

1 Kirk D. Miller, WSBA #40025  
Attorneys for Intervenor Center for Justice  
2 KIRK D. MILLER, P.S.  
421 W. Riverside Avenue, Suite 660  
3 Spokane, Washington 99201-0410  
Telephone: (509) 413-1494  
4 Facsimile: (509) 413-1724  
Email: kmiller@millerlawspokane.com  
5  
6

7 U.S. DISTRICT COURT  
8 EASTERN DISTRICT OF WASHINGTON

9 ELF-MAN, LLC,

Plaintiff,

10 vs.

11 RYAN LAMBERSON, an individual,

12 Defendant.  
13  
14  
15  
16  
17  
18  
19  
20

NO: 2:13-cv-00395-TOR

**INTERVENOR CENTER FOR  
JUSTICE'S MOTION TO UNSEAL  
EXHIBITS**

**Note on Motion Calendar: 11/30/17**

6:30 PM - Without Oral Argument

INTERVENOR CENTER FOR JUSTICE'S MOTION  
TO UNSEAL EXHIBITS  
CASE NO: 2:13-cv-00395-TOR

**TABLE OF CONTENTS**

**Page No.**

I. INTRODUCTION ..... 1

II. STATEMENT OF FACTS ..... 2

III. AUTHORITY AND ARGUMENT ..... 3

    A. Keeping the Exhibits Under Seal Violates the Public’s  
Common Law and First Amendment Rights of Access..... 3

        1. The Public Has a Presumptive Right Of Access To  
Court Records ..... 3

        2. The Court Should Apply The “Compelling Reasons”  
Standard ..... 5

            a. Documents Connected to Elf-Man’s Motion  
to Dismiss ..... 5

            b. Documents Connected to Elf-Man’s  
Investigators..... 6

            c. A Document Connected to the Court’s Order  
on Sanctions..... 8

        3. No Good Cause Exists that Would Justify Sealing  
The Records In This Case ..... 8

    B. The Documents Should Be Unsealed Without Delay ..... 10

IV. CONCLUSION ..... 10

**TABLE OF AUTHORITIES**

**Page No.**

**FEDERAL CASES**

1

2

3

4 *BT Collective v. IP Holdings, LLC,*  
2011 U.S. Dist. LEXIS 135549, 2011 WL 5873388 (S.D. Cal.  
5 Nov. 23, 2011) .....6

6 *Center for Auto Safety v. Chrysler Group, LLC,*  
809 F.3d 1092 (9th Cir. 2016) .....4

7

8 *Courthouse News Serv. v. Planet,*  
750 F.3d 776 (9th Cir. 2014) .....1, 4, 10

9 *Foltz v. State Farm Mut. Auto. Ins. Co.,*  
331 F.3d 1122 (9th Cir. 2003) .....9

10

11 *In re PPA Prods. Liab. Litig.,*  
460 F.3d 1217 (9th Cir. 2006) .....6

12 *Ingenuity13 LLC v. Doe,*  
651 F. App'x 716 (9th Cir. 2016).....8

13

14 *Joy v. North,*  
692 F.2d 880 (2d Cir. 1982) .....7

15 *Kamakana v. City & Cnty. of Honolulu,*  
447 F.3d 1172 (9th Cir. 2006) .....1, 4, 9, 10

16

17 *Lugosch v. Pyramid Co. of Onondaga,*  
435 F.3d 110 (2d Cir. 2006) .....10

18 *Nixon v. Warner Commc'ns,*  
435 U.S. 589 (1978) .....1, 3

19

20

1 *Orlob-Radford v. Midland Funding LLC*,  
     No. 2:15-CV-00307-JLQ, 2016 WL 5859002 (E.D. Wash.  
 2      Oct. 5, 2016) .....4

3 *Perez v. Lantern Light Corp.*,  
     No. C12-1406RSM, 2017 WL 2172012 (W.D. Wash. May 17, 2017) .....10  
 4

5 *Perry v. Brown*,  
     667 F.3d 1078 (9th Cir. 2012) .....5

6 *San Jose Mercury News, Inc. v. U.S. Dist. Court*,  
     187 F.3d 1096 (9th Cir. 1999) .....8, 9  
 7

8 *Wood v. Ryan*,  
     759 F.3d 1076 (9th Cir. 2014) .....4, 5

**FEDERAL RULES**

9  
10  
11 Fed. R. Civ. P. 26(c) .....9  
12  
13  
14  
15  
16  
17  
18  
19  
20

1 **I. INTRODUCTION**

2 In the interest of providing greater access to justice and creating more  
3 transparency in the judicial system, the Center for Justice (“CFJ”) files this  
4 motion to unseal. The court records that the CFJ seeks to make public were sealed  
5 in violation of the public’s presumptive right of access to court records—a right  
6 protected by both the common law and the First Amendment. *See Nixon v.*  
7 *Warner Commc’ns*, 435 U.S. 589, 597 (1978); *Courthouse News Serv. v. Planet*,  
8 *750 F.3d 776, 787-78 (9th Cir. 2014)*; *Kamakana v. City & Cnty. of Honolulu*,  
9 *447 F.3d 1172, 1178 (9th Cir. 2006)*.

10 Defendant Ryan Lamberson, a Spokane resident, was sued for allegedly  
11 infringing a film that he had never heard of. ECF No. 19 at ¶ 5-6, 10. Amidst  
12 concerns about the rise of “copyright trolling,” Lamberson’s case presents a rare  
13 and important opportunity for the public to understand the scope of the problem.

14 As such, there is simply no overriding interest in favor of keeping secret six  
15 court documents that may help explain how innocent Washingtonians continue to  
16 find themselves named as defendants in copyright infringement lawsuits. Nor did  
17 this Court make any particularized findings that the parties’ need for secrecy  
18 outweighed the public’s presumptive right of access. That was error. Unless the  
19 requisite showing and findings are made, the records should be unsealed.

1 **II. STATEMENT OF FACTS**

2 Plaintiff Elf-Man, LLC sued Lamberson under federal copyright law,  
3 alleging that it had recorded Lamberson copying and publishing the motion  
4 picture *Elf-Man* via BitTorrent, an interactive peer-to-peer file transfer  
5 technology. ECF Nos. 1 at ¶ 60 and 2 at ¶ 137.

6 Maintaining his innocence, Lamberson offered to have his personal  
7 computer forensically inspected. ECF No. 18 at ¶ 16. Eventually, Lamberson  
8 counterclaimed, alleging Elf-Man, LLC is part of an unlawful scheme to falsely  
9 accuse residents of violating federal copyright law. *Id.* at 41, 43.

10 This Court granted the parties’ stipulated motion for a boilerplate  
11 protective order. ECF No. 32. That protective order allows a producing party to  
12 designate documents as “confidential” and file them under seal if it has a “good  
13 faith basis for asserting” they are “confidential under the applicable legal  
14 standards” ECF No. 23-1 at 2. The order is silent on how nonparties may  
15 challenge a designation of confidentiality. *Id.* at ¶ 11.

16 Based on the unsealed exhibits and declarations, it appears that Elf-Man  
17 has links to a discredited German operation that provides both the lawyers  
18 representing film companies and the “investigators” that claim to identify  
19 infringing activities—its investigators apparently have a direct financial interest  
20

1 and the software used to detect these infringing activities is questionable at best.  
2 ECF Nos. 53 at ¶ 9; 57 at 3,7; 58 at ¶¶ 4, 5; 64 at 3.

3 The public deserves to know if foreign entities and local lawyers are  
4 feeding on the subpoena power of federal courts to extract settlements from  
5 innocent people. To this end, CFJ requests this Court unseal six key documents,  
6 filed separately under seal at ECF Nos. 40-1, 40-2, 44-5, 52-2, 66-2, and 85-2. All  
7 of these documents were filed under seal without obtaining leave of court. Other  
8 than the blanket protective order, the parties did not articulate a need for secrecy,  
9 the Court made no specific findings that would outweigh the public’s right of  
10 access to court records, and there is no evidence that the parties explored  
11 alternatives to filing under seal.

### 12 III. AUTHORITY AND ARGUMENT

#### 13 A. Keeping the Exhibits Under Seal Violates the Public’s Common Law 14 and First Amendment Rights of Access.

##### 15 1. The Public Has a Presumptive Right Of Access To Court Records.

16 Both the United States Supreme Court and Ninth Circuit recognize a  
17 common law right of the public “to inspect and copy public records and  
18 documents, including judicial records and documents.” *Nixon*, 435 U.S. at 597 &  
19 n.7. Unless a document is of the type “traditionally kept secret”—such as a grand  
20 jury transcript or a pre-indictment warrant—there is “a strong presumption in

1 favor of access” to court records. *Kamakana*, 447 F.3d at 1178 (internal quotation  
2 marks omitted). The presumption of access is “based on the need for federal  
3 courts, although independent – indeed, particularly because they are independent  
4 – to have a measure of accountability and for the public to have confidence in the  
5 administration of justice.” *Center for Auto Safety v. Chrysler Group, LLC*, 809  
6 F.3d 1092, 1096 (9th Cir. 2016) (“*Chrysler*”) (quotation omitted).

7         While the presumption in favor of access is especially strong vis-à-vis  
8 documents attached to dispositive motions, “public access to filed motions and  
9 their attachments does not merely depend on whether the motion is technically  
10 ‘dispositive.’” *Orlob-Radford v. Midland Funding LLC*, No. 2:15-CV-00307-  
11 JLQ, 2016 WL 5859002, at \*8 (E.D. Wash. Oct. 5, 2016) (citing  
12 *Chrysler*, 809 F.3d at 1101). The test is “whether the motion is more than  
13 tangentially related to the merits of a case.” *Id.* Thus, if the motion at issue is  
14 “more than tangentially related to the merits of a case” then sealing the document  
15 requires “compelling reasons.” *Id.* (citing *Chrysler*, 809 F.3d at 1102). For all  
16 other documents, sealing still requires parties to make a particularized showing of  
17 good cause. *Chrysler*, 809 F.3d at 1097; *Kamakana*, 447 F.3d at 1180.

18         In addition to the common law right of access, the First Amendment  
19 protects the public’s right of access to the court records in this case. *See*  
20 *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786-78 (9th Cir. 2014); *Wood v.*



1 *Ryan*, 759 F.3d 1076, 1081-82 (9th Cir. 2014), *vacated on other grounds*, 135 S.  
2 Ct. 21 (2014) (“[W]e recently acknowledged the First Amendment right of access  
3 to civil proceedings and associated records and documents.” (internal quotation  
4 marks omitted)). The First Amendment standard is even more demanding. A  
5 party seeking to seal documents must demonstrate not only a “compelling  
6 interest” in sealing, but also a “high probability” that this interest would be  
7 harmed if the documents were disclosed and that “there are no alternatives to  
8 closure that would adequately protect the compelling interest.” *Perry v. Brown*,  
9 667 F.3d 1078, 1088 (9th Cir. 2012) (internal quotation marks omitted).

10 2. The Court Should Apply The “Compelling Reasons” Standard.

11 The exhibits that CFJ seeks to unseal were filed in connection with: (1) Elf-  
12 Man’s motion to dismiss Lamberson’s counterclaims (ECF No. 37); (2)  
13 Lamberson’s motions to compel discovery (ECF Nos. 42 and 57); and (3)  
14 Lamberson’s motion for sanctions under Rule 11 (ECF No. 80). All of these  
15 motions are directly related to the merits of the case. *See Chrysler*, 809 F.3d at  
16 1099. Therefore, the “compelling reasons” standard applies to all of these  
17 documents.

18 a. *Documents Connected to Elf-Man’s Motion to Dismiss*

19 First, the CFJ requests access to two documents filed under seal in  
20 connection with Elf-Man’s motion to dismiss Lamberson’s counterclaims. *See*

1 ECF Nos. 40-1 and 40-2. The documents—which apparently chronicle Elf-Man,  
2 LLC’s assignment of a financial interest in the film to a company called Vision  
3 Films, LLC—will elucidate whether Elf-Man, LLC failed to disclose parties with  
4 a direct financial interest in the outcome of the litigation. Motions to dismiss are  
5 dispositive motions, and documents connected with such motions are public  
6 unless there are “compelling reasons” to decide otherwise. *See In re PPA Prods.*  
7 *Liab. Litig.*, 460 F.3d 1217, 1231 (9th Cir. 2006); *BT Collective v. IP Holdings,*  
8 *LLC*, 2011 U.S. Dist. LEXIS 135549, 2011 WL 5873388, at \*12-13 (S.D. Cal.  
9 Nov. 23, 2011) (holding a dispositive motion need not “tackle the merits of a case  
10 before it serves the public’s understanding of the judicial process such that a  
11 presumption of access should attach”); *Chrysler*, 809 F.3d at 1102 (noting the  
12 right of access does not turn on the motion’s final result). As the records are  
13 connected with a motion to dismiss, they should be unsealed.

14 *b. Documents Connected to Elf-Man’s Investigators*

15 The CFJ next requests the unsealing of three exhibits related to  
16 Lamberson’s motions to compel discovery regarding Elf-Man’s relationship to its  
17 investigators and the software they used to “observe” Lamberson’s alleged  
18 infringing activities, filed separately under seal at ECF Nos. 44, 52, and 66. The  
19 parties must show compelling reasons for maintaining the secrecy of these three  
20 exhibits because they cut to the core of Elf-Man’s and Lamberson’s claims

1 against one another. *Chrysler*, 809 F.3d at 1098-99 (finding that the standards  
2 courts apply turn on the relevance of the documents to the substantive merits of a  
3 case—not on the relief sought); *Oliner*, 745 F.3d at 1026.

4 Elf-Man, through its “sales agent,” retained a company called Anti-Piracy  
5 Management Company (“APMC”) to file copyright infringement lawsuits like the  
6 one against Lamberson. ECF No. 57 at 3. The record suggests that APMC is an  
7 entity that both harvested the BitTorrent data and managed the Lamberson  
8 litigation behind the scenes. ECF No. 64 at 5-6. It appears APMC regularly  
9 prepares declarations to support motions for expedited discovery from a man  
10 named Daniel Macek, the same investigator that Elf-Man identified as a witness  
11 to infringing activity in Lamberson. ECF Nos. 42 at 2, 64 at 5-6. The requested  
12 documents promise to elucidate the relationship between Elf-Man, its lawyers and  
13 the investigators it hired to make representations to the Court—all of which form  
14 “the basis for the adjudication, [so] only the most compelling reasons can justify  
15 the total foreclosure of public and professional scrutiny.” *Joy v. North*, 692 F.2d  
16 880, 894 (2d Cir. 1982) (cited by *Oliner*, 745 F.3d at 1027) (emphasis added).

17 CFJ cannot conceive of any “compelling interests” that would be strong  
18 enough to justify the continued sealing of exhibits that shed light on the  
19 questionable arrangement between film companies and the “investigators”  
20 purporting to catch infringers in the act. The records should be unsealed.

1           c.       *A Document Connected to the Court's Order on Sanctions*

2           Finally, the CFJ seeks to provide the public access to a printout of the  
3 illegal BitTorrent activity allegedly associated with Lamberson's IP address,  
4 which Elf-Man filed in response to Lamberson's motion for sanctions. ECF No.  
5 85. Not only did the Court appear to rely on Elf-Man's under-seal report when it  
6 declined to sanction Elf-Man's counsel, *see* ECF No. 99 at 19, but Lamberson's  
7 motion for sanctions is of statewide if not national interest. Indeed, the Ninth  
8 Circuit recently affirmed sanctions levied against a law firm for misusing the  
9 subpoena power of courts by filing multiple-Doe-defendant lawsuits to gain  
10 contact information for threatening demand letters. *See Ingenuity13 LLC v. Doe*,  
11 651 F. App'x 716, 718, 720 (9th Cir. 2016). Here, the BitTorrent activity that Elf-  
12 Man filed under seal is not only "more than tangentially related to the merits of a  
13 case," it purports to prove the very wrongful activity that Elf-Man alleged.  
14 *Chrysler*, 809 F.3d at 1102. Thus, Elf-Man must provide compelling reasons for  
15 the document to remain under seal.

16           3.       No Good Cause Exists To Justify Sealing The Records In This Case.

17           Alternatively, the Court should unseal the six records at issue because the  
18 parties failed to articulate good cause to seal them. A protective order does not  
19 authorize parties to seal court documents simply because they designated them as  
20 confidential in the course of discovery. *See San Jose Mercury News, Inc. v. U.S.*

1 *Dist. Court*, 187 F.3d 1096, 1101 (9th Cir. 1999) (noting that “blanket  
2 [protective] orders are inherently subject to challenge and modification, as the  
3 party resisting disclosure generally has not made a particularized showing of good  
4 cause with respect to any individual document.”); ECF No. 23-1 at 1 (noting that  
5 the parties’ agreement “does not presumptively entitle parties to file confidential  
6 information under seal.”). They must provide good cause to do so.

7 Here, the protective order does not define “confidential.” ECF No. 23-1 at  
8 ¶ 3. And there is no evidence in that record to show that any party provided good  
9 cause—a “particularized showing” that “specific prejudice or harm will result”—  
10 to justify sealing each court document in the first place. *See Foltz v. State Farm*  
11 *Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003) (quotation omitted); *see*  
12 Fed. R. Civ. P. 26(c). The parties’ blanket protective order, “unsubstantiated by  
13 specific examples or articulated reasoning,” does not satisfy Rule 26(c). *See*  
14 *Foltz*, 331 F.3d at 1130 (quoting *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d  
15 470, 476 (9th Cir. 1992)). Therefore, there was no “good cause” for keeping *any*  
16 of the court documents under seal, let alone “compelling reasons supported by  
17 specific factual findings,” as required in the Ninth Circuit. *See Kamakana*, 447  
18 F.3d at 1178, 1180. Finally, the parties made no effort to explain why they could  
19 not redact the documents to protect proprietary interests while allowing access to  
20 the documents in question. In sum, the parties had no basis to seal these exhibits.

1 **B. The Documents Should Be Unsealed Without Delay.**

2 Several courts have “emphasize[d]” that “where a right of access is found,”  
3 access should be granted “immediate[ly].” *Lugosch v. Pyramid Co. of Onondaga*,  
4 435 F.3d 110, 126 (2d Cir. 2006) (collecting cases); *see also Perez v. Lantern*  
5 *Light Corp.*, No. C12-1406RSM, 2017 WL 2172012 (W.D. Wash. May 17, 2017)  
6 (ordering the Clerk to “immediately unseal” fifteen exhibits filed under seal  
7 absent compelling reasons). Because court records are public by default, the  
8 sealed filings should be unsealed as soon as this Court determines that there is no  
9 valid basis for keeping them secret. *Kamakana*, 447 F.3d at 1181-82. Delay in  
10 permitting access to court records impairs not only the right of access itself, but  
11 also the right of free speech. *Courthouse News*, 750 F.3d at 789.

12 **IV. CONCLUSION**

13 For the foregoing reasons, the Center for Justice requests that the six listed  
14 sealed exhibits be immediately unsealed and made available to the public unless  
15 (1) the parties can demonstrate compelling reasons for secrecy that outweigh the  
16 public’s presumptive right of access to court records; and (2) the Court finds that  
17 there are no alternatives to closure that would adequately protect the parties’  
18 compelling interest in secrecy.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20

RESPECTFULLY SUBMITTED AND DATED this 17th day of October,  
2017.

KIRK D. MILLER, P.S.

By: /s/ Kirk D. Miller, WSBA #40025  
Kirk D. Miller, WSBA #40025  
Attorneys for Intervenor Center for Justice  
421 W. Riverside Avenue, Suite 660  
Spokane, Washington 99201-0410  
Telephone: (509) 413-1494  
Facsimile: (509) 413-1724  
Email: kmiller@millerlawspokane.com

CERTIFICATE OF SERVICE

I, Kirk D. Miller, hereby certify that on Oct. 31st 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

David Allen Lowe, WSBA #24453  
Attorneys for Elf-Man LLC  
LOWE GRAHAM JONES PLLC  
701 Fifth Avenue, Suite 4800  
Seattle, Washington 98104  
Telephone: (206) 381-3300  
Email: lowe@lowegrahamjones.com

John Christopher Lynch, WSBA #17462  
Jeffrey Ray Smith, WSBA #37460  
Rhett V. Barney, WSBA #44764  
Attorneys for Ryan Lamberson  
LEE & HAYES, PLLC  
601 West Riverside Avenue, Suite 1400  
Spokane, Washington 99201  
Telephone: (509) 324-9256  
Facsimile: (509) 323-8979  
Email: chris@leehayes.com  
Email: jeffreys@leehayes.com  
Email: rhettb@leehayes.com

Collette C. Leland, WSBA #40686  
Attorneys for Interested Party Maureen VanderMay  
WINSTON & CASHATT  
601 West Riverside Avenue, Suite 1900  
Spokane, Washington 99201-0695  
Telephone: (509) 838-6131  
Facsimile: (509) 838-1416  
Email: ccl@winstoncashatt.com



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20

DATED this 31st day of October, 2017.

KIRK D. MILLER, P.S.

By: /s/ Kirk D. Miller, WSBA #40025  
Kirk D. Miller, WSBA #40025  
Attorneys for Intervenor Center for Justice  
421 W. Riverside Avenue, Suite 660  
Spokane, Washington 99201-0410  
Telephone: (509) 413-1494  
Facsimile: (509) 413-1724  
Email: kmiller@millerlawspokane.com