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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 DEFENDANT'S MOTION FOR RULE 11 SANCTIONS Without Oral Argument DATE: August 20, 2014

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Defendant Ryan Lamberson brings this Motion under Fed. R. Civ. P. 11 for plaintiff's failure to withdraw the First Amended Complaint, ECF No. 3. The requirements of Fed. R. Civ. P. 11(c)(2) are met. This Motion is supported by the Declaration of Mr. Lamberson's counsel, J. Christopher Lynch.

Rule 11(b) requires (i) certification of a reasonable inquiry, plus that (ii) the pleading is not for improper purpose, (iii) the claims are warranted by law, and (iv) the factual contentions have evidentiary support. Ms. VanderMay's signature on the First Amended Complaint and failure to withdraw it violate Rule 11(b). Bad faith is not required. *Truesdell v. S. Cal. Permanente Med. Grp.*, 209 F.R.D. 169, 174 (C.D. Cal. 2002) (citing Ninth Circuit cases).

1. Counsel for Plaintiff did not Undertake Reasonable Inquiry.

Ms. VanderMay was admitted to this District on March 15, 2013. In the next two weeks, she filed four lawsuits against 410 people: (i) *Elf-Man LLC v. Does 1-152* in WDWA, filed March 20, (ii) *Elf-Man LLC v. Does 1-29* in EDWA, filed March 22, (iii) *The Thompsons Film LLC v. Does 1-35* in EDWA filed March 27, and (iv) *The Thompsons Film LLC v. Does 1-194* in WDWA, filed March 28. Ms. VanderMay simultaneously requested relief from the Federal and Local Rules in each case, lodging Motions for Expedited Discovery. Lynch Decl. at ¶ 2.

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Ms. VanderMay's Complaints and Motions for Expedited Discovery are identical to Complaints and Motions for Expedited Discovery already filed by attorney Carl Crowell in the District of Oregon, on February 26, 2013, for *Elf-Man*, and on March 19, 2013, for *The Thompsons Film*. Lynch Decl. at ¶ 3.

Ms. VanderMay's Complaints do not include the copyright certificate, and neither do Mr. Crowell's. The *Elf-Man* Complaints filed in other Districts by other counsel each do purport to include the Certificate. Lynch Decl. at ¶ 4.

Ms. VanderMay's Motions to Expedite Discovery do not include any foundational testimony for the typed-up charts of alleged infringement, and neither do Mr. Crowell's. The *Elf-Man* cases filed in other Districts by other counsel each do include a declaration of a "Darren M. Griffin." Lynch Decl. at ¶ 5.

These other Elf-Man counsel who submitted certificates and declarations set a minimum objective standard – a standard not met by Ms. VanderMay. Any objective counsel would understand that the Certificate is jurisdictional, and is required for Copyright Act presumptions, statutory damages, and attorneys' fees. 17 U.S.C. §§ 410-412. Any objective counsel would understand that a Motion for Expedited Discovery would require admissible evidence of liability.

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In the 161 days between the filing of the Complaint and the First Amended Complaint, it does not appear that Ms. VanderMay undertook any additional investigation, despite additional facts warranting deeper investigation.

Judge Lasnik raised concerns *sua sponte* on May 9, 2013:

> [T]he Court admits to some concerns … that the judicial authority of the United States may be used to wrest improvident settlements from pro se litigants under threat of huge statutory penalties.

Elf-Man v. Does 1-152, Case No. 13-cv-0507-RSL, ECF No. 10 at p. 2 (W.D. Wa. 2013). Lynch Decl. at ¶ 6.

By August 7, 2013 Judge Lasnik saw the Rule 11 problem:

> It is not clear plaintiff could, consistent with its obligations under Fed. R. Civ. P. 11, make factual contentions regarding an internet subscriber's infringing activities based solely on the fact that he or she pays the internet bill. Plaintiff seems aware of this problem and has refrained from identifying the Doe defendants more specifically after it learns the name of the subscriber . . . . Plaintiff's litigation strategy seems to be to use the pendency of this action to create a period of time in which it can scare subscribers into settlement as the only means of avoiding both litigation costs and harsh statutory penalties.

Id. at ECF No. 15 pg. 8; Lynch Decl. at ¶¶ 10-11.

Ms. VanderMay responded with declarations in both Districts stating policies of working with defendants and not accepting settlements from innocent people. Lynch Decl. at ¶¶ 7-8, 12. Yet, plaintiff declined to examine Mr. Lamberson or his computer. Lynch Decl. at ¶¶ 14-18. A reasonable inquiry should include the very instrumentality of the accused infringement if made available.

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During this 161 day period from the filing of the original Complaint to the First Amended Complaint, the time to file summonses expired. Fed. R. Civ. P. 4(m). Ms. VanderMay heard multiple responses from accused defendants who had never heard of the movie. These facts raised the original Rule 11 ante, warranting examination. Judge Lasnik's warnings raised the Rule 11 ante. Objective counsel would have re-examined the case before signing the First Amended Complaint. "Everyone else is lying" is not an objectively reasonable position. But, despite the facts and the law, Ms. VanderMay signed the First Amended Complaint.

Mr. Lamberson was served on September 21, 2013. Mr. Lamberson hired counsel who appeared on October 11, 2013. A Rule 11 demand to withdraw the First Amended Complaint within twenty-one days was made October 11, 2013. The required form of Rule 11 motion was included. Defense counsel offered an immediate interview of their clients and an examination of their computers. Defense counsel offered the opportunity to inspect and dismiss the claims for no fees, but explained that if the cases were not dismissed, defendants would defend and claim fees under *Fogerty v. Fantasy*. Lynch Decl. at ¶ 14, Exhibit A.

Defense counsel used the statutory twenty-one day period to attempt a dialogue requesting withdrawal of the First Amended Complaint or an explanation

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under the Copyright Act of how there could be liability and what the evidence was. Plaintiff refused the dialogue and the examinations.

Messrs Lynch, Smith, and Barney had undertaken defense of three individuals named in the *Elf-Man* and *The Thompsons Film* cases. On October 16, 2013, defense counsel sent Ms. VanderMay a letter explaining that another mistake had been made, and making another offer of an interview and examination of the machines. Lynch Decl. at ¶ 15, Exhibit B.

Ms. VanderMay replied by email on October 16, 2013, explaining that a response would be forthcoming, but in the meantime: "Rest assured that I am well aware of my professional obligations, including but not limited to those imposed by Fed. R. Civ. P. 11." Lynch Decl. at ¶ 16, Exhibit C.

Mr. Lynch replied on October 16, 2013:

> If you have facts that these three individuals actually unlawfully copied these movies or may somehow have liability if someone using their IP addresses did, we are ready to listen.…We remain willing to cooperate fully to show you that our clients are innocent and should never have been named and served in a federal lawsuit.

Lynch Decl. at ¶ 17, Exhibit D.

On October 21, 2013, Ms. VanderMay sent a substantive reply. Plaintiff claimed some legal support for a strict secondary liability theory, but without citing any statutes or cases. Plaintiff declined the interview or inspection of the machines:

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> We cannot, however, simply dismiss based solely upon an unsubstantiated claim that a person is not the direct infringer.…With respect to your proposal that we interview of take limited depositions of your clients, we are always happy to engage in such initial discovery to see if a matter can be resolved. In this instance, however, my concern is that our differing legal analyses of the indirect infringement issue may preclude us from resolving based upon such discovery.… If despite the foregoing you believe that some initial discovery is likely to be fruitful, we would be happy to address this issue with you, including the parameters of any interviews with your clients.

Lynch Decl. at ¶ 18, Exhibit E.

Defense counsel replied the next day, October 22, 2013:

> This is not an 'unsubstantiated' claim of innocence – we remain willing to 'prove it' to you. Our offer to view their machines and to depose/interview them about their circumstances will lead to the conclusion that they have no liability under 17 U.S.C. 501/106. Indeed, our offer is 'likely to be fruitful' to the extent to show your clients that they were mistaken when they named these individuals as defendants and they are mistaken now.

Lynch Decl. at ¶ 19, Exhibit F.

Defense counsel wrote again on October 25, 2013. This mail requests confirmation whether "Darren M. Griffin" is the investigator and what the "one-second" timeframe of the Complaint stood for. Lynch Decl. at ¶ 20, Exhibit G.

Ms. VanderMay replied on October 29, 2013:

> With respect to your offer of an interview with Mr. Lamberson and a forensic analysis of his computer at this time, your recent correspondence still does not explain how this would serve the interests of efficiency or economy in light of Plaintiff's claim for indirect infringement…. Because we expect that such preliminary

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> discovery would only serve to increase the costs of litigation to both parties, we are not inclined to engage in such discovery before Mr. Lamberson responds to the First Amended Complaint.

Lynch Decl. at ¶ 21, Exhibit H.

Ms. VanderMay also refused to answer the simple factual questions about the investigation and the investigators:

> Lastly, with respect to your demands that we respond to various questions that you have raised regarding the allegations made in the amended complaint, we fail to see how addressing these issues at this time will serve to further the resolution of the matter.

Lynch Decl. at ¶ 21 Exhibit H.

On October 30, 2013, defense counsel made one last attempt to get plaintiff to undertake a reasonable review of the case against Mr. Lamberson:

> Otherwise, it seems we have no choice on Mr. Lamberson other than to defend to verdict and attorneys fees…Our offer for your firm to examine the machines and defendants before any formal discovery was to give your clients the chance to confirm that our clients are not infringers… Our offer was an attempt to allow you to see if there was actual evidence to support your claims or to withdraw the pleadings as FRCP 11 is designed to accomplish.

Lynch Decl. at ¶ 22, Exhibit I.

On Friday November 1, 2013, the Fed. R. Civ. P. 11 twenty-one day safe harbor closed. Thereafter, Mr. Lamberson answered the First Amended Complaint and proceeded to final dismissal of the case against him. Lynch Decl. at ¶ 22-31.

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2. Case Law Supports a Finding of a Violation of Rule 11.

Although the facts of each Rule 11 matter are different, the cases support the relief requested. *Holgate v. Baldwin* explains the test as to a Complaint: "a district court must conduct a two-prong inquiry to determine: (1) whether the complaint is legally or factually baseless from an objective standpoint, and (2) if the attorney has conducted a reasonable and competent inquiry before singing and filing it. As a shorthand for this test, we use the word 'frivolous' to denote a filing that is *both* baseless *and* made without a reasonable and competent inquiry." 425 F.3d 671, 676 (9th Cir. 2005) (emphasis in original) (citing *Christian v. Mattel,* 286 F.3d 1118, 1127 (9th Cir. 2002)); *see also Moore v. Keegan,* 78 F.3d 431, 434 (9th Cir. 1996). "The mere existence of one non-frivolous claim in a complaint does not immunize it from Rule 11 sanctions." *Holgate v. Baldwin,* 425 F.3d 671, 677 (9th Cir. 2005) (citing *Townsend v. Holman,* 929 F.2d 1358, 1364 (9th Cir. 1990)).

Here, as in *Holgate,* the plaintiff's initial counsel signed a pleading that was baseless and made without reasonable inquiry. There was no adequate legal basis for the First Amended Complaint because it did not include any copyright certificate, it had no witnesses to support the allegations, and the law did not support copyright liability of wholly innocent ISP subscribers. There was no adequate factual basis because plaintiff had only an imperceptible foreign blip not associated

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with Mr. Lamberson, yet plaintiff declined to examine Mr. Lamberson or his machine. There was no reasonable inquiry under that objective standard.

In fact, Mr. Lowe's first act in the case, i.e. filing a Motion to Dismiss, is evidence that Rule 11 was violated when Ms. VanderMay signed and filed the First Amended Complaint. *Holgate* ruled on this point at page 679: "The fact that the Holgate's second counsel recommended that they request voluntary dismissal of the complaint suggests that Levinson did not conduct a reasonable inquiry before filing the complaint."

The fact of Ms. VanderMay's withdrawal does not affect her responsibility. *Holgate* ruled on this point at page 677: "The fact that Levinson was allowed to withdraw as counsel due to a conflict of interest does not protect him from sanctions based on a filing that he made before that withdrawal." *See also In re Itel Sec. Litig.*, 791 F.2d 672, 675 (9th Cir. 1986) (holding that an attorney may not escape sanctions by withdrawing from a case).

Rule 11 "is intended to maintain the integrity of the system of federal practice or procedure." *Estate of Calloway v. Marvel Entm't Grp.*, 9 F.3d 237, 241 (9th Cir. 1993). Ms. VanderMay's pursuit of Mr. Lamberson despite the objective evidence of his innocence harms the integrity of the federal system and should be deterred.

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3. Conclusion.

Ms. VanderMay's federal lawsuits against over 60 people in this District within one week of her admission were signed without basis or adequate investigation under Fed. R. Civ. P. 11. Objective counsel would have sought the jurisdictional copyright certificate and submitted it. Objective counsel would have supported a motion for Expedited Discovery with foundational witness testimony. Objective counsel would have researched copyright infringement, contributory copyright infringement and other secondary copyright infringement liability to confirm that none of those avenues of liability applied to the facts at hand. Objective counsel would listen and adjust when Judge Lasnik expressed concern *sua sponte* that plaintiff's counsel cannot meet her Rule 11 obligations. Objective counsel would have understood emphatic pleas of innocence as a sign that there may be a problem with the case, not that there was not a problem. Objective counsel would take advantage of an accused defendant's offer to demonstrate his innocence, especially when paired with an express allegation of a violation of Rule 11.

Ryan Lamberson respectfully requests that his Motion be granted and that sanctions be awarded in amounts and on terms the Court deems just.

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DATED this 21st day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st 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

And I hereby certify that I have mailed by United States Postal Service the document to the following:

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