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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

ELF-MAN, LLC,

Plaintiff,

vs.

RYAN LAMBERSON,

Defendant.

No. 2:13-CV-00395-TOR

DEFENDANTS MEMORANDUM  
OF SUPPORT OF THE CENTER  
FOR JUSTICE'S MOTION TO  
UNSEAL EXHIBITS

Date: November 30, 2017

Time: 6:30 p.m.

Without Oral Argument

1 **I. INTRODUCTION**

2 Defendant Ryan Lamberson, by and through his counsel and assignee Lee &  
3 Hayes PLLC submits this Memorandum in Support of Intervenor the Center For  
4 Justice’s (“CFJ”) Motion to Unseal Exhibits. ECF No. 116.

5 CFJ is correct that this case presents a rare and important opportunity for the  
6 public to understand the scope of the problem of illicit copyright trolling in the  
7 federal courts. With the benefit of hindsight and ongoing investigation, counsel for  
8 defendant can confirm the concerns CFJ raises in its Motion. Lynch Dec.<sup>1</sup> at ¶¶9-  
9 34.

10 **II. ARGUMENT**

11 Six of the cited sealed documents were submitted by defense counsel. One  
12 of the cited sealed documents was submitted by a former counsel for the plaintiff.  
13 Lynch Dec. at ¶¶4-6. All were evidence submitted in connection to Motions that  
14 were important to the final disposition of the case. Lynch Dec. at ¶¶9-34.

15 **A. Documents from Elf-Man’s Motion to Dismiss Mr. Lamberson’s**  
16 **Counterclaims for Declaratory Relief.**

17 Elf-Man filed 14 copyright cases in nine U.S. District Courts (D OR; WD  
18 WA; ED WA; D CO; ED MO; ND IL; ND OH; SD OH; ED TN). Elf-Man did not  
19 take any cases to trial nor did it move for summary judgment in any of them. Each  
20 case started with a Motion to waive the Federal Rules of Civil Procedure to allow

21 \_\_\_\_\_  
22 <sup>1</sup> Declaration of J. Christopher Lynch Re: ECF Nos. 114 and 116 (“Lynch Dec.”)

1 early discovery of the subscriber names of ISP accounts. Each case closed without  
2 a ruling on the merits.

3 A defendant who Answers triggers Fed. R. Civ. P. 41(a)(2), requiring leave  
4 of court for a plaintiff to dismiss its own case. But *Cadkin v. Loose*, 569 F.3d 1142  
5 (9th Cir. 2009) is a loophole for those plaintiffs. If the Court dismisses the  
6 plaintiff's claim "without prejudice" at the plaintiff's request under Fed. R. Civ. P.  
7 41(a)(2), then that exonerated defendant is not automatically a "prevailing party"  
8 entitled to seek defense attorneys' fees under the Copyright Act, 17 U.S.C. Section  
9 505.

10 If, however, that innocent defendant has filed counterclaims as to the  
11 copyright allegations, those counterclaims might not be affected by such a *Cadkin*  
12 dismissal. Those counterclaims could remain a vehicle for defense attorneys' fees  
13 under the Copyright Act. Judge Alsup of the ND CA recognized this in *Malibu*  
14 *Media v. Does*, No. 3:15-cv-4441-WHA, (N.D. Cal. June 20, 2016), ECF No. 53:

15 Malibu Media's motion [to dismiss its own case] seems more like a  
16 gimmick designed to allow it an easy exit if discovery reveals its  
17 claims are meritless. Section 505 of Title 17 of the United States Code  
18 provides that a "prevailing party" may be awarded attorney's fees in a  
copyright infringement action; however, when a copyright plaintiff  
voluntarily dismisses a claim without prejudice, the defendant is not a  
prevailing party . . . .

19 Absent defendant's counterclaim, if events reveal that this case is  
20 meritless, Malibu Media could voluntarily dismiss its affirmative  
21 claims without prejudice under Rule 41(a)(2), seeking to avoid an  
award of attorney's fees. If, however, defendant's counterclaim  
remains alive, he will be able to press his counterclaim . . . .

22 [A] defendant may feel pressure to settle even a meritless case.  
Coupled with the taboo nature of the subject matter, there remains

1 potential for abuse. The availability of attorney’s fees should any  
2 defendant facing a lawsuit against Malibu Media prevail protects  
3 those, such as our defendant herein, who elect to challenge Malibu  
4 Media’s case on the merits instead of accepting a nuisance-value  
5 settlement. Indeed, that may be the only factor motivating such  
6 defendants. C.f. *Ingenuity 13 LLC v. Doe*, Nos. 13-55859, 13-55880,  
7 slip op. at 13 (9th Cir. June 10, 2016) (“Without hope of receiving  
8 attorney’s fees for defending sanctions on appeal, Doe and other  
9 victims of abusive litigation would be left with no remedy.”).

6 Mr. Lamberson Answered with Counterclaims for declaratory relief that the  
7 copyright was not infringed and was unenforceable, along with customary  
8 affirmative defenses. Tellingly, rather than seek relief on its own claims, Elf-Man  
9 filed its elaborate Motion to Dismiss the Counterclaims and to Strike the  
10 Affirmative Defenses. ECF No. 37.

11 Elf-Man’s Motion to dismiss was brought under the esoteric Noerr-  
12 Pennington Antitrust Immunity Doctrine, even though that doctrine applies to  
13 affirmative civil monetary claims (e.g. antitrust claims), and not to declaratory  
14 relief claims of a falsely accused copyright defendant.

15 Mr. Lamberson opposed the Motion under the “sham litigation exception” to  
16 the Noerr Pennington doctrine. ECF No. 38. *Kottle v. Northwest Kidney Centers*,  
17 146 F.3d 1056 (9th Cir. 1998), identifies three situations for applicability of the  
18 sham litigation exception:

19 1. Where the lawsuit under scrutiny is objectively baseless and the  
20 motive in bringing it was unlawful;

1           2.     Where the conduct involves a series of lawsuits “brought pursuant to a  
2 policy of stalling legal proceedings without regard to the merits” and for an  
3 unlawful purpose;

4           3.     If the allegedly unlawful conduct consists of making intentional  
5 misrepresentations to the court, litigation can be deemed a sham if “a party’s  
6 knowing fraud upon, or its intentional misrepresentations to the court deprive the  
7 litigation of its legitimacy.”

8           Mr. Lamberson’s submission of sealed documents ECF Nos. 39-1 and 39-2  
9 was made to prove the applicability of the sham litigation exception. Lynch Dec.  
10 ¶¶9-21.

11 **B.     Documents from Mr. Lamberson’s Motions to Compel.**

12           CFJ seeks sealed documents relating to two Motions to Compel filed by Mr.  
13 Lamberson. ECF No. 42 was a motion to compel depositions of Elf-Man  
14 witnesses. ECF No. 57 was a motion to compel correspondence with APMC,  
15 which Elf-Man had represented was the company that engaged “Crystal Bay  
16 Corporation” to conduct its investigation.

17 **C.     Motion to Compel ECF No. 42.**

18           Elf-Man was not forthcoming in Initial Disclosures about the identity of its  
19 investigators. Lynch Dec. ¶¶15-22. Eventually, Daniel Macek and Michael Patzer  
20 were identified. Both were identified with addresses in Stuttgart, Germany that  
21 were exposed as incorrect. ECF No. 53.

22

1 Since there is no legal way to depose German nationals outside of the  
2 expensive Hague Convention, Mr. Lamberson proposed that Elf-Man volunteer to  
3 bring Mr. Macek and Mr. Patzer to Spokane for deposition. Since the witnesses  
4 would have to travel to Spokane for trial, Elf-Man could perpetuate their testimony  
5 at that time, and one trip could serve both the deposition and any necessary trial  
6 testimony. Elf-Man refused to so volunteer. Consequently, Mr. Lamberson moved  
7 to compel depositions of Elf-Man's substantive witnesses in Spokane. ECF No. 42.

8 The sealed documents, ECF Nos. 43-5, 43-6, and 51-2 relate to the  
9 "explanation" provided by Elf-Man in response to this Court's Order, ECF No. 31,  
10 requiring a narrative description of Elf-Man's relationship to its investigators. The  
11 sealed documents include this "explanation" and follow up correspondence about  
12 it. The "explanation" is fabricated. Lynch Dec. at ¶¶15-17; 23-25. Even under the  
13 explanation's own terms, it appears the investigators may have had a contingency  
14 interest in the case, and thus might have been un-disclosed real parties in interest.  
15 If the investigators are real parties in interest, then deposing the investigators might  
16 have been effectuated by Notice of Deposition in Spokane, as the venue for the  
17 case.

18 **D. Motion to Compel ECF No. 57.**

19 The sealed "explanation" provided by Elf-Man in response to the Court's  
20 Order, ECF No. 31, is essentially summarized: (a) Elf-Man LLC hired Vision  
21 Films; (b) Vision Films hired APMC; (c) APMC hired Crystal Bay Corporation;  
22 (d) Crystal Bay Corporation hired Daniel Macek; (e) Mr. Macek used special

1 software written by Michael Patzer; (f) Mr. Patzer assigned the special software to  
2 Excipio; (g) Excipio hired Mr. Pazter as a consultant to monitor the special  
3 software; (h) Crystal Bay Corporation licensed the special software from Excipio;  
4 (i) Mr. Macek made observations using the special software. That type of structure  
5 might be a legitimate structure in some other setting, but it is not legitimate here.  
6 For example, Elf-Man’s explanation wholly overlooks the Declarations of “Darrin  
7 M. Griffin” filed by Elf-Man in the other U.S. District Courts where “Darrin M.  
8 Griffin” attests to observations that overlap in time with the observations Mr.  
9 Macek testified that he made. ECF No. 88. The fabricated “explanation” that is a  
10 sealed exhibit in this case cannot be true. Lynch Dec. at ¶¶15-17; 23-27.

11 **E. Document from Defendant’s Motions for Sanctions.**

12 After Ms. VanderMay withdrew because of her ethical conflict with  
13 “plaintiff’s representatives,” ECF Nos. 55 and 55-1, Mr. Lowe appeared for Elf-  
14 Man. Mr. Lowe moved to dismiss Elf-Man’s case under Fed. R. Civ. P. 41(a)(2).  
15 The Court granted that dismissal with prejudice, allowing Mr. Lamberson to file a  
16 request for attorneys’ fees.

17 Mr. Lamberson sought attorneys’ fees and sanctions against Elf-Man and  
18 counsel for pursuit of meritless claims against an innocent man. ECF Nos. 76-81.

19 Elf-Man opposed these Motions and submitted declarations of Mr. Lowe,  
20 Ms. VanderMay; Mr. Patzer; Mr. Macek; Mr. Ubersax and Mr. Paige. ECF Nos.  
21 84-90.

1 Ms. VanderMay’s declaration attempts to justify her role in the matter prior  
2 to her ethical withdrawal. Exhibit 85-2 is a long list of movies, music, and software  
3 (in multiple languages) that Ms. VanderMay represented that Elf-Man’s  
4 investigators claimed were downloaded by Mr. Lamberson. The list is ridiculous  
5 and wholly inaccurate as Mr. Lamberson testified at the time. ECF No. 98.

6 Elf-Man’s undisclosed “representatives” have used these long lists of other  
7 purported “infringements” in other cases as a tool to persuade defendants to  
8 volunteer to give them money. *See, Malibu Media v. Doe*, No. 4:16-cv-2319 (S.D.  
9 Tex. June 21, 2017), ECF No. 30.

10 **III. CONCLUSION**

11 The CFJ is correct that Elf-Man and its un-disclosed “representatives” are  
12 engaged in illicit copyright trolling. Mr. Lamberson does not object to un-sealing  
13 the documents in the case.

14  
15 RESPECTFULLY SUBMITTED this 14th day of November, 2017.

16  
17 By: s/ J. Christopher Lynch

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22 *Attorney for Defendant Ryan Lamberson*



**CERTIFICATE OF SERVICE**

1  
2 I hereby certify that on the 14th day of November, 2017, I caused to be filed  
3 the foregoing with the Clerk of the Court using the CM/ECF system, which in turn  
4 automatically generated a Notice of Electronic Filing (NEF) to all parties in the case  
5 who are registered users of the CM/ECF system. The NEF for the foregoing  
6 specifically identifies recipients of electronic notice.

7  
8 By: s/ J. Christopher Lynch

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