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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELF-MAN, LLC,

Plaintiff,

v.

RYAN LAMBERSON,

Defendant.

NO: 13-CV-0395-TOR

ORDER RE: DEFENDANT’S POST-DISMISSAL MOTIONS

BEFORE THE COURT are Defendant’s Motion for Attorney Fees (ECF No. 75), Motion for Sanctions Pursuant to 28 U.S.C. § 1927 (ECF No. 78), and Motion for Rule 11 Sanctions (ECF No. 80). These matters were submitted for consideration without oral argument. The Court has reviewed the briefing and the record and files herein, and is fully informed.

BACKGROUND

This case involved alleged copyright infringement. In the motions now before the Court, Defendant Lamberson moves for attorney fees and costs pursuant

1 to 17 U.S.C. § 505, RCW 4.84.250, and Fed. R. Civ. P. 54(d)(2)(A), and an award
2 of costs pursuant to 28 U.S.C. §§ 1920, 1923; and moves for sanctions pursuant to
3 28 U.S.C. § 1927 and Fed. R. Civ. P. 11. For the reasons explained below, the
4 Court denies Defendant’s motions for sanctions pursuant to Rule 11 and 28 U.S.C.
5 § 1927, and grants in part Defendant’s motion for attorney fees.

6 **FACTS AND PROCEDURAL HISTORY**

7 Plaintiff Elf-Man, LLC, is a limited liability company that produced the
8 motion picture at issue in this matter, *Elf-Man*. Plaintiff originally sued Defendant
9 Lamberson, along with twenty-eight other defendants,¹ on March 22, 2013, in
10 Cause No. 13-CV-0115-TOR. On October 18, 2013, Defendant Lamberson moved
11 to sever the claims against him. The Court granted the motion on November 21,
12 2013, and opened the above-captioned case.

13 The First Amended Complaint alleges that Defendants, including
14 Lamberson, used BitTorrent, an interactive peer-to-peer file transfer technology
15 protocol to copy, download, share, and upload Plaintiff’s motion picture, or
16 permitted, facilitated, or promoted such conduct by others. Peer-to-peer networks,

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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 in their most common form, are computer systems enabling users to make files
2 stored on each user's computer available for copying by other users, to search for
3 files stored on other users' computers, and to transfer exact copies of the files from
4 one computer to another via the Internet. The complaint alleges that Plaintiff has
5 recorded each Defendant identified as actually copying and publishing Plaintiff's
6 motion picture via BitTorrent, as Plaintiff's investigator has downloaded the
7 motion picture from each Defendant. Plaintiff alleges that, upon information and
8 belief, each Defendant was a willing and knowing participant in the file transfer
9 "swarm" at issue and engaged in such participation for the purpose of infringing
10 Plaintiff's copyright.

11 Plaintiff sued Defendants, claiming copyright infringement, contributory
12 infringement, and indirect infringement of copyright. Plaintiff's First Amended
13 Complaint requests damages of \$30,000 from each Defendant pursuant to 17
14 U.S.C. § 504(c)(1) for its claims of infringement and contributory infringement,
15 and damages of not more than the statutory minimum of \$750.00 on its indirect
16 infringement claim. Plaintiff also requests entry of permanent injunctions to enjoin
17 each Defendant from directly, contributorily, or indirectly infringing Plaintiff's
18 rights in Plaintiff's motion picture, and reasonable costs and attorney fees.

19 Defendant filed an Answer to Plaintiff's Amended Complaint on December
20 17, 2013, without awaiting a ruling on the motions to dismiss pending in Cause

1 No. 13-CV-0115-TOR. The Court held a telephonic scheduling conference on
2 December 19, 2013, and issued a Scheduling Order later the same day. ECF Nos.
3 16, 17. Defendant filed an Amended Answer on January 3, 2014. ECF No. 18.

4 On January 17, 2014, Plaintiff moved to dismiss several of the counterclaims
5 and affirmative defenses asserted in Defendant's Amended Answer. ECF No. 20.
6 Incorporated into this motion was a special motion to strike Defendant's state law
7 counterclaims for defamation, tortious interference with business relationships, and
8 for violations of the Washington Consumer Protection Act ("CPA") pursuant to
9 RCW 4.24.525, the Washington "Anti-SLAPP" Act. Three days later, Defendant
10 filed a motion seeking to (1) withdraw its Amended Answer; (2) dismiss Plaintiff's
11 Amended Complaint for failure to state a claim under Rule 12(b)(6) in light of (i) a
12 ruling issued by Judge Lasnik in a companion case filed in the Western District of
13 Washington, and (ii) the possibility that this Court might issue a similar ruling on
14 the motions to dismiss pending in Cause No. 13-CV-0115-TOR; and (3) as an
15 alternative to dismissal of the Amended Complaint, for leave to file a Second
16 Amended Answer. ECF No. 21.

17 On January 22, 2014, the Court granted in part and denied in part the
18 motions to dismiss in Cause No. 13-CV-0115-TOR. This ruling dismissed, with
19 prejudice, Plaintiff's alternative cause of action for "indirect infringement" of its
20 copyright. *Elf-Man, LLC v. Charles Brown, et al.*, No. 13-CV-0115-TOR (E.D.

1 Wash. Jan. 22, 2014). In light of this ruling, Defendant withdrew the portion of his
2 motion to dismiss (ECF No. 21) seeking to withdraw his Amended Answer and
3 dismiss Plaintiff's Amended Complaint. Defendant did, however, indicate that he
4 still sought leave to file a Second Amended Answer. ECF No. 22.

5 On March 17, 2014, Defendant filed his Second Amended Answer, which
6 alleges two counterclaims: (1) declaration of non-infringement, and (2) declaration
7 of copyright invalidity and unenforceability. ECF No. 35. On March 31, 2014,
8 Plaintiff moved (1) to dismiss Defendant's counterclaims pursuant to Fed. R. Civ.
9 P. 12(b)(6) for failure to state a claim upon which relief can be granted; (2) to
10 dismiss counterclaims and/or strike affirmative defenses based upon allegations of
11 fraud pursuant to Fed. R. Civ. P. 9(b); and (3) to strike pursuant to Fed. R. Civ. P.
12 12(f) material in Defendant's Second Amended Complaint on grounds that it is
13 redundant, impertinent, and/or scandalous. ECF No. 37. Before the Court ruled on
14 that motion, Plaintiff's initial counsel, Maureen VanderMay, moved to withdraw as
15 attorney. ECF No. 55. Shortly thereafter, Plaintiff's new counsel moved to
16 dismiss with prejudice all claims asserted in this case. ECF No. 59. In response,
17 Defendant Lamberson consented to dismissal with prejudice provided that Plaintiff
18 pay costs and reasonable attorney fees in advance. ECF No. 67. The Court
19 dismissed all claims with prejudice and all counterclaims without prejudice, but
20

1 noted that it would consider Defendant's timely filed motion for attorney fees and
2 costs, if any. ECF No. 73.

3 In the motions now before the Court, Defendant Lamberson moves for
4 attorney fees and costs pursuant to 17 U.S.C. § 505, RCW 4.84.250, and Fed. R.
5 Civ. P. 54(d)(2)(A) and an award of costs pursuant to 28 U.S.C. §§ 1920, 1923;
6 and moves for sanctions pursuant to 28 U.S.C. § 1927 and Fed. R. Civ. P. 11.

7 DISCUSSION

8 **A. Motion for Attorney Fees (ECF No. 75)**

9 Defendant Ryan Lamberson moves the court for an award of attorney fees
10 pursuant to 17 U.S.C. § 505, RCW 4.84.250, and Fed. R. Civ. P. 54(d)(2)(A); and
11 an award of costs pursuant to 28 U.S.C. §§ 1920, 1923. The request for costs
12 under 28 U.S.C. §§ 1920, 1923 (ECF No. 77) will be addressed by a separate order
13 pursuant to Local Rule 54.1. Thus, the Court here will only consider the other
14 grounds for awarding attorney fees and costs.

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

16 In any civil action under this title, the court in its discretion may allow
17 the recovery of full costs by or against any party other than the United
18 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.

19 17 U.S.C. § 505. Prevailing defendants as well as prevailing plaintiffs may be
20 awarded attorney fees. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

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

6 In determining whether fees should be awarded, courts may consider a non-
7 exclusive list of factors, including degree of success obtained, frivolousness,
8 motivation, objective unreasonableness (both in the factual and legal components
9 of the case), the need in particular circumstances to advance considerations of
10 compensation and deterrence, and whether the chilling effect of attorney fees may
11 be too great or impose an inequitable burden on an impecunious party. *Ets-Hokin*
12 *v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (citing *Fogerty*, 510 U.S. at
13 534, n. 19); *see also Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769, 787
14 (9th Cir. 2006).²

15 _____
16 ² There is no single set of factors considered by courts in this circuit. For example,
17 see the Ninth Circuit’s articulation of the factors in 2003:

18 Supreme Court identified the following non-exclusive list of factors to
19 guide the award or denial of attorney's fees: “frivolousness,
20 motivation, objective unreasonableness (both in the factual and in the
legal components of the case), and the need in particular
circumstances to advance considerations of compensation and
deterrence.” The Ninth Circuit has added as additional considerations:
the degree of success obtained, the purposes of the Copyright Act, and

1 Examining the relevant factors in turn, this Court determines an award of
2 fees is appropriate. First, Plaintiff dismissed all its claims against Mr. Lamberson;
3 thus, Defendant is the prevailing party. Moreover, Defendant's success was
4 unqualified, as the dismissal against him was with prejudice. Second, from this
5 record, the Court has no basis from which to determine that Plaintiff's claims were
6 frivolous. The case was dismissed short of trial, so all the evidence is not before
7 the Court. Third, Defendant contends the case against him was baseless, but the
8 Court notes that Plaintiff has obtained stipulated relief against others on virtually
9 the same allegations as Plaintiff asserted against Defendant. Fourth, whether
10 Plaintiff's claims were therefore unreasonable is likewise not determinable from
11 this record. Plaintiff requested damages of \$30,000—the full amount of statutory
12 damages available under the Copyright Act for Lamberson's alleged infringement.

13
14 whether the chilling effect of attorney's fees may be too great or
impose an inequitable burden on an impecunious plaintiff.

15 *Ets-Hokin*, 323 F.3d at 766 (internal citations omitted). And see:

16 A district court may consider (but is not limited to) five factors in
17 making an attorneys' fees determination pursuant to § 505. These
18 factors are (1) the degree of success obtained, (2) frivolousness, (3)
motivation, (4) reasonableness of losing party's legal and factual
19 arguments, and (5) the need to advance considerations of
20 compensation and deterrence.

Wall Data Inc., 447 F.3d at 787.

1 In the end, Plaintiff received nothing from Mr. Lamberson, and now nothing more
2 can be said. From Mr. Lamberson's perspective, he has suffered the unjustified
3 expense of defending himself for something he did not perpetrate and for which he
4 should be compensated. Plaintiff may contend the allegations were not unjustified,
5 but in the end Plaintiff elected not to pursue them further. Because Plaintiff
6 elected to cease its action short of proving its entitlement to relief, this factor
7 weighs heavily in favor of awarding Defendant fees as the prevailing party.
8 Finally, awarding fees to Defendant will not have a chilling effect on Plaintiff's
9 other copyright claims. Plaintiff can pursue its valid and well-founded copyright
10 claims with vigor, seeking both damages and fees where warranted. But Plaintiff
11 cannot exact a pound of flesh simply by making defendants caught in its wide net
12 expend attorney fees to defend themselves, perhaps unjustifiably. This factor
13 weighs in favor of an award of attorney fees.

14 Accordingly, the Court finds an award of fees appropriate. This Court will
15 now consider whether Defendant's proposed fees are reasonable.

16 **B. Amount of Attorney Fees Requested**

17 Defendant requests the Court award \$206,580 in attorney fees for defending
18 this case. ECF Nos. 92 at 8; 75 at 7-8. Other than to recite the total hours
19 expended, counsel has not provided a sufficiently detailed justification for the
20 hours claimed. *See* ECF Nos. 76 at 8-10; 68 at 11-14; *see also* ECF No. 68 at 11

1 (“I can provide more detail on these billing if the court requests, but here is a
2 summary of the billing entries and the time and fees logged.”).

3 Plaintiff has contested Defendant’s fee request contending that he has failed
4 to provide adequate documentation and justification for the exorbitant fee request.
5 *See* ECF No. 83 at 9. Plaintiff seeks to “carefully scrutinize and challenge each
6 entry made in the case for date, description, person allegedly performing the work
7 and time spent to ensure that all time was justified, relevant to the particular issues
8 in this case, and not redundant.” *Id.* at 10. Plaintiff also disputes the claim for
9 costs, without corresponding copies of the receipts.

10 In determining reasonable hours, counsel bears the burden of submitting
11 detailed time records justifying the hours claimed to have been expended.
12 *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). Illegible,
13 abbreviated time records, submitted in a form not reasonably capable of evaluation,
14 do not satisfy the “burden of submitting detailed time records justifying the hours
15 claimed.” *Stewart v. Gates*, 987 F.2d 1450, 1453 (9th Cir. 1993) (citing *Chalmers*,
16 796 F.2d at 1210). It is an abuse of discretion to award fees for hours not properly
17 documented. *Stewart*, 987 F.2d at 1453. “[H]ours may be reduced by the court
18 where documentation of the hours is inadequate; if the case was overstaffed and
19 hours are duplicated; if the hours expended are deemed excessive or otherwise
20 unnecessary.” *Chalmers*, 796 F.2d at 1210.

1 Having determined that Defendant is entitled to “reasonable” attorney fees,
2 the Court will allow Defendant the opportunity to supplement the record with
3 detailed time records justifying the hours claimed in this matter. Correspondingly,
4 the Plaintiff will have an opportunity to scrutinize those records and file a
5 responsive brief.

6 Simultaneously, the Court encourages the parties to come to a stipulated
7 resolution of the amount of fees reasonably owed by Plaintiff.

8 **C. Motion for Sanctions Pursuant to 28 U.S.C. § 1927(ECF No. 78)**

9 Title 28, U.S.C. § 1927 provides in pertinent part that

10 [a]ny attorney . . . who so multiplies the proceedings in any case
11 unreasonably and vexatiously may be required by the court to satisfy
12 personally the excess costs, expenses, and attorneys’ fees reasonably
13 incurred because of such conduct.

14 28 U.S.C. § 1927. “The filing of a complaint may be sanctioned pursuant to Rule
15 11 or a court’s inherent power, but it may not be sanctioned pursuant to § 1927.”

16 *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 435 (9th Cir. 1996). Section
17 1927 sanctions require a finding of recklessness or bad faith. *Id.* at 436.

18 Defendant moves for sanctions pursuant to 28 U.S.C. § 1927 and the Court’s
19 inherent authority, arguing that Plaintiff was reckless in its undertakings,
20 multiplying the proceedings, showing bad faith, and concealing a real party in
interest. ECF No. 78 at 2-3. Plaintiff contends that it was bad faith to proceed

1 with the First Amended Complaint in spite of warnings about Rule 11 and false
2 positives from the investigation, as well as declining to examine Defendant
3 Lamberson's computer. *Id.* at 3. The Court notes that section 1927 sanctions are
4 unavailable for complaints. *See Keegan*, 78 F.3d at 435. Accordingly, the Court
5 declines to sanction Plaintiff for its First Amended Complaint.

6 Defendant argues that Plaintiff served summons after its time for service
7 expired and before any order for an extension had issued, and that this delay in
8 seeking summonses and serving Defendant Lamberson after time expired were
9 multiplications undertaken in bad faith. ECF No. 78 at 4. Defendant provides no
10 explanation about how a delay is a multiplication within the meaning of section
11 1927.

12 As Plaintiff points out, Defendant cites egregious facts and outcomes from
13 other cases in other jurisdictions. But there simply is no evidence in this case of
14 the kind of bad faith that warrants sanctions under section 1927 or the Court's
15 inherent authority. Accordingly, the Court declines to award sanctions under
16 section 1927.

17 **D. Motion for Sanctions Pursuant to Fed. R. Civ. P. 11 (ECF No. 80)**

18 Defendant Lamberson moves for sanctions pursuant to Fed. R. Civ. P. 11 for
19 Plaintiff's failure to withdraw its First Amended Complaint (ECF No. 3). ECF No.
20 80 at 2. Defendant argues that Plaintiff's counsel, Maureen VanderMay, failed to

1 undertake reasonable inquiry in pursuing Plaintiff's case. *Id.* Plaintiff and its
2 current counsel, as well as Maureen VanderMay, have responded to the motion.
3 Ms. VanderMay maintains that Defendant's motion should be denied because he
4 has failed to satisfy the procedural and substantive requirements of Rule 11 and has
5 failed to show that it is Ms. VanderMay who has unreasonably and vexatiously
6 multiplied the proceedings in this matter. Plaintiff also opposes this motion,
7 arguing that Defendant has made an insufficient showing that Rule 11 sanctions
8 are warranted. The Court agrees with Ms. VanderMay.

9 "Rule 11 imposes a duty on attorneys to certify that all pleadings are legally
10 tenable and well-grounded in fact; it governs only papers filed with the court."
11 *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997). The
12 Ninth Circuit has "held that 'an attorney violates [R]ule 11 **whenever** he signs a
13 pleading, motion, or other paper without having conducted a *reasonable inquiry*
14 into whether his paper is frivolous, legally unreasonable, or without factual
15 foundation.'" *Keegan*, 78 F.3d at 434 (quoting *Unioil, Inc. v. E.F. Hutton & Co.*,
16 809 F.2d 548, 557 (9th Cir. 1986)). An attorney is subject to Rule 11 sanctions
17 when, among other reasons, he presents to the court "claims, defenses, and other
18 legal contentions [not] warranted by existing law or by a nonfrivolous argument
19 for the extension, modification, or reversal of existing law or the establishment of
20 new law." Fed. R. Civ. P. 11(b)(2).

1. Rule 11's Procedural Requirements

“Rule 11(c)(1)(A) provides strict procedural requirements for parties to follow when they move for sanctions under Rule 11.” *Radcliffe v. Rainbow Const. Co.*, 254 F.3d 772, 788 (9th Cir. 2001). These procedural requirements provide that

[a] motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.

Fed. R. Civ. P. 11(c)(2). “[B]efore sanctions may be imposed upon a party there must be ‘sufficient, advance notice of exactly which conduct was alleged to be sanctionable.’” *Foster v. Wilson*, 504 F.3d 1046, 1052 (9th Cir. 2007) (quoting *In re DeVille*, 361 F.3d 539, 549 (9th Cir. 2004)). The Advisory Committee Notes clarify that “the purpose of Rule 11 sanctions is to deter rather than to compensate, and that the 21-day period is “intended to provide a type of ‘safe harbor’ against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party’s motion unless, after receiving the motion, it refuses to withdraw that positio.” Fed. R. Civ. P. 11 advisory committee’s note. The Advisory Committee went on to note that

[t]o stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides

1 that the “safe harbor” period begins to run only upon service of the
2 motion. In most cases, however, counsel should be expected to give
3 informal notice to the other party, whether in person or by a telephone
4 call or letter, of a potential violation before proceeding to prepare and
5 serve a Rule 11 motion.

6 Fed. R. Civ. P. 11 advisory committee’s note. Thus, a party wishing to impose
7 sanctions must state with clarity the basis for the motion, serve that motion, and
8 wait twenty-one days.

9 Here, Defendant Lamberson served a document captioned “Motion for
10 Sanctions,” on October 11, 2013, which very generally states the following:

11 Pursuant to Fed. R. Civ. P. 11(b)(4), the moving Defendant requests
12 monetary sanctions sufficient to cover costs and attorneys’ fees to date, as
13 well as to deter the reckless behavior of the Plaintiff, plus equitable
14 sanctions of dismissal with prejudice of the action against him.

15 This Motion is brought pursuant to Fed. R. Civ. P. 11(c) and this Court’s
16 Local Rules. The Motion is Supported by a Memorandum in Support of
17 Motion for Sanctions, the Declaration of J. Christopher Lynch, the
18 Declaration of Ryan Lamberson, and a Proposed Order.

19 ECF No. 81-1. This motion contains no specific description of the basis for the
20 sanction. Though the motion states that it is supported by a memorandum and a
declaration, these documents were not included in the exhibits supplied to the
Court, and Ms. VanderMay declares that these documents were not attached to the
motion that was served on her. *See* ECF No. 84. Defendant argues that the letter
accompanying the motion served on October 11, 2013, explains the baselessness of
the First Amended Complaint and, thus, there was sufficient notice of what

1 conduct was alleged to be sanctionable. ECF No. 93 at 9. This letter states, in
2 relevant part, the following:

3 We are concerned with the representations made to the court about the
4 accused “infringing” activity. We see the reference in your pleadings .
5 . . . that your investigation shows that a certain IP address assigned to
6 Mr. Lamberson “was observed infringing plaintiff’s motion picture at
7 04:39:20pm on 12/02/2012.” As we understand BitTorrent, the times
8 listed in the Amended Complaint may indicate that some activity
9 regarding a hash associated with the movie may have occurred on the
10 appointed IP address – but that activity may be simply the passing of a
11 bit of the movie, and not necessarily the delivery (or re-sending) of
12 the entire work. Both Section 106 and Section 107 recognize that
13 ephemeral passage of a bit of work is not-infringing, and even if so,
14 may be fair use. So how do the Amended Complaint’s references to
15 these precise dates and times work?

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17 Given our clients’ frank innocence – i.e. that they never heard of your
18 clients’ movies and never acted to copy them – there is only one
19 conclusion to draw: that your pre-filing investigation and use of the
20 Subpoena process are not sufficient to name Mr. Ryan Lamberson nor
Staff Sgt. Anthony Ades as copyright infringement defendants, nor as
having any secondary copyright infringement liability. FRCP 11
requires an adequate investigation to identify a copyright infringer or
to accuse a person of secondary liability, but here, there is no evidence
that these people did anything unlawful – no evidence they copied and
no evidence they had a relationship with any identifiable copyist
sufficient to meet the established tests for secondary liability under
Title 17.

ECF No. 81-1 at 4-5.

In the motion before the Court, Defendant claims that Ms. VanderMay,
Plaintiff’s initial counsel, violated Rule 11 when she signed a pleading that was

1 baseless and made without reasonable inquiry because it did not include any
2 copyright certificate, had no witnesses to support the allegations, and the law did
3 not support copyright liability of innocent ISP subscribers. ECF No. 80 at 9.
4 Defendant's October 11, 2013 motion and accompanying letter simply do not with
5 sufficient specificity identify the basis for the Rule 11 sanctions. Nor is it clear
6 that the letter—which contains the only hint of specificity as required under Ninth
7 Circuit case law—was “served” as required under the rule.

8 First, neither the letter nor the motion mention the copyright certificates.
9 Thus, Ms. VanderMay had no notice that she might be subject to Rule 11 sanctions
10 on those grounds. Thus, the Court declines to impose Rule 11 sanctions for failure
11 to include the copyright certificate because Ms. VanderMay did not have notice of
12 this argument as required by Rule 11.

13 Second, the letter states only very summarily that Defendant is accusing Ms.
14 VanderMay of failure to investigate. The letter, instead of specifically pointing out
15 where Ms. VanderMay failed to investigate, generally states that Defendant is
16 innocent and asks questions (“How does the Amended Complaint’s references to
17 these precise dates and times work? Are they evidence of actual copying . . . or are
18 the times associated with the ephemeral transit of some bit of the work, which
19 might not be infringement in any manner?”). This is simply insufficient for the
20 Court to impose Rule 11 sanctions, a serious remedy.

1 Furthermore, the purpose of sanctions is to deter subsequent abuses; “[t]his
2 policy is not well served by tolerating abuses during the course of an action and
3 then punishing the offender after the trial is at an end.” *In re Yagman*, 796 F.2d
4 1165, 1183 (9th Cir. 1986), *amended on denial of reh'g*, 803 F.2d 1085 (9th Cir.
5 1986). Here, the motion for sanctions was only filed with the Court following the
6 dismissal of the case.

7 Accordingly, Defendant’s motion for Rule 11 sanctions fails on procedural
8 grounds.

9 **2. Rule 11’s Substantive Requirements**

10 When, as here, a “complaint is the primary focus of Rule 11 proceedings, a
11 district court must conduct a two-prong inquiry to determine (1) whether the
12 complaint is legally or factually baseless from an objective perspective, and (2) if
13 the attorney has conducted a reasonable and competent inquiry before signing and
14 filing it.” *Holgate v. Baldwin*, 425 F.3d 671, 675-76 (9th Cir. 2005) (quoting
15 *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002)) (internal quotations
16 and citation omitted). “As shorthand for this test, we use the word ‘frivolous’ ‘to
17 denote a filing that is *both* baseless *and* made without a reasonable and competent
18 inquiry.” *Id.* (quoting *Keegan*, 78 F.3d at 434).

19 Defendant maintains that Ms. VanderMay, Plaintiff’s counsel at the time,
20 signed a pleading that was baseless and made without reasonable inquiry because it

1 did not include any copyright certificate, had no witnesses to support the
2 allegations, and the law did not support copyright liability of innocent ISP
3 subscribers. ECF No. 80 at 9. Defendant also argues that the fact that Plaintiff's
4 second counsel voluntarily dismissed the complaint suggests that Ms. VanderMay
5 did not conduct a reasonable inquiry before filing the complaint. *Id.* at 10.

6 The Court declines to consider Ms. VanderMay's action in other cases, to
7 which Defendant refers. *See, e.g.*, ECF No. 93 at 6. This is not particularly
8 relevant to Ms. VanderMay's action in the case now before the Court.

9 Nor does the Court find Ms. VanderMay's refusal to examine Mr.
10 Lamberson and his computer dispositive of the question of whether Rule 11
11 sanctions should be imposed. As Ms. VanderMay argues, Defendant provides no
12 authority establishing that an interview of a defendant and an examination of a
13 computer constitute the "minimum objective standard" of an investigation. *See*
14 ECF No. 91 at 8. Ms. VanderMay provided evidence that an investigator had
15 "witnessed" Mr. Lamberson's IP address with a small piece of Plaintiff's motion
16 picture. While the Court agrees with Defendant that perhaps this is ultimately
17 insufficient to "win at trial," ECF No. 93 at 7, it is not probative of Ms.
18 VanderMay's disregard for her duty to investigate in good faith.

19 Accordingly, Defendant's motion for Rule 11 sanctions fails on substantive
20 grounds as well.

1 **IT IS HEREBY ORDERED:**

2 1. Defendant's Motion for Attorney Fees (ECF No. 75) is **GRANTED** in
3 part and **reserved** in part. Defendant shall supplement the record with
4 detailed time records justifying the hours claimed in this matter no later
5 than **November 21, 2014**. Plaintiff may file a responsive memorandum
6 within 14 days after service. Defendant may file a reply memorandum
7 within 7 days after service of the response. The Court will set this matter
8 for hearing without oral argument on December 19, 2014.

9 2. Defendant's Motion for Sanctions Pursuant to 28 U.S.C. § 1927 (ECF
10 No. 78) is **DENIED**.

11 3. Defendant's Motion for Rule 11 Sanctions (ECF No. 80) is **DENIED**.

12 The District Court Executive is hereby directed to enter this Order and
13 provide copies to counsel.

14 **DATED** October 31, 2014.



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Thomas O. Rice
THOMAS O. RICE
United States District Judge