating
10 activities which are fairly recoverable from those that are not. *Id.* at 7. Finally,
11 Plaintiff faults Defendant's counsel for failing to make a "good faith" effort to
12 exclude improper fees, such as time spent on failed claims and unnecessary
13 research. *Id.* at 7-16.

14 This Court has thoroughly reviewed the itemized billing submitted by
15 Defendant's counsel, as well as Plaintiff's detailed opposition, and finds the
16 following regarding the proposed award.

17 ⁴ "Block billing is the time-keeping method by which each lawyer and legal
18 assistant enters the total daily time spent working on a case, rather than itemizing
19 the time expended on specific tasks." *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942,
20 945 n.2 (9th Cir. 2007).

1 1. Reasonableness of Hours Expended

2 Regarding the number of hours reasonably expended, this Court finds a
3 significant reduction is warranted. This Court is persuaded by several, though not
4 all, of Plaintiff's arguments. As an initial matter, the Court finds Defendant's
5 summarization of time records sufficiently reliable as evidence of hours spent on
6 this case and time actually billed to Mr. Lamberson.⁵ See ECF No. 104 at ¶¶ 6, 7
7 (“[H]ours requested for this award were all billed to Mr. Lamberson”).

8 First, Defendant should not receive fees for his unsuccessful motion for
9 sanctions and state law counterclaims. *Sorenson v. Mink*, 239 F.3d 1140, 1147
10 (9th Cir. 2001) (“The first step is to consider whether the [party] failed to prevail

11 ⁵ It is worth noting that Plaintiff's counsel's recent attorney fee request to this
12 Court in related litigation did not provide this Court with copies of invoices or
13 other proof of time actually billed to Elf-Man, LLC. *Elf-Man, LLC*, No. 13-CV-
14 0115-TOR (ECF No. 127). Further, as to the charge that Defendant's records were
15 not contemporaneously recorded, the Ninth Circuit has explicitly stated that “fee
16 requests can be based on ‘reconstructed records developed by reference to
17 litigation files.’” *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000).
18 Thus, to the extent Defendant's counsel referenced past court documents to help
19 reconstruct their fee record timeline, the Court finds such practice to be
20 permissible.

1 on claims that were unrelated to the claims on which he succeeded . . . Hours
2 expended on unrelated, unsuccessful claims should not be included in an award of
3 fees.”) (internal quotation marks and citation omitted); *Lahiri v. Universal Music*
4 *& Video Distrib. Corp.*, 606 F.3d 1216, 1222 (9th Cir. 2010) (noting that the fee
5 award is limited to fees incurred in defending against a copyright infringement
6 claim and excludes expenses for dismissed Lanham Act and unfair competition
7 claims). Although a prevailing party need not prevail on each matter in order to be
8 entitled to full fees, *see Hensley*, 461 U.S. at 435, this is not such a case.

9 The Court finds time spent preparing the state law counterclaims, and
10 subsequently withdrawing them following Plaintiff’s motion to strike, should be
11 excluded. Because Defendant’s counsel repeatedly billed time spent on these
12 counterclaims with other tasks, the Court within its discretion excludes a portion of
13 the itemized billing regarding these counterclaims. Thus, of the more than 30
14 hours of block billing, which included time spent on drafting these counterclaims
15 and researching and subsequently drafting the notice of withdrawal, this Court
16 finds a reduction is warranted. Accordingly, 16 of Mr. Lynch’s proposed hours are
17 excluded and 6 of Mr. Smith’s hours are excluded from the proposed total.

18 Further, the Court finds time spent researching and briefing the unsuccessful
19 motions for sanction should also be excluded. Again, this Court must within its
20 discretion exclude a portion of the itemized billing regarding these counterclaims

1 because of the use of block billing. Thus, of the approximately 60 hours billed by
2 Mr. Lynch, the majority of which included time spent on researching and drafting
3 his motion for sanctions, supporting declarations, and reply briefs, this Court finds
4 a 75% reduction is warranted. Accordingly, 45 hours of Mr. Lynch's proposed
5 hours are excluded from the proposed total. In addition, this Court excludes 3
6 hours billed by Mr. Barney for drafting the briefing in support of the motions for
7 sanctions.

8 Second, Defendant should not receive fees for the hours counsel spent
9 drafting the supplemental information requested by this Court because of
10 Defendant's previously deficient request. If Defendant's counsel had provided
11 these detailed time entries in their native format, or even devised a more efficient
12 way of maintaining these records, Defendant's counsel would not have expended
13 over 20 hours on this task, which is in addition to the original motion for fees and
14 declaration in support. *See Lahiri*, 606 F.3d at 1223 (upholding the district court's
15 decision to exclude fees incurred because of court-requested supplemental
16 information). Accordingly, 20 hours of Mr. Lynch's proposed hours are excluded
17 from the proposed total.

18 Third, this Court excludes all hours that are "excessive, redundant, or
19 otherwise unnecessary," from Defendant's proposed award. *See Hensley*, 461 U.S.
20 at 434. Defendant's counsel spent over 200 hours investigating whether there is a

1 “real party in interest” other than Elf-Man, LLC; researching the involvement of
2 foreign third parties, such as Guardelay and APMC; researching whether Mr.
3 Griffin, an investigator in numerous other BitTorrent cases, is fictitious, and thus
4 perpetrating a fraud on the judicial system; and investigating whether Vision Films
5 was a necessary party.⁶ Mr. Lynch alone logged over 180 of these hours,
6 primarily investigating whether the potentially fraudulent investigator Mr. Griffin
7 had committed a fraud on the court in other cases. Because this case was
8 voluntarily dismissed before the relevance of these pursuits became clear, this
9 Court is unable to determine that such tasks were completely unnecessary.

10 However, based on the time entries and the procedural posture this case ultimately
11 reached, Defendant’s counsel’s pursuit of these topics, particularly Mr. Lynch’s,
12 can properly be characterized as excessive and not reasonably billed to a client.

13 *See Moreno v City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008) (“The
14 number of hours to be compensated is calculated by considering whether, in light
15 of the circumstances, the time could reasonably have been billed to a private
16 client.”). Accordingly, the Court will reduce as excessive 144 of Mr. Lynch’s
17 hours, 6 hours of Mr. Smith’s hours, and 10 hours of Mr. Barney’s (e.g., Mr.

18 ⁶ Because Defendant’s counsel used block billing, it is impossible for this Court to
19 determine what portion of these time entries was dedicated specifically to these
20 issues.

1 Barney unnecessarily spent 4 hours comparing signatures while selecting exhibits,
2 7/16-17/2014), while allowing for a reasonable fee for the other tasks described in
3 the block billings.

4 Finally, this Court finds a further reduction appropriate considering
5 Defendant's extensive use of block-billing. Because block-billing makes it more
6 difficult for the district court to determine whether the time spent on each activity
7 was reasonable, a court may, within its discretion reduce the proposed hours.
8 *Welch*, 480 F.3d at 948. That being said, the court must explain why the specific
9 reduction "fairly balances" the hours that were actually billed in block format. *Id.*
10 (quoting *Sorenson*, 239 F.3d at 1146); *see Lahiri*, 606 F.3d at 1222-23 (upholding
11 the district court's reduction, which determined that approximately 80% of the
12 entries used block-billing and thus finding it reasonable to reduce 80% of the
13 attorneys' entries by 30%).

14 Approximately 75% of Defendant's counsel's time entries contain some
15 degree of block billing. Although the Court finds the tasks listed generally
16 reasonable (other than the ones already discussed above), it cannot verify that the
17 time spent on each specific task is similarly justified. This Court finds it
18 appropriate to reduce 75% of each attorney's remaining proposed hours (that is, the
19 hours remaining after applying the reductions detailed above) by 20% as this Court
20 cannot accurately verify the reasonableness of time spent on specific tasks.

1 Accordingly, Mr. Lynch's hours, already reduced to 225.2 hours, are further
2 reduced to 191.4 hours (i.e., using the equation $225.2 - (225.2 \times 75\% \times 20\%)$); Mr.
3 Smith's hours, already reduced to 75 hours, are further reduced to 63.8; and Mr.
4 Barney's hours, already reduced to 33.8, are further reduced to 28.7.

5 This Court finds all other hours reasonably charged, including hours spent
6 moving to sever, researching other BitTorrent cases to help assess the merit of
7 Plaintiff's claims, time spent after Defendant declined Plaintiff's settlement terms,
8 briefing drafted after Plaintiff moved to voluntarily dismiss the case but before the
9 Court granted such dismissal, and what Plaintiff characterizes as duplicative time
10 entries. As the Ninth Circuit has recognized, "sometimes 'the vicissitudes of the
11 litigation process' will require lawyers to duplicate tasks." *Costa*, 690 F.3d at
12 1136 (quoting *Moreno*, 534 F.3d at 1113). Consequently, "[f]indings of
13 duplicative work should not become a shortcut for reducing an award without
14 identifying just why the requested fee was excessive and by how much." *Id.*
15 (quoting *Moreno*, 534 F.3d at 1113). This Court does not find any of Defendant's
16 counsel's time entries unnecessarily duplicative; although some entries indicate
17 that more than one attorney worked on the same or similar task—such as reviewing
18 court documents, revising briefing, and completing discovery—the litigation
19 process requires as much. *See Moreno*, 534 F.3d at 1113. Accordingly, this Court
20 is not persuaded that any reduction for duplicative or redundant work is warranted.

1 2. Reasonableness of Rates

2 Second, regarding the reasonableness of the proposed rates, this Court finds
3 the proposed billing rates of Mr. Lynch and Mr. Barney—\$400 per hour and \$250
4 per hour, respectively—to be commensurate with prevailing market rates in the
5 Eastern District of Washington and thus reasonable. This Court finds Mr. Smith’s
6 customary billing rate, \$270 per hour for litigation and corporate work, rather than
7 his proposed rate, \$300 per hour, to be reasonable. The Court’s finding is based on
8 sufficient explanation provided by Defendant and its own review. *See Ingram*, 647
9 F.3d at 928 (holding that a district court can rely on its own knowledge and
10 experience when determining a reasonable hourly rate for the services performed).

11 Mr. Lynch has twenty-five years of intellectual property practice and has
12 been counsel of record in numerous patent, trademark, and copyright matters. ECF
13 No. 68 at 9. Although Mr. Lynch’s standard billing rate is \$490 per hour and he
14 charged Mr. Lamberson \$250 per hour in this action, he has requested \$400 per
15 hour. ECF Nos. 68 at 9-10, 100 at 2. Mr. Smith has practiced since 2007 in the
16 corporate, litigation, and life-sciences groups. ECF No. 68 at 10. Mr. Smith’s
17 customary billing rate is \$270 per hour for litigation and corporate work; however,
18 he only charged Mr. Lamberson \$200 per hour in this action. ECF No. 68 at 10.
19 Here, Mr. Smith requests \$300 per hour but without sufficient explanation to
20 warrant an increase from his standard billing rate for similar work. ECF No. 100 at

1 2. Mr. Barney is a recent law graduate who practices in the trademark, copyright,
2 and litigation practice groups. ECF No. 68 at 10. Mr. Barney's customary billing
3 rate is \$260 per hour; however, he only charged Mr. Lamberson \$200 per hour in
4 this action. ECF No. 68 at 10-11. Here, Mr. Barney requests \$250 per hour. ECF
5 No. 100 at 2.

6 Plaintiff urges the Court to award the rates actually billed to Mr. Lamberson.
7 However, the Ninth Circuit has repeatedly admonished district courts who
8 determine the reasonableness of an hourly rate with reference to the rate actually
9 charged. *See e.g., Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 908
10 (9th Cir. 1995) ("This determination is not made by reference to rates actually
11 charged the prevailing party. Rather, the Court should be guided by the rate
12 prevailing in the community for similar work performed by attorneys of
13 comparable skill, experience, and reputation.") (internal quotation marks and
14 citation omitted). Although Defendant's counsel charged Mr. Lamberson a
15 reduced rate, the proposed billing rates for Messrs. Lynch and Barney and the
16 standard billing rate for Mr. Smith are appropriate considering each counsel's
17 respective experience and skill and the experience and skill required to defend this
18 particular matter.

19 Accordingly, the Court finds the following to be a reasonable initial lodestar
20 calculation: (1) 191.4 hours for Mr. Lynch at \$400 per hour; (2) 63.8 hours for Mr.

1 Smith at \$270 per hour; and (3) 28.7 hours for Mr. Barney at \$250 per hour.

2 Because this Court finds that none of the Kerr factors warrant an additional
3 reduction or multiplier, *see Chalmers*, 796 F.2d at 1212 (noting that a district court
4 “may” consider other factors in determining whether to adjust the fee upward or
5 downward but that such factors are largely subsumed within the initial calculation),
6 Defendant is entitled to \$100,961 in attorney fees.

7 3. Costs

8 The Court finds the following otherwise untaxable costs pursuant to 17
9 U.S.C. § 505 to be compensable: (1) \$24.63 for postage and federal express; (2)
10 \$9.74 for a copy of the Elf-Man Video.⁷ ECF No. 75 at 8; *see Trustees of Const.*
11 *Indus & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253,
12 1257 (9th Cir. 2006) (discussing the well-established rule that “reasonable out-of-
13 pocket litigation expenses that would normally be charged to a fee paying client”
14 are recoverable).

15 Defendant seeks the cost of the court reporter fee associated with a
16 deposition; however, Plaintiff’s counsel, Mr. Lowe, notified Defendant of his

17 ⁷ Defendant’s Bill of Costs filed pursuant to 28 U.S.C. §§ 1920, 1923 (ECF No.
18 77) was separately addressed by the Clerk of Court pursuant to Local Rule 54.1.
19 ECF No. 109. The Clerk awarded Defendant \$66.94 for photocopying, \$105.13
20 for service of summons and subpoena, and \$20 for the docket fee. *Id.*

1 unavailability and need to reschedule this deposition. ECF No. 101 at 12.

2 Although the parties dispute whether Defendant's counsel agreed to the
3 cancellation, ECF Nos. 104 at 17, Defendant does not dispute that Mr. Lowe made
4 his unavailability known. Thus, because it was not reasonable to nonetheless incur
5 this fee, this Court declines to award Plaintiff \$154.50 for the court reporter.

6 Defendant also seeks the cost of PACER charges incurred to examine "each
7 of the Elf-Man, LLC lawsuits; the other Vision Films cases; cases where the
8 witnesses or companies coordinating the witnesses were the same as in this case;
9 other BitTorrent cases filed by Ms. VanderMay, Mr. Crowell, and Mr. Lowe; the
10 action by a falsely accused BitTorrent defendant against GuardaLey and its related
11 parties; claims for secondary copyright liability; claims for attorneys' fees and
12 sanctions in copyright matters; the form of counterclaims, declarations, motions,
13 arguments, fee requests, sanctions requests, and the like in other BitTorrent cases
14 throughout the country" ECF No. 76 at 3-4. Although the Court does not
15 question whether Defendant incurred these costs, the Court is not convinced that
16 they were *reasonably* incurred. Thus, this Court declines to award \$931.60 in
17 PACER costs.

18 Accordingly, under the Copyright Act, Defendant is entitled to \$34.37 in
19 what would otherwise be untaxable costs.

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1 4. Immediate Payment

2 Plaintiff requests immediate payment of costs and attorney fees. ECF No.
3 75 at 8. Federal Rule of Civil Procedure 62(a) provides that “no execution may
4 issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have
5 passed after its entry.” Fed. R. Civ. P. 62(a). Accordingly, this Court declines to
6 order immediate payments of costs and attorney fees. Defendant may seek
7 enforcement of this Order, if need be, 14 days after its entry.

8 **B. Plaintiff’s Motion to Strike (ECF No. 105)**

9 Plaintiff moves to strike several paragraphs of Mr. Lynch’s supplemental
10 declaration in support of his motion for attorney fees, as well as the accompanying
11 exhibits on several grounds, including that they contain hearsay, speculation,
12 improper argument, and inflammatory allegations. ECF No. 105.

13 The Court finds Mr. Lynch’s declaration permissible to the extent it helps
14 justify the reasonableness of the time records. However, to the extent Mr. Lynch’s
15 declaration (ECF No. 104-1) or reply brief (ECF No. 103) aim to relitigate
16 allegations that formed the basis of Defendant’s motions for sanctions or otherwise
17 unnecessarily accuse Plaintiff of fraudulent or unethical behavior, the Court does
18 not find these statements particular relevant or helpful to its determination of
19 reasonable fees. Likewise, the attached exhibits, which include declarations from
20 out-of-district cases and internet articles concerning other BitTorrent cases, are

1 similarly irrelevant and unhelpful to the particular matter at hand. *See* ECF Nos.
2 104-2 to 104-5. Therefore, Plaintiff's Motion (ECF No. 105) is **DENIED**.

3 **ACCORDINGLY, IT IS HEREBY ORDERED:**

4 1. Defendant's Motion for Attorneys' Fees (ECF No. 175) is **GRANTED**
5 **in part and DENIED in part**. Defendant is awarded attorney fees in the amount
6 of \$100,961. Defendant is awarded statutory costs pursuant to 17 U.S.C. § 505 in
7 the amount of \$34.37.

8 2. Plaintiff's Motion to Strike (ECF No. 105) is **DENIED**.

9 The District Court Executive is hereby directed to enter this Order and
10 provide copies to counsel. Since the Clerk of Court has taxed costs pursuant to
11 LR 54.1, an Amended Judgment shall be entered for the total amount of fees
12 (\$100,961) and total amount of costs (\$226.44), accruing statutory interest and the
13 file shall then be **CLOSED**.

14 **DATED** January 9, 2015.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge