

HONORABLE THOMAS O. RICE

J. CHRISTOPHER LYNCH, WSBA #17462
JEFFREY R. SMITH, WSBA #37460
RHETT V. BARNEY, WSBA #44764
LEE & HAYES, PLLC
601 W. Riverside Avenue, Suite 1400
Spokane, WA 99201
Phone: (509) 324-9256
Fax: (509) 323-8979
Emails: chris@leehayes.com
jeffreys@leehayes.com
rhettb@leehayes.com

Counsel for Defendant Ryan Lamberson

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

ELF-MAN, LLC,

Plaintiff,

vs.

RYAN LAMBERSON,

Defendants.

No. 2:13-CV-00395-TOR

MEMORANDUM REGARDING
PLAINTIFF'S MOTION TO DISMISS

MEMORANDUM RE PLAINTIFF'S
MOTION TO DISMISS - 1

LEE & HAYES, PLLC
601 West Riverside Avenue, Suite 1400
Spokane, Washington 99201
Telephone: (509)324-9256 Fax: (509)323-8979

1 Ryan Lamberson submits this Memorandum regarding plaintiff's Motion to
2 Dismiss, ECF No. 59. This Memorandum is supported by the Declarations of Ryan
3 Lamberson and his counsel, J. Christopher Lynch. Provided the Court imposes the
4 conditions of payment in advance of costs and reasonable attorneys' fees, Mr.
5 Lamberson consents to the dismissal with prejudice. These requested conditions
6 are warranted in this exceptional case.

7 Plaintiff filed lawsuits in the Eastern and Western Districts of Washington
8 for alleged copyright infringement of the straight-to-DVD movie *Elf-Man*. Over
9 180 people were charged with infringement in the two cases. Due to fundamental
10 errors in plaintiff's methodologies, many of those 180 people may be entirely
11 innocent. Ryan Lamberson is one of those entirely innocent people. In fact, it
12 appears plaintiff has no admissible evidence of liability at all.

13 In order to make a *prima facie* case for copyright infringement, the plaintiff
14 must show (i) ownership of a valid copyright, and (ii) improper copying. Although
15 plaintiff presented no evidence of either element to the Court, it obtained its
16 subpoenas and proceeded to target people with demands.

17 **Where is the *Elf-Man* Copyright Certificate?**

18 Plaintiff has never submitted its purported copyright certificate to the Court.
19 This is a jurisdictional requirement, 17 U.S.C. § 411, and a requirement for the
20 statutory damages plaintiff continues to seek in the main case, 17 U.S.C. § 412.
21 Even in the *Elf-Man* cases in other districts where a purported copyright certificate
22 was submitted to the Court, the certificate is incomplete and missing the critical

1 page two containing the acknowledgement of who presented it to the Copyright
2 Office. Lynch Decl. at ¶ 2. In fact, Mr. Lowe admitted that plaintiff or its
3 “representatives” might not even possess page two of the purported certificate.
4 Lynch Decl. at ¶ 3. This is important because, for example, any person could
5 submit the form, the deposit, and the fee to the Copyright Office in order to obtain
6 a certificate. For example, in Mr. Lowe’s earlier BitTorrent case in this District,
7 *Canal Street Films v. Does 1-13*, Case No. 2:13-cv-03001-EFS, Mr. Lowe did
8 submit the purported copyright certificate for the direct-to-DVD movie *Scary or*
9 *Die*, but the certificate was executed by “Josh Partridge” who was not the author of
10 the movie nor an officer of Canal Street Films. Mr. Partridge worked for the
11 discredited German firm GuardaLey, the firm that presumably conducted the
12 investigation and had a monetary stake in the outcome of that enforcement
13 litigation. Lynch Decl. at ¶ 4. GuardaLey is tied to the purported investigative firm
14 in this case Anti-Piracy Management Company, LLC (“APMC”) (e.g., Patrick
15 Achache is the purported President of APMC, and Mr. Achache has submitted
16 declarations in other districts indicating he is an executive in GuardaLey). Lynch
17 Decl. at ¶ 5. GuardaLey was not disclosed under Fed. R. Civ. P. 7.1 as a party in
18 interest in that case, just as its sister company APMC was not disclosed as a party
19 in interest in this case. Lynch Decl. at ¶ 6.

20 The copyright certificate is not simply jurisdictional, it creates certain
21 presumptions under copyright law. 17 U.S.C. § 410(c). Without the certificate,
22 plaintiff has no evidence of ownership of the work, or its copyrightability, or the

1 other presumptions afforded by the certificate under the law. The copyright office
2 data submitted by Mr. Lamberson in his Second Amended Answer and
3 Counterclaims, e.g., ECF No. 36 at pp. 20-21, shows that purported ownership in
4 the *Elf-Man* movie was “by Transfer,” “by written agreement,” and by “employer
5 for hire.” These avenues of copyright ownership require employee relationships or
6 else written agreements, signed by the parties, and identifying the copyrightable
7 material assigned. 17 U.S.C. §§ 101, 204(a). None of these relationships or signed
8 agreements are before the Court. Many people make copyrightable contributions to
9 a movie – every camera operator, editor, special effects person, writer, set
10 decorator, etc. Mr. Lamberson requested these source documents in discovery and
11 received a jumble of redacted papers that do not appear to cover all the participants
12 who made copyrightable contributions to the movie. Lynch Decl. at ¶ 7. Without
13 the certificate, plaintiff has not met its burden of ownership or copyrightability.

14 In addition, the copyright office data for *Elf-Man* includes express
15 disclaimers of portions of the work (“pre-existing footage, preexisting
16 photograph(s), preexisting music.”) These are portions of the movie that plaintiff
17 cannot claim under its copyright. Plaintiff has no evidence or witness who can
18 attest that the tiny pieces of the movie allegedly distributed by the 180+ defendants
19 are not in fact these disclaimed portions to which plaintiff can claim no rights.
20 Defendant asked plaintiff to identify the “piece” that plaintiff’s investigators
21 allegedly harvested from the IP address later associated with Mr. Lamberson, but
22 plaintiff was unable to identify the piece. Lynch Decl. at ¶ 8. That piece (actually a

1 “block” of a “piece”) with a size too small to be perceived by the human eye,
2 might have been a part of the disclaimed portion of the movie. Lynch Decl. at ¶ 9.

3 **Where are the *Elf-Man* Investigators?**

4 No actual admissible evidence of infringement was ever submitted to the
5 court to support the issuance of the subpoenas that led to the naming of the 180+
6 people. There is no declaration in the record to lay any foundation for the typed-up
7 chart of IP addresses for which plaintiff’s Amended Complaint, ECF No. 3, p. 11,
8 alleges that each defendant was “observed infringing.” In fact, no one was
9 “observed infringing” at all.

10 A computer in a foreign country joined a BitTorrent swarm, its software
11 automatically sending requests for pieces to the other participants in the swarm and
12 then noting which IP addresses sent a block of a piece. These exchanges, i.e., the
13 “handshake” where the foreign computer makes the request for a piece, and the
14 “uploading” of the block of the piece from the U.S. based IP address, are captured
15 in a “PCAP” file. Plaintiff produced an encrypted copy of this PCAP file in
16 discovery. Mr. Lamberson’s counsel was able to decrypt the PCAP file to confirm
17 that in fact only one handshake was made and only one block of one piece was sent
18 to fulfill the request made by the foreign computer. Lynch Decl. ¶ 10. One block of
19 one piece over the course of one second – the one second identified in the First
20 Amended Complaint with its allegation that Mr. Lamberson was “observed
21 infringing.” ECF No. 3 at p. 11. Who made this observation? What was observed?

1 Plaintiff's Complaint is misleading because it would like the Court to
2 believe it has some witness who actually "observed" Mr. Lamberson "infringing,"
3 which, in the common sense of the term might be that an investigator actually
4 "watched" the defendant "copy" the movie. But the reality is that no human made
5 such an observation, and there is no evidence that any defendant "copied"
6 anything. The foreign computer apparently cannot identify which imperceptibly
7 small block of a piece was requested by the foreign computer and allegedly
8 uploaded to the foreign computer. (Ironically, the only participant in the swarm for
9 which there is evidence of copying the entire movie is the foreign computer that
10 made all of the requests and received all of the pieces.)

11 Plus, of course, the "improper copying" element of copyright infringement
12 requires analysis of "fair use" of the work under 17 U.S.C. § 107 (the exclusive
13 rights of 17 U.S.C. § 106 are expressly subject to the fair use exception at 17
14 U.S.C. § 107 and the other exceptions to infringement at 17 U.S.C. §§ 108-122).
15 Fair use under 17 U.S.C. § 107 is a fact-intensive analysis regarding the preamble
16 of the statute and of its four factors. For example, it might be fair use for a person to
17 take a personal photograph of a sculpture in a public park, even if the entire
18 sculpture is in the photograph, whereas a commercial photograph of the entire
19 sculpture to make into post cards might not be fair use. Here, the foreign computer
20 was not in a position to adjudge the nature of the alleged use, because, for
21 example, as Mr. Lamberson's Counterclaims allege, it might be fair use for a
22 person to download the entire movie as part of a school assignment to prepare a

1 report on elf-based movies of the 21st century (or for a commercial critic to do so).
2 ECF No. 36 at pp. 33, 34. The foreign computer did not “observe infringement”
3 because the foreign computer was in no position to make such a legal assessment,
4 nor could it.

5 Plaintiff would like the Court to think its foreign computer is in fact a person
6 watching a defendant copying the entire movie without a fair use motivation, but in
7 this case, there is no such person. No declaration of any person was filed to explain
8 or support the typed-up chart plaintiff has used to trick the Court into issuing
9 subpoenas to use to wrest settlements from people who might be innocent.

10 **Mr. Lamberson is Innocent.**

11 Mr. Lamberson is one of these innocent people. Mr. Lamberson had never
12 heard of the movie prior to being served in this case. Lamberson Decl. at p. 2. *Elf-*
13 *Man* had no theatrical release or advertising targeted at Spokane. Plaintiff and its
14 counsel fail to realize a person might have no interest in searching for and copying
15 an unknown movie, especially when the accused person might have a Netflix
16 account like Mr. Lamberson did such that he could have rented *Elf-Man* for no
17 marginal cost if he ever cared to view it. The most fundamental fact of this case is
18 the one that plaintiff has refused to acknowledge: Mr. Lamberson did not copy the
19 movie. Mr. Lamberson is not aware of anyone who did copy it. Lamberson Decl. at
20 pp. 2, 3. There is no witness who can testify to the contrary. Over the entire course
21 of this litigation, plaintiff never interviewed or deposed Mr. Lamberson nor availed
22 itself of his offers to inspect his computer. Why not?

1 Mr. Lamberson opted not to pay plaintiff for an alleged violation of federal
2 law that he did not commit. Instead, after giving plaintiff multiple opportunities to
3 confirm Mr. Lamberson's innocence and dismiss its case prior to answer, Mr.
4 Lamberson answered the Amended Complaint and defended the case to clear his
5 name. Apparently, but without ever taking Mr. Lamberson's deposition or
6 inspecting his computer, Plaintiff now concludes its case against Mr. Lamberson is
7 no longer worthy of pursuit. Plaintiff provides no explanation *why* it has moved to
8 dismiss, but, presumably, the reasons include lack of admissible evidence and a
9 desire to avoid discovery of its foreign investigations and investigators.

10 Plaintiff brought its Motion to Dismiss while two Motions were pending
11 against it: (i) Mr. Lamberson's Motion to Compel the depositions of the alleged
12 investigators against him, ECF No. 42, and (ii) Mr. Lamberson's Motion to
13 Compel the production of communications with APMC, the company that
14 purportedly conducted the alleged investigation against him, ECF No. 57. This is
15 an exceptional case because in very few intellectual property cases is the plaintiff
16 so loath to allow discovery of its liability evidence. Mr. Lamberson has requested
17 costs, attorneys' fees and dismissal of plaintiff's case with prejudice as a sanction
18 as to its Motion to Compel the APMC discovery. ECF No. 57. Now that plaintiff
19 has moved to dismiss with prejudice, Mr. Lamberson repeats his request for this
20 relief and respectfully requests that costs and attorneys' fees be awarded as a
21 condition to entry of the dismissal that plaintiff now seeks.

22 ///

Defendant Has Pled the Elements of a Consumer Protection Act Claim.

Plaintiff's Motion to Dismiss takes the position that its motion moots Mr. Lamberson's counterclaims. ECF No. 59 at p. 2. Mr. Lamberson currently has lodged two counterclaims, Count One for a declaration of non-infringement of the *Elf-Man* copyright, and Count Two for a declaration that the *Elf-Man* copyright is unenforceable and that the Court should Order plaintiff to cancel its purported copyright registration as an equitable remedy. Plaintiff has brought a Motion to Dismiss these two Counterclaims, ECF No. 37, relying primarily on the esoteric *Noerr-Pennington* antitrust immunity doctrine. Mr. Lamberson has opposed that motion, arguing that *Noerr-Pennington* does not apply to counterclaims outside antitrust or RICO, and, thus, it cannot apply to counterclaims for declaratory relief. Mr. Lamberson has also opposed the motion on the basis that the "sham litigation exception" defeats *Noerr-Pennington* immunity, even if somehow it were to apply.

Since that Motion to Dismiss, ECF No. 37, was fully briefed, even more evidence consistent with the sham litigation exception has come to light. For example, from Mr. Lamberson's own investigation, it was discovered that plaintiff's only "fact" witnesses were identified in plaintiff's Initial Disclosures as likely having false addresses, given with an intent to deceive as to these witnesses' real employers (e.g. Mr. Macek's telephone number with a Karlsruhe city code was answered "GuardaLey," and GuardaLey is located in Karlsruhe, but plaintiff identified Mr. Macek as residing in Stuttgart and "working for" Crystal Bay Corporation of South Dakota). Lynch Decl. at ¶ 11. Counsel for defendant asked

1 Ms. VanderMay, Mr. Crowell, and Mr. Lowe to clarify or correct the addresses,
2 but no response has been given to correct the addresses or to explain that they are
3 somehow correct despite the evidence to the contrary. Lynch Decl. at ¶ 14. Why
4 would a plaintiff deliberately obfuscate the identity and location of its fact
5 witnesses?

6 There is a plethora of other evidence directly on point as to the sham
7 litigation exception, demonstrated in defendant's two pending Motions to Compel
8 Discovery. ECF Nos. 42 and 57. All of this evidence proves the applicability of the
9 principal point of the sham litigation exception: plaintiff is more interested in the
10 *process* of the litigation rather than the *outcome* of the litigation. Indeed, the
11 *process* of the litigation allows the plaintiff to obtain subscriber information so it
12 has someone to whom to make its demands – demands that do not explain that
13 there is in fact no admissible evidence against the subscriber – but the *outcome* of
14 the litigation would be as it is here with the accused defendants eventually
15 discovering and exposing plaintiff's speculative licensing scheme as the charade
16 that it is, incapable of ever producing a real verdict in a real trial.

17 The Court has yet to rule on plaintiff's Motion to Dismiss relying on *Noerr-*
18 *Pennington*, but note that defendant has reserved the right to expressly lodge a
19 Washington Consumer Protection Act counterclaim if plaintiff's motion is denied.
20 ECF No. 38 at p. 18. Indeed, paragraph 5 of the Counterclaims of Mr. Lamberson's
21 Second Amended Answer, Affirmative Defenses, and Counterclaims, ECF. No 36

1 at p. 17, alleges all of the elements of such a claim under the leading authority of
2 *Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 719 P.2d 531 (1986).

3 Nevertheless, since the Court has yet to rule on plaintiff's Motion to
4 Dismiss, ECF No. 37, Mr. Lamberson is not yet in a position to request
5 amendment of his Counterclaims to add an express Count Three for the violation
6 of the Consumer Protection Act. Consequently, under the current procedural
7 posture of the matter, Mr. Lamberson is willing to concede that dismissal with
8 prejudice of the copyright claims against him would likely moot the two currently
9 lodged Counterclaim Counts One and Two for declaratory relief, even though the
10 request for a declaration of unenforceability and invalidity of the copyright
11 associated with the speculative invoicing program would aid resolution of the
12 matter for the other 180+ residents targeted in the state and the many hundreds
13 more nationwide (including, for example, the individuals against whom plaintiff
14 has recently sought default judgments and attorneys' fees. Case No. 2:13-cv-
15 00115-TOR, ECF No. 112.) In other words, if the Court decides to rule on this
16 present Motion to Dismiss, ECF No. 59, before it rules on the earlier-filed Motion
17 to Dismiss, ECF No. 37, then Mr. Lamberson acknowledges that his case,
18 including his counterclaims, will substantively be over upon such a ruling.
19 Consequently, however, the evaporation of Mr. Lamberson's rights for monetary
20 counterclaims makes his present requests for conditioning the dismissal upon
21 payment of costs and fees and his request for sanctions against Elf-Man, LLC and
22 its counsel more important.

1 **Dismissal of Plaintiff's Claims with Prejudice is Appropriate.**

2 Plaintiff moved for dismissal of its claims against Mr. Lamberson with
3 prejudice. This is an appropriate resolution of the matter, since Mr. Lamberson is
4 innocent and there is no admissible evidence otherwise. Such a dismissal with
5 prejudice results in Mr. Lamberson being the prevailing party, entitled to request
6 for costs and related attorneys' fees under Fed. R. Civ. P. 54, 28 U.S.C. § 1920,
7 and 17 U.S.C. § 505. *Cadkin v. Loose*, 569 F.3d 1142, 1147-48 (9th Cir. 2009).

8 **The Court Should Condition the Dismissal upon Payment of Costs and Fees.**

9 The Court has discretion to condition the request for the dismissal under
10 Fed. R. Civ. P. 41(a)(2): dismissal of the action is contingent both "upon order of
11 the court" and "upon such terms and conditions as the court deems proper." The
12 conditions the Court may impose include the payment of costs and attorneys' fees.
13 *Davis v. McLaughlin*, 326 F.2d 881, 883 (9th Cir. 1964). Although there are
14 matters where such a condition was requested but not awarded (e.g. *Munoz v. City*
15 *of Yakima*, E.D. Wash. Case No. 12-cv-3024-TOR), this case is different for many
16 reasons and those differences support the inclusion of a condition to this requested
17 dismissal.

18 As noted above, Mr. Lamberson is the prevailing party entitled to statutory
19 costs and to request statutory attorneys' fees. But, the nature of the plaintiff's
20 secret relationship with its "representatives" should influence the Court to
21 condition the requested dismissal on *payment* of the costs and attorneys' fees –
22 rather than allowing the dismissal followed by defendant's request for the fees

1 resulting in a judgment against Elf-Man, LLC. The reality: the “representatives”
2 with whom Ms. VanderMay is having her ethical dilemma, ECF No. 55 at p. 1, are
3 the real party in interest. Note that Ms. VanderMay is having the same ethical
4 dilemma in this case where Elf-Man, LLC is her client, and in Case No. 2:13-cv-
5 00126-TOR where The Thompsons Film, LLC is her client, ECF No. 103 at p. 1.
6 Plaintiff refused to disclose the relative stake that APMC has in the matter, but it
7 has such a stake, because any settlements plaintiff did wrest go first to paying
8 APMC, before payment to the purported rights holder. Lynch Decl. at ¶ 12.

9 Recall that plaintiff was loath to describe its relationship with its
10 investigators, resulting in a six-week delay by plaintiff from the Court’s Order,
11 ECF No. 31, to the provision of such an explanation. Mr. Lamberson immediately
12 confronted plaintiff with evidence of the implausibility of the explanation,
13 including such fundamentals that a South Dakota shell corporation could not have
14 a German national (Mr. Macek, identified as plaintiff’s “primary investigator”)
15 “working for” it, as the explanation proffers. Newly discovered evidence further
16 exposes plaintiff’s “explanation” as implausible: in *Elf-Man, LLC v. Does 1-85*,
17 Case No. 1:13-cv-00686-WYD-MEH filed March 14, 2013, in the District of
18 Colorado, Elf-Man, LLC claims its investigator was working for “IPP, Limited,”
19 ECF No. 1, at pp. 7-8, not Crystal Bay Corporation as plaintiff claims in this case,
20 even though the time-frames of the typed-up charts overlap in the cases. IPP,
21 Limited is a German company associated with GuardaLey. Lynch Decl. at ¶ 13.

1 Mr. Lamberson's investigation has now revealed that APMC appears to be
2 the investigator, the financier of the litigation, the party hiring the attorneys, the
3 party preparing the pleadings, and the party negotiating the settlements and cashing
4 the checks. Lynch Decl. at ¶ 15. In other words, it appears that APMC is the real
5 party in interest in this case. Neither plaintiff nor its counsel have ever voluntarily
6 identified APMC as a real party in interest, and no Corporate Disclosure Statement
7 has ever been submitted to the Court to identify APMC as the real party in interest
8 as required under Fed. R. Civ. P. 7.1. But, it appears APMC is making the
9 decisions on the case, as shown by Ms. VanderMay's identical Motions to
10 Withdraw in this case and *The Thompsons Film* case citing her ethical dilemma
11 with "plaintiff's representatives."

12 Elf-Man, LLC may not have funds to meet a judgment against it, but
13 presumably AMPC does. APMC appears to be financing copyright lawsuits
14 throughout our country, none of which truthfully admit in the Complaints or the
15 requests for expedited discovery that they are based only on similarly flawed
16 foreign investigations which DO NOT include any actual evidence (beyond
17 supposition) that the accused defendant actually downloaded anything.
18 Consequently, Mr. Lamberson requests the court to condition the requested
19 dismissal with prejudice on *payment* of the statutory costs and attorneys' fees. This
20 way, Elf-Man, LLC, Vision Films, Inc., APMC, IPP, GuardaLey, and Crystal Bay
21 Corporation can maintain their purported confidential relationships and decide
22 among themselves who will pay. The Court may have a different interest in

1 conditioning the dismissal on identification of real parties in interest including
2 APMC and Vision Films, Inc., but Mr. Lamberson does not especially care who
3 pays, as long as he is made whole.

4 It does appear that the Court's discretion to condition the dismissal has
5 limits. *Hecklethorn v. Sunan Corp.*, 992 F.2d 240, 242 (9th Cir. 1993) rules that
6 Fed. R. Civ. P. 41(a)(2) is not an independent basis for sanctions against counsel.
7 Consequently, Mr. Lamberson requests that the court limit its express condition of
8 Fed. R. Civ. P. 41(a)(2) dismissal on payment of costs and attorneys' fees under 28
9 U.S.C. § 1920 and 17 U.S.C. § 505. Mr. Lamberson will separately request that the
10 Court award sanctions under Fed. R. Civ. P. 11, under 28 U.S.C. § 1927, and under
11 the Court's inherent authority subject to separate Motions. Ms. VanderMay's
12 withdrawal does not moot the Court's power to impose sanctions over her or her
13 client. *Holgate v. Baldwin*, 425 F.3d 671 (9th Cir. 2005).

14 **Is Plaintiff's Motion to Dismiss a Delay Tactic?**

15 Mr. Lamberson is concerned that plaintiff's Motion to Dismiss is a delay
16 tactic. Plaintiff's Motion was filed while two important Motions to Compel were
17 pending against it. Since the filing of plaintiff's motion, plaintiff has not
18 participated in the active substance of the case at all. There are numerous important
19 open issues plaintiff has refused to address: (1) plaintiff did not note nor take the
20 deposition of Mr. Lamberson, which was agreed on by counsel and scheduled for
21 Thursday, June 19, 2014, despite knowledge that Mr. Lamberson had arranged to
22 take that day off from work at no pay; (2) plaintiff did not appear at its noted Fed.

1 R. Civ. P. 30(b)(6) deposition, nor did plaintiff provide any alternate dates; (3)
2 plaintiff has not substantively responded to inquiries from defense counsel
3 regarding a number of relevant issues including (i) the correct addresses of its
4 witnesses, (ii) provision of the results of plaintiff's subpoena to Comcast,
5 presumably served on plaintiff on the subpoena due date of June 6, 2014, (iii) the
6 required privilege log to support its purported objections regarding APMC (plus,
7 obviously, the associated requested documents), or (iv) how the relationship of the
8 investigators actually works, as opposed to the implausible explanation provided
9 which includes that Mr. Macek, a German national (whose phone number is
10 answered "GuardaLey"), could possibly have been "working for" a delinquent
11 South Dakota "shelf" corporation (Crystal Bay Corporation) in "its technical
12 department" when Crystal Bay Corporation appears to have no real operations and
13 continues to be in violation of South Dakota corporate law. Lynch Decl. at ¶ 16.

14 *Lau v. Glendora Unified School District*, 792 F.2d 929, 930-31 (9th Cir.
15 1986) rules that a plaintiff has a choice between accepting the conditions the court
16 imposes on a Fed. R. Civ. P. 41(a)(2) dismissal, and withdrawing the motion and
17 proceeding on the merits. At this point, and given "plaintiff's representatives"
18 continued efforts to hide from legitimate discovery, Mr. Lamberson would be
19 significantly prejudiced if plaintiff were to resume the case, while it has totally
20 abdicated its responsibilities and obligations since at least May, 2014.

21 Consequently, if plaintiff does attempt to use this Motion to Dismiss and a
22 subsequent withdrawal therefrom as a delay tactic, Mr. Lamberson respectfully
23

1 requests (i) that the Court otherwise order dismissal of plaintiff's case with
2 prejudice as a discovery sanction on the Motions to Compel, (ii) that the Court
3 deny plaintiff's earlier Motion to Dismiss and allow Mr. Lamberson to amend his
4 Counterclaims to expressly allege a violation of the Consumer Protection Act, and
5 (iii) that the Court sanction plaintiff and its counsel under its inherent powers, under
6 28 U.S.C. § 1927, Fed. R. Civ. P. 11, and Fed. R. Civ. P. 37.

7 **Mr. Lamberson is Entitled to Costs and Attorneys' Fees.**

8 On June 27, 2014, plaintiff moved for default judgments against several
9 defendants in the *Elf-Man* and *The Thompsons Film* cases. Plaintiff requests
10 \$30,000 from each defendant, plus attorneys' fees. The Court should note that the
11 request includes fees for Ms. VanderMay at \$450 per hour and includes such
12 outrageous entries as a combined 18.6 hours for Ms. VanderMay on March 26,
13 2013 (ECF No. 112-1 p. 5 in the *Elf-Man* case, and ECF No. 108-1 in *The*
14 *Thompsons Film* case) for drafting the initial complaint and request for expedited
15 discovery, when, in fact, the initial complaints and requests for expedited
16 discovery are virtually **identical** to the initial complaints and requests for expedited
17 discovery filed a week earlier by Mr. Carl Crowell in the District of Oregon (Case
18 No. 6:13-cv-00469, ECF Nos. 1 and 2 for *The Thompsons Film*; and Case Nos.
19 6:13-cv-00331, ECF Nos. 1 and 4, 3:13-cv-00334, ECF Nos. 1 and 6, and 1:13-cv-
20 00333, ECF Nos. 1 and 5, for *Elf-Man*).

1 By contrast, defendant's counsel has no 18.6 hour days devoted to this case,
2 and defendant's request is for \$250 per hour for Mr. Lynch and for \$200 per hour
3 for his associates Messrs. Smith and Barney. Lynch Dec. at ¶¶ 19-24.

4 In *Fogerty v. Fantasy*, 510 U.S. § 517 (1994) the Supreme Court held that
5 the prevailing party language of 17 U.S.C. § 501 included prevailing defendants. In
6 determining whether to award attorneys' fees to a prevailing party under the
7 Copyright Act, the Court may consider: (1) the degree of success obtained by the
8 prevailing party; (2) frivolousness of the losing party's claim; (3) the motivation of
9 the losing party; (4) the reasonableness of the losing party's legal and factual
10 arguments; and (5) the need to advance considerations of compensation and
11 deterrence. *Wall Data v. L.A. County*, 447 F.3d 769, 787 (9th Cir. 2006); *Ets-Hokin*
12 *v. Skyy Spirits*, 323 F.3d 763, 766 (9th Cir. 2003).

13 Intellectual property cases are complex, especially in a case where the
14 plaintiff does everything it can to avoid discovery. The American Intellectual
15 Property Law Association ("AIPLA") publishes statistics every other year on the
16 costs of a variety of types of intellectual property cases. Lynch Decl. at ¶¶ 17-18.
17 The most recent version of the statistics are for 2013. They show an average cost
18 of \$216,000 through discovery for litigation of copyright cases with a value of less
19 than \$1,000,000, and an average cost of \$373,000 through trial for those small
20 cases. Although a copy of *Elf-Man* can be purchased for under \$10, plaintiff has
21 sought \$30,000 from each defendant against whom it recently sought a default
22 judgment and the value of its Washington cases at 181 times \$30,000 is over

1 \$5,400,000. The average cost of cases with a value between \$1,000,000 and
2 \$10,000,000 through discovery is \$415,000, and the cost through trial for those
3 cases is \$710,000. Lynch Decl. at ¶¶ 17-18.

4 In order to incentivize plaintiff not to use *Lau v. Glendora Unified School*
5 *District*, 792 F.2d 929, 930-31 (9th Cir. 1986) to reject the conditions the Court
6 might impose, Mr. Lamberson does not seek payment of the entirety of its fees as a
7 condition to the entry of the requested dismissal. Mr. Lamberson will seek the
8 entirety of its fees if he otherwise prevails, but the request here is deliberately kept
9 under the actual time invested in the case in order to resolve it now. Consequently,
10 Mr. Lamberson requests the court condition the dismissal on payment in advance
11 of \$100,000 plus \$154.50 in allowable costs for the deposition costs charged for
12 the Fed. R. Civ. P. 30(b)(6) deposition of Elf-Man, LLC which was noted and held,
13 but which neither Elf-Man, LLC, nor its counsel attended. Lynch Decl. at ¶¶ 25-39.

14 These fees and costs were necessarily incurred in this successful defense of
15 the matter and are supported by the Declaration of counsel. Lynch Decl. at ¶ 39.
16 The fee factors all fully support such a condition to dismissal. (1) Mr. Lamberson
17 so fully prevailed that plaintiff ran away from inspection of his computer
18 presumably for fear of what it would not reveal. (2) Plaintiff's claims were entirely
19 frivolous because it has no admissible evidence of liability and for the numerous
20 other reasons in the pending motions regarding the sham litigation issues and the
21 Motions to Compel. (3) Plaintiff was motivated to file its case and get subscriber
22 information and then coerce those subscribers to pay it money without telling them
23

1 the truth, but plaintiff was not motivated to participate in discovery to show the
2 numerous substantive defects in its cases. (4) Plaintiff's factual investigation was
3 entirely missing and fraught with errors, and its legal case was entirely misguided,
4 refusing to engage in dialogue about its "secret authority" of liability which turned
5 out to be "no authority." (5) Most importantly, all of this could have been avoided
6 back in October, 2013, when Mr. Lamberson offered to be interviewed or deposed
7 and to have his computer examined and to accept a dismissal at that time for no
8 costs or fees. Plaintiff's refusal to examine the facts right in front of its nose is an
9 abuse of the judicial system and is conduct that should be deterred in this District.
10 Lynch Decl. at ¶ 27.

11 *Pythagoras Intellectual Holdings v. Stegall*, 2009 WL 3245000 (C.D. Cal.
12 2009) awarded defense attorneys' fees following withdrawal of plaintiff's counsel
13 and an order of dismissal by the Court. The Court found for the defendant on all
14 five of the *Wall Data* factors, and concluded as to factor five:

15 Finally, the Court finds that the need for deterrence here is strong. An
16 award of fees in this case will deter plaintiffs from filing and arguing
17 frivolous and baseless claims in the future....Further, an award of fees
18 will encourage plaintiffs to choose defendants carefully in future suits
to ensure that plaintiffs have a reasonable basis for each claim against
each defendant. Case No. 8:08-cv-0087, ECF No. 376.

19 *Pythagoras* awarded attorneys' fees under the copyright act to each
20 requesting defendant (e.g., ECF No. 388 awarding \$128,264, and ECF No. 386
21 ordering the payment to be made by plaintiff immediately).

1 *Atlantic Recording v. Andersen*, 2008 WL 2536834 (D. Or. 2008) awarded
 2 attorneys' fees of \$103,175 and costs of \$4,659 to prevailing defendants in a peer-
 3 to-peer copyright case. Case No. 3:05-cv-00993, ECF No. 199. The Ninth Circuit
 4 in *Inhale v. Starbuzz*, 739 F.3d 446 (9th Cir. 2013) affirmed an award of \$111,993
 5 in attorneys' fees to prevailing defendants in a copyright action. The request by
 6 Mr. Lamberson is reasonable and in line with Ninth Circuit authority.

7 **Conclusion**

8 Mr. Lamberson consents to dismissal with prejudice of the case against him
 9 provided the plaintiff is required to simultaneously pay costs and reasonable
 10 attorneys' fees as a condition to entry of the dismissal.

11
 12 DATED this 3rd day of July, 2014.

13
 14 LEE & HAYES, PLLC

15 By: s/ J. Christopher Lynch

16 J. Christopher Lynch, WSBA #17462

17 Jeffrey R. Smith, WSBA #37460

18 Rhett V. Barney, WSBA #44764

19 601 W. Riverside Avenue, Suite 1400

20 Spokane, WA 99201

21 Phone: (509) 324-9256

22 Fax: (509) 323-8979

23 Emails: chris@leehayes.com

24 jeffreys@leehayes.com

rhettb@leehayes.com

Counsel for Defendant Ryan Lamberson

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July, 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:

David A. Lowe lowe@lowegrahamjones.com

LEE & HAYES, PLLC

By: s/ J. Christopher Lynch

J. Christopher Lynch, WSBA #17462
601 W. Riverside Avenue, Suite 1400
Spokane, WA 99201
Phone: (509) 324-9256
Fax: (509) 323-8979
Email: chris@leehayes.com