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9 *Counsel for Defendant Ryan Lamberson*

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

12 ELF-MAN, LLC,

13 Plaintiff,

14 vs.

15 RYAN LAMBERSON,

16 Defendant.

17 No. 2:13-CV-0395-TOR

18 DEFENDANT LAMBERSON'S
19 MOTION TO COMPEL DISCOVERY

20 Date: July 14, 2014
21 Time: 6:30 p.m.
22 Without Oral Argument

DEFENDANT'S MOTION
TO COMPEL - 1

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1 Defendant Ryan Lamberson (hereinafter, "Mr. Lamberson") moves for an
2 Order to Compel Discovery from plaintiff. Mr. Lamberson served a Second Set of
3 Requests for Production on April 22, 2014, consisting of three numbered requests.
4 The subject of the requests is simple: correspondence about Mr. Lamberson with
5 APMC LLC, the investigative company that was identified in response to the
6 Court's Order of February 27, 2014. ECF No. 31. Plaintiff has failed to provide
7 any of the requested documents.

8 This Motion is made pursuant to Fed. R. Civ. P. 37(a) and LR 37.1. The
9 Motion is supported by the Declaration of J. Christopher Lynch and its exhibits.
10 This Motion certifies pursuant to Fed. R. Civ. P. 37(a)(1) that defendant has in good
11 faith conferred or attempted to confer with the plaintiff in an effort to obtain the
12 discovery without court action. Lynch Decl. at ¶ 2. Due to the total failure of the
13 plaintiff to provide discovery or to provide any substantive response to
14 correspondence requesting compliance, Mr. Lamberson has chosen to bring this
15 Motion to Compel, rather than availing himself of the telephonic conference
16 discovery process provided as an option under the Jury Trial Scheduling Order.
17 ECF No. 17 at p. 5. Costs, attorneys fees, and sanctions are requested pursuant to
18 Fed. R. Civ. P. 37(a)(5)(A) and LR 37.1(d). Mr. Lamberson requests dismissal with
19 prejudice of the claims against him as a sanction against plaintiff, including a ruling
20 that Mr. Lamberson is the prevailing party in the matter.

1 **A. The Requests for Production and the Responses**

2 The Second Set of Requests for Production comprises of three requests.
 3 Plaintiff has “responded” to the requests, but no documents were produced. Here
 4 are the three requests and the corresponding responses:

5 **REQUEST FOR PRODUCTION NO. 29:** All
 6 correspondence (and included attachments and links) of plaintiff
 7 company Elf-Man, LLC with (i.e. to and from) APMC LLC regarding
 8 the investigation and prosecution of claims against Mr. Lamberson.

9 **RESPONSE TO REQUEST FOR PRODUCTION NO. 29:**
 10 Plaintiff objects to this request on the ground that it is overly broad,
 11 not likely to lead to discoverable evidence, and seeks material subject
 12 to the attorney-client privilege and work product protections. Without
 13 waiving these objections, Plaintiff responds to this request as follows:
 14 Defendant is aware from documents previously produced in this
 15 action that Plaintiff, through its sales agent Vision Films, Inc., has
 16 retained APMC LLC to manage its anti-piracy efforts, including but
 17 not limited to this litigation. Plaintiff’s communications with its agent
 18 that is managing this litigation are privileged and not discoverable.

19 **REQUEST FOR PRODUCTION NO 30:** All correspondence
 20 (and included attachments and links) of Elf-Man, LLC’s purported
 21 agent Vision Films, Inc. with (i.e. to and from) APMC LLC regarding
 22 the investigation and prosecution of claims against Mr. Lamberson.

23 **RESPONSE TO REQUEST FOR PRODUCTION NO. 30:**
 24 Plaintiff objects to this request on the ground that it is overly broad,
 25 not likely to lead to discoverable evidence, and seeks material subject
 26 to the attorney-client privilege and work product protections. Without
 27 waiving these objections, Plaintiff responds to this request as follows:
 28 Defendant is aware from documents previously produced in this
 29 action that Plaintiff, through its sales agent Vision Films, Inc., has
 30 retained APMC LLC to manage its anti-piracy efforts, including but
 31 not limited to this litigation. Communications between Plaintiff’s
 32 sales agent and the agent that is managing this litigation are privileged
 33 and not discoverable.

34 **REQUEST FOR PRODUCTION NO 31:** All correspondence
 35 (and included attachments and links) of plaintiff’s counsel with (i.e. to

1 and from) APMC LLC regarding the investigation and prosecution of
 2 claims against Mr. Lamberson.

3 **RESPONSE TO REQUEST FOR PRODUCTION NO. 31:**
 4 Plaintiff objects to this request on the ground that it is overly broad,
 5 not likely to lead to discoverable evidence, and seeks material subject
 6 to the attorney-client privilege and work product protections. Without
 7 waiving these objections, Plaintiff responds to this request as follows:
 Defendant is aware from documents previously produced in this
 action that Plaintiff, through its sales agent Vision Films, Inc., has
 retained APMC LLC to manage its anti-piracy efforts, including but
 not limited to this litigation. Plaintiff's counsel's communications
 with Plaintiff's agent that is managing this litigation are privileged
 and not discoverable.

8 **B. Plaintiff's Objections are Waived**

9 The Court can see that no documents were provided, simply objections. But
 10 plaintiff has waived its objections because they were not timely served. *Richmark*
 11 *Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992). Even
 12 objections that the information sought is privileged or work-product are waived if
 13 not timely served. *Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981); *United*
 14 *States v. 58.16 Acres of Land, More or Less*, 66 F.R.D. 570, 572 (E.D. Ill. 1975).
 15 Additionally, plaintiff provided no "privilege log" or other explanatory document
 16 was provided to support the claim of privilege as is required by Fed. R. Civ. P.
 17 26(b)(5)(A).

18 Fed. R. Civ. P. 34 governs Requests for Production. Mr. Lamberson served
 19 the three requests on April 22, 2014. Fed. R. Civ. P. 34(b)(2)(A) requires responses
 20 in writing within thirty days of service. The "responses" were received in the USPS
 21 on May 30, 2014, with an Oregon postmark dated May 28, 2104. Lynch Decl. at
 22 ¶ 3, Exhibit A. The responses were not otherwise served by email, FedEx, or other

1 delivery service. *Id.* at ¶ 13. Plaintiff's Certificate of Service claims the responses
 2 were "caused to be served" from Oregon on May 22, 2014, but the May 28, 2014
 3 postmark calls this into question. Service is not effective when the lawyer asks for it
 4 to be served or wishes it had been served; service is effective upon mailing. Fed. R.
 5 Civ. P. 5(b)(2)(C). This Certificate of Service does not indicate when the document
 6 was *actually mailed* – that is, *served*. LR 5.1(b) requires "an affidavit evidencing
 7 the service of the document." Consequently, the Certificate of Service is not in
 8 compliance with LR 5.1(b) because it does not "evidence" "service" of the
 9 document, i.e. mailing – the Certificate of Service only indicates the signatory's
 10 apparent direction that it be mailed on Thursday, May 22, 2014, when the postmark
 11 six days later on Wednesday May 28, 2014 indicates this was probably not the case.

12 On May 30, 2014, immediately upon receipt of the discovery responses with
 13 the curious Certificate of Service, counsel for defendant wrote counsel for plaintiff
 14 offering plaintiff an opportunity to correct the Certificate of Service. *Id.* at ¶ 11,
 15 Exhibit D. Plaintiff's counsel replied that same day confirming that she did not mail
 16 the document, nor did she have any first-hand knowledge of when the document
 17 was actually served, but insisted the Certificate of Service was nevertheless
 18 accurate. *Id.* at ¶ 12, Exhibit E. Counsel for defendant replied on that same day
 19 asking for a Declaration of the person who actually mailed the document so that the
 20 actual date of actual service could be determined. *Id.* at ¶ 13, Exhibit F. No such
 21 Declaration of the un-named assistant who mailed the document has been provided
 22 to date. *Id.* at ¶¶ 15-17.

1 On June 2, 2014 counsel for defendant spoke with Oregon attorney Carl
 2 Crowell who claimed he represented Elf-Man LLC and who explained that Ms.
 3 VanderMay would be moving to withdraw from the case, a withdrawal that was
 4 then filed June 3, 2014 as ECF No. 55. On this call with Mr. Crowell, counsel for
 5 defendant raised the issue of the curious Certificate of Service and again requested
 6 an explanation or a Declaration of the person who actually served the document. *Id.*
 7 Mr. Crowell followed up by email on June 2, 2104 asking for “a copy of the letter to
 8 Maureen on this and I will see that it is addressed.” *Id.* Counsel for defendant
 9 immediately provided the requested correspondence and explained the importance
 10 of the issue as to waiver of objections:

11 “The APMC discovery is important.... None of this can be
 12 privileged as plaintiff claims. And the May 22 Declaration of Service
 13 vs. the May 28 postmark is critical on this point. If the objections are
 14 waived, then we expect the documents immediately. If the objections
 15 are not waived, then we expect the privilege log immediately and our
 16 first order of business will be our required LR 37 conference on the
 17 production.”

18 *Id.* at ¶ 17, Exhibit G.

19 On June 3, 2014 Ms. VanderMay replied to Mr. Lynch’s June 2, 2014 email
 20 to Mr. Crowell. Ms. VanderMay again claimed the Certificate of Service was
 21 accurate, but without providing any Declaration from the person who mailed the
 22 document. *Id.* at ¶ 18. This was the same day that Ms. VanderMay filed her Motion
 23 to Withdraw as counsel, ECF No. 55, citing an ethical predicament prohibiting her
 24 from continuing as counsel for plaintiff.

1 The bottom line is that the “responses” were received late and postmarked
2 late and the Certificate of Service is not in compliance with LR 5.1(b). No
3 additional Declaration has been supplied by any person with actual knowledge of
4 the date of service. Consequently, the objections, including privilege and work-
5 product, are waived. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d
6 1468, 1473 (9th Cir. 1992); *Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981).

7 **C. The Requests for Production are Within the Scope of Rule 26**

8 The Requests for Production seek correspondence about Mr. Lamberson with
9 APMC. Mr. Lamberson has no previous relationship with APMC, so all of the
10 requested documents would be about this lawsuit. APMC is the company identified
11 by plaintiff in its long-delayed narrative explanation of the relationship of the
12 plaintiff to its investigators. That explanation includes that Elf-Man, LLC has some
13 contract with Vision Films, Inc. and that Vision Films has some contract with
14 APMC for anti-piracy management services. APMC then has some undefined
15 relationship with Crystal Bay Corporation of South Dakota which then somehow
16 had German national Daniel Macek “working for” it. Mr. Macek is identified in the
17 Initial Disclosures as “plaintiff’s primary investigator,” a witness plaintiff intends to
18 rely upon at trial.

19 Request No. 29 seeks correspondence between APMC and Elf-Man LLC
20 about Mr. Lamberson. Request No. 30 seeks correspondence between APMC and
21 Vision Films about Mr. Lamberson. Request No. 31 seeks correspondence between
22

1 APMC and plaintiff's counsel about Mr. Lamberson. None of the requests are for
 2 correspondence between plaintiff's counsel and her client of record Elf-Man, LLC.

3 This correspondence is discoverable under Fed. R. Civ. P. 26(b). The
 4 documents sought include the putative "investigator" of the matter and relate to Mr.
 5 Lamberson. These documents are relevant (i) to plaintiff's claims (i.e. APMC is the
 6 "investigator"), and (ii) to Mr. Lamberson's defenses (i.e. the correspondence likely
 7 reveals admissions about the nature and extent of the investigation, and, thus, the
 8 limits thereto). All of this could lead to admissible evidence.

9 These requests for correspondence are not overly broad. Each of the three
 10 requests was narrowly tailored to include only correspondence about Mr.
 11 Lamberson and which includes APMC and its related companies.

12 **D. The Requests for Production do not Seek Privileged Information**

13 The requested correspondence is not privileged. None of the requests are for
 14 correspondence between plaintiff's counsel and her client of record Elf-Man, LLC.
 15 Counsel for defendant forewarned counsel for plaintiff that these inquiries about
 16 APMC would be served and invited a discussion of privilege from the start. Counsel
 17 for plaintiff declined to engage in such a discussion. *Id.* at ¶¶ 4-9, Exhibits B and C.

18 Plaintiff has the burden to show evidence as to each element of attorney-
 19 client privilege in order to shield such documents from discovery. *United States v.*
 20 *Munoz*, 233 F.3d 1117, 1128 (9th Cir. 2000). Blanket assertions of privilege such as
 21 those made here by plaintiff are not proper. *Clarke v. Am. Commerce*, 974 F.2d
 22 127, 129 (9th Cir. 1992). Plaintiff must establish the privilege as to each document

1 withheld: “[A party] must identify specific communications and the grounds
 2 supporting the privilege as to each piece of evidence over which privilege is
 3 asserted.” *United States v. Martin*, 278 F.3d 988, 1000 (9th Cir. 2002). This
 4 privilege log requirement is expressly covered in the civil rules. Fed. R. Civ. P.
 5 26(b)(5)(A). Plaintiff has provided no such privilege log and has refused to do so.

6 The Washington Supreme Court has recently ruled on the scope of privilege
 7 and work product in a case where an analogous discovery request was pending. In
 8 *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 295 P.3d 239, 247 (Wa.
 9 2013), Mr. Cedell claimed that his insurer Farmers had acted in bad faith in its
 10 handling of his insurance claim for fire damage. Farmers had hired coverage
 11 counsel and investigated the claim. Mr. Cedell sought a copy of the claims file,
 12 including correspondence between Famers and its coverage counsel. The
 13 Washington Supreme Court held that “Cedell is entitled to broad discovery,
 14 including, presumptively the entire claims file,” rejecting an insurance company’s
 15 argument that its entire claims file about the plaintiff was privileged or work-
 16 product.

17 Here, Mr. Lamberson does not seek correspondence between plaintiff’s
 18 counsel and its client Elf-Man, LLC. Mr. Lamberson seeks documents between
 19 plaintiff’s counsel and the investigator, plus any direct communications there may
 20 be between the investigator and the plaintiff company itself, or its alleged agent.
 21 This request is analogous to the “claims file” against Mr. Lamberson. Counsel for
 22 plaintiff owes a duty to the client, Elf-Man, LLC, not the apparent financier of the

1 matter. On this point, *Tank v. State Farm*, 105 Wn.2d 381, 388, 715 P.2d 1133 (Wa.
 2 1986) finds: "The standards of the legal profession require undeviating fidelity of
 3 the lawyer to his client. No exceptions can be tolerated."

4 **E. Conclusion**

5 The requested documents are discoverable. Plaintiff's objections are waived
 6 and not well taken. It is obvious the plaintiff is exceedingly reluctant to allow
 7 discovery of its investigators, unlike in a legitimate case where such discovery
 8 would be *de regueur*. Plaintiff has provided no assistance in setting the deposition of
 9 the investigators (including even failing to provide a legitimate address when
 10 challenged), and plaintiff now fails to even make a good faith response to provide
 11 written documentation from these investigators. Plaintiff's failures to allow
 12 discovery from its principal witnesses prejudices Mr. Lamberson's ability to defend
 13 the claims against him and to develop facts to support his counterclaims that
 14 plaintiff's copyright should be rendered unenforceable under equity.

15 Mr. Lamberson respectfully requests and Order Compelling Discovery, and
 16 costs and attorneys fees for bringing this Motion. He also respectfully requests
 17 dismissal of the action against him with prejudice and that he be declared the
 18 prevailing party with an ability to present a request of costs and attorneys fees under
 19 17 U.S.C. § 505. The equities support such relief. Lynch Decl. at ¶¶ 1-23.

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DATED this 13th day of June, 2014.

LEE & HAYES, PLLC

By: s/ J. Christopher Lynch

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DEFENDANT'S MOTION
TO COMPEL - 11

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2014, I caused to be 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:

Maureen C. VanderMay

efile@vandermaylawfirm.com

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