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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELF-MAN, LLC, Plaintiff, v. RYAN LAMBERSON, Defendants.	Civil Action No. 13-cv-00395 TOR PLAINTIFF'S RESPONSE TO DEFENDANT'S ATTORNEY'S FEES AND COST REQUEST 12/19/14 Without Oral Argument

In its October 31, 2014 order, the Court ruled that Defendant was entitled to "reasonable" attorney's fees and costs in this case, to the extent they are properly documented, relevant to issues in this case, and not redundant or excessive. (EFC No. 99 at 10). The party seeking fees bears the burden of submitting detailed time records justifying the hours claimed. *Chalmers v. Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). "[H]ours may be reduced by the court where documentation of the hours is inadequate; if the case was overstaffed and hours are duplicated; if the hours expended are deemed excessive or otherwise unnecessary." *Id.* Moreover, reasonable hours must be based on hours billed, not worked. In other words, unless Defendant can prove that alleged time was actually billed to the client with an expectation that he is responsible for the fees, such time is not properly included as reasonable fees

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chargeable to the Plaintiff. Finally, Defendant has an obligation to make a "good faith effort" to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary. As articulated by the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983):

> The district court also should exclude from this initial fee calculation hours that were not 'reasonably expended.' Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. 'In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.'

Previously Defendant had been given multiple opportunities to provide "detailed time records justifying the hours claimed," as well as perform necessary self-edits to that time to remove unjustified, excessive, unnecessary or otherwise improperly included time, but the Court allowed additional time to "supplement the record with detailed time records justifying the hours claimed in this matter." Despite these multiple opportunities, Defendant has still failed to provide Plaintiff or the Court with **contemporaneous, detailed time records, properly edited, showing the time actually billed to the client**. As a result, Plaintiff and the Court are left unable to thoroughly scrutinize the claimed attorney's fees and are left to guess at what should or should not be included. Because what Defendant has submitted are neither contemporaneous time nor actual billing records, including monthly invoices to the client, there is nothing to prevent fanciful or misremembered time entries from being included. Defendant's pervasive use of block billing further prevents evaluation of each separate claimed activity for its purpose and reasonableness, leaving Plaintiff and the

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Court wholly unable to meaningfully examine the record to determine "reasonable fees" in this case.

When Plaintiff's present counsel first appeared in this case, Plaintiff inquired why the case had not yet settled. Attorney Lynch asserted that he was "fighting this case for an award of attorney's fees under the *Fogerty* case" and that "he would not agree to dismiss the case unless Plaintiff paid his attorney's fees." (ECF No. 86 at ¶ 4). Yet to this day, Defendant has failed to provide contemporaneous, detailed time records, properly edited, showing the time actually billed to the client sufficient to even attempt to ascertain the amount of reasonable attorney's fees.

This same lack of detail and reliability has prevented the parties from coming to a stipulated resolution of the amount of fees reasonably owed in this case, despite the Court encouragement to come to a stipulated resolution of the amount of fees. (EFC No. 99 at 11) Defendants simply would not (and apparently could not) produce genuine time records in a format allowing them to be meaningfully evaluated, and insisted on including large categories of activity that the law does not allow. In emails exchange between November 10 and December 4, Defendant refused to provide any underlying data supporting actual attorney's fees and costs billed in this case. (Lowe Ex. A). Instead, Defendant demanded $185,922, then when pressed, amended that amount to $175,593, while never even presenting a rationale how both might stand as "reasonable attorney's fees."

Plaintiff believes both numbers to be ridiculously inflated and has pressed Defendant to provide detail in the form of line items as opposed to the gross time sheets provided in the Attorney Lynch Supplemental Declaration. Rather than engage in any good faith discussion of actual, reasonable attorney's fees properly attributable to justified, non-excessive, non-duplicative and otherwise legitimate activity, Defendant was focused, even after this case has long been dismissed, upon demands for discovery

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on irrelevant matters, thereby to make unfounded and speculative statements, and to threaten appeal. (Id.)

As noted in the Court's order, it is an abuse of discretion to award fees for hours not properly documented. *Stewart v. Gates*, 987 F.2d 1450, 1453 (9th Cir. 1993). What is the Court to do under such circumstances? In this type of egregious case, where Defendants have utterly and repeatedly failed to (a) provide the required contemporaneous time records showing what was actually billed to the client, (b) provide sufficient detail of discrete tasks by attorney, date and time for review and challenge, and (c) make any effort to exclude fees indisputable improper attorney's fees, including those pertaining to other claims, failed sanctions proceedings, unnecessary 3rd party research and participation in unrelated case, among other things, the Ninth Circuit has specifically authorized district courts to "throw[] up its hands and refus[e] to award any fees whatsoever." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1204 (9th Cir. 2013). Plaintiff respectfully submits that this is proper and justified result in the present case.

Even if the Court is otherwise inclined make some type of award, despite the lack of the required detailed, reliable and provably billed time records, Plaintiff respectfully submits that any such award should be severely reduced by the following analysis.

A. DEFENDANT FAILS TO SUBMIT RELIABLE, CONTEMPORANEOUS TIME RECORDS

Defendant claims fee entries dating back more than a year. But it is impossible to accurately reconstruct such records over that length of time. This is one of the main reasons that contemporaneous records are preferred in the Ninth Circuit. *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000); *Nance v. Jewell*, 2013 U.S. Dist. LEXIS 185971 (D. Mont. 2013). Nevertheless, Defendant has utterly failed to come

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forward with any evidence that the time submitted to the Court was contemporaneously recorded over the past year. To the contrary, there is every indication that the time submitted was actually reconstructed by Defendant's counsel in response to the Court's October 31, 2014 order demanding fee details. Instead of providing copies of contemporaneous time sheets of actual time billed—a project that would take an administrative assistant less than an hour to format and print—Defendant's partner-level attorney Lynch claims to have spent 25 hours preparing a 76 page Supplemental Declaration (ECF No. 100), of which 42 pages are substantially a regurgitation of multiple prior Lynch declarations (see ECF Nos. 76, 79, 81 and 95). Indeed, Lynch admits to "compiling previous testimony" as part of the 25 hours purportedly spent providing required detailed time records. This is little more than a stream-of-consciousness self-serving recitation full of utter speculation and argument, and should be disregarded on that basis.

Moreover, the thirty pages purportedly comprising attorney time entries lack any indicia of reliability. As explained further below, they consist almost entirely of confused, vague, amalgamated and often repeated rambling statements about generalized work projects, making it utterly impossible to definitively establish what amount of time was spent on any particular activity. Further evidence that these entries are reconstructed long after the claimed date of activity is the fact that Defendant (a) failed to provide detailed time records as part of its initial July 21, 2014 motion; (b) failed to provide detailed time records in its August 12, 2014 reply, even though specifically requested by Plaintiff in its opposition; (c) failed to provide detailed time records in response to Plaintiff's request on November 10, 2014 (Lowe Ex. A); and (d) failed to provide detailed time records showing what if anything was actually billed to Mr. Lamberson, even in response to the Court's October 31, 2014 order. It is reasonable to find, after all of this, that Mr. Lamberson has never been billed for any of this time.

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Indeed, Attorney Lynch admits on multiple occasions in these time records that he was attempting to reconstruct the time based on "ECF records," "court docket" and some type of vague "timeline:"

Date	Attorney	Time	Activity
6/23/14	JCL	2	Prepare timeline for fee request; review timesheets/bills and court docket re same
6/24/14	JCL	2	Review ED WA and WD WA files re timeline of progress for fee request; revise declaration re same
7/18/14	JCL	3	Initial prep of Motion for 28 USC 1927 Sanction; timeline and declaration re same; exhibit selection.
11/12/14	JCL	2	Review ECF record re attorneys fees timeline; prepare same to augment bills.

(ECF No. 100, Ex. 1 at 31).

Defendant's obvious failure to provide reliable, contemporaneous records in this case provides a strong reason to reduce any fee award. *Fischer*, 214 F.3d at 1121 (while it is permissible to base a fee request on reconstructed records developed from litigation files, doing so may "provide the district court with a reason to reduce the fee.")

B. DEFENDANT FAILS TO PROVIDE PROOF OF TIME ACTUALLY BILLED TO THE CLIENT

Defendant failed to produce proof that any time was actually billed to Mr. Lamberson, let alone that all of the time now claimed by Defendants was billed. Instead, Defendant has provided only what appears to be gross time claimed to have been worked by Defendant's counsel. Unless this time was actually billed to Mr. Lamberson, it is not properly included in the attorney's fees sought against Plaintiff. *Hensley*, 461 U.S. at 434. Defendant has been given multiple opportunities to provide copies of actual invoices sent to Mr. Lamberson. Without such evidence, Plaintiff can only assume that no such bills were even sent, and no claim was ever made for such work. Accordingly, no claim for attorney's fees is proper against Plaintiff.

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C. DEFENDANT'S BLOCK BILLING PRECLUDES DETERMINATION OF REASONABLE FEES

"Block billing is the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks." *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 945 n.2 (9th Cir. 2007). The Ninth Circuit court have routinely either disallowed in their entirety of severely reduced across the board block billing fee entries. *Taleff v. Southwest Airlines Co.*, 2013 U.S. App. LEXIS 7296 (9th Cir. 2013) (block billed fees disallowed); *Innospan Corp. v. Shasta Ventures GP LLC*, 2014 U.S. App. LEXIS 12959 (9th Cir. 2014) (proper reduction in the total fees amount and reductions to account for block billing and excessive work); *Lahiri*, 606 F.3d at 1222-1223 (80% of entries were block billing, which were reduced across the board by 30%).

Here, 84% of the entries were block billing, accounting for $127,095 out of the total $137,950 in claimed fees. This pervasive use of block billing makes it impossible for Plaintiff, let alone the Court, to separately evaluate and challenge virtually all of Defendant's claimed activity for reasonableness, as required to justify any award of attorney's fees. Many of the block entries commingle activities that may otherwise be fairly recoverable with activities that clearly are not, such as the failed sanctions motions and counterclaims. Defendant bore the burden of providing detailed records of time actually billed sufficient to allow Plaintiff scrutinize and challenge the records. (ECF No. 99 at 11). Plaintiff submits that Defendant's failure in this regard necessitates excluding these block billed fees, in their entirety.

D. DEFENDANT FAILS TO MAKE THE REQUIRED "GOOD FAITH" EFFORT TO EXCLUDE IMPROPER FEES

As articulated by the Supreme Court, "[c]ounsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive,

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redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." The reason is that "[h]ours that are not properly billed to one's client also are not properly billed to one's adversary." *Hensley*, 461 U.S. at 434. In other words, Defendant must exclude time that are not allowable for this recovery even if they were billed. For example, Defendant's counsel may well have elected to bill the client for claims unrelated to the copyright infringement claims, such as the failed sanctions motions or counterclaims, but these are still not chargeable to Plaintiff as part of a fee award.

Defendant failed to make any effort—let alone the required good faith effort—to exclude improper fees. To the contrary, it is clear that Defendant made every effort to include every single minutes of every person that touched this case over the last year, regardless of the claim to which it pertained. Among the numerous examples noted in the detailed Fee Analysis Table (Lowe Ex. B) submitted herewith are the following illustrations:[1]

1. Failed counterclaims

Defendant made no effort to exclude time spent on failed counterclaims. On March 17, 2014, the Court denied Defendant's requests for attorney's fees related to the Anti-SLAPP motion Plaintiff was forced to bring to dismiss Defendant's state law counterclaims. (ECF No. 35 at pp. 7-8) Nevertheless, Defendant includes approximately 44 hours and claims $10,640 in fees related directly to the failed counterclaims for which the Court has already denied attorney's fees, which should be

[1] Because of Defendant's use of block billings, categorization of gross time entries throughout this response was necessarily based on a minimum of one entry for a particular activity. It was not possible to ascertain which part of the block entry was attributable each of the separate activities.

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excluded in their entirety. *Accord Lahiri v. Universal Music & Video Distrib. Corp.*, 606 F.3d 1216, 1222 (9th Cir. 2010) (award is explicitly limited to excess costs and fees incurred in defending against Lahiri's copyright infringement claim, and excludes litigation expenses for his dismissed Lanham Act and unfair competition claims).

2. Failed sanctions motions

Defendant made no effort to exclude time spent on failed sanctions motions, including both the Rule 11 and 28 U.S.C. § 1927 motions that were denied by the Court. *See, e.g., Thomas v. City of Tacoma*, 410 F.3d 644, 649 (9th Cir. 2005) (hours spent on unrelated, unsuccessful claims should be excluded from the fee award). Nevertheless, Defendant includes approximately 94 hours and claims $22,835 in fees related directly to the failed counterclaims for which the Court has already denied attorney's fees, which should be excluded in their entirety.

3. Duplicative time entries

Defendant assigned three attorneys to work on virtually every facet of the case through its dismissal. Yet Defendant made no effort to exclude duplicative or redundant time spent, whether by the same attorney or multiple attorneys repeatedly churning on the identical issue or activity. As best as can be ascertained from the block entry, gross time sheet provided, Defendant includes approximately 120 hours and claims $26,800 in fees for unnecessary, duplicative work, which should be excluded in their entirety.

4. Vague time entries

Billing entries are too vague to justify a finding that they were reasonably expended in connection with the litigation. *Harper v. City of L.A.*, 2006 U.S. Dist. LEXIS 101235, 21-22 (C.D. Cal. May 16, 2006). At noted in the attached detailed Fee

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Analysis Table (Lowe Ex. B), not less than 45 hours and $10,500 in fees consist of vague entries that should be excluded.

5. Review or investigation of third parties

Defendant made no effort to exclude time spent on unnecessary review or investigation related to third parties wholly unrelated to the copyright claim in this case:

- Attorney Lynch admitted to reviewing more than 50 cases on attorney's fees in general and virtually all of the many BitTorrent cases from across the country. Mr. Lynch even brought up cases Plaintiff's counsel had previously worked on last year for an unrelated client. (ECF No. 86 at ¶ 4)

- Defendant spent hours consulting with outside attorneys such as Mike Matesky, who represented third parties, including hours spent traveling to and attending hearings in the Western District of Washington. For example, Defendant claims nearly 10 hours on January 14 and 15, 2014 apparently assisting Mr. Matesky for and attending in Seattle a hearing in a completely unrelated case.

- Defendant spent hours attempting to secure further legal work. For example, between September 4 and 15, Attorney Lynch apparently spent more than six hours reviewing default judgment submissions in separate BitTorrent cases in this jurisdiction, reviewing infringement charts, investigating whether defaulted parties unrepresented by Attorney Lynch spoke Spanish, and researching whether to intervene.

- Defendant spent hours unnecessarily pursuing a fabricated "real party in interest." Defendant speculated that there was a party other than the named and properly identified Plaintiff Elf-Man, LLC in this case. But the

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undeniable evidence is that Elf-Man, LLC is the owner of copyrights in the film at issue, making it the proper "real party in interest."

- Defendant spent hours researching third parties such as Guardelay / APMC / Molina / Partridge / Achache / Griffin completely unrelated to the present case. For example, according to the gross time records provided, Defendant spent 75 hours and claimed $18,425 related to the mindless pursuit of an investigator (Griffin) used in other, unrelated cases across the country but never used whatsoever in this case. That is completely unnecessary and unreasonable.

- Defendant spent hours pursing discovery from third parties who "might" be necessary parties in this case based on a misreading of the Ninth Circuit's decision in *Righthaven, LLC v. Hoehn*, 716 F.3d 116 (9th Cir. 2013). This included, but was not limited to, a subpoena issued to Vision Films, Inc. Plaintiff explained to Defendant's counsel that the *Righthaven* case did not support any need to subpoena Vision Films. *Righthaven* actually stands for the proposition that only Plaintiff had standing to file this action, not that it deprived Plaintiff of standing. In sum, there was absolutely no identifiable basis relevant to this case for Defendant's subpoena to Vision Films. Moreover, Defendant's counsel was aware of the contractual relationship between Plaintiff and Vision Films, Inc. and, in fact, had been provided with documentation regarding this relationship in discovery. Nonetheless, counsel opted to pursue this material through the completely unnecessary, more costly and cumbersome subpoena process. (ECF No. 84 ¶¶ 11, 33-34)

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None of these activities were related to or necessary for the copyright infringement claim brought against Mr. Lamberson. Rather than engage in a reasonable and professional manner to address the merits of case, Defendant's counsel has engaged in a vitriolic, scorched-earth approach solely to run up exorbitant fees. This is not academia where esoteric theories can be chased with reckless abandon. Defense counsel is welcome to educate themselves on such topics, but should not expect anyone else to pay for it, and Plaintiff should not be required to pay to defend against it. *See, e.g., Wells v. Cal. Home Loan Solutions*, 2007 U.S. Dist. LEXIS 74291 (S.D. Cal. Oct. 4, 2007) (unnecessary third party claims and research excluded) *Thomas*, 410 F.3d at 649. Nevertheless, Defendant includes approximately 310 hours and claims $76,400 in fees related directly to the completely unnecessary third party pursuits, which should be excluded in their entirety.

6. Unnecessary deposition after notice of unavailability

After Plaintiff's counsel newly appeared in this case, Defendant was informed that the deposition scheduled the following week would need to be rescheduled because counsel was unavailable, and Attorney Lynch agreed that it would be cancelled. Illustrative of Defendant's approach in this litigation, Defendant nevertheless proceeded with the deposition, ordered the court reporter in Spokane, and attended solely to make a record of Plaintiff's absence and create further costs and fees. (ECF No. 86 at ¶¶ 5, 10). Nevertheless, Defendant includes approximately 3.6 hours and claims $720 in fees related to the deposition, which should be excluded in their entirety.

7. Unnecessary churning and accusations regarding mail service of discovery responses

Defendant claims to have spent 12 hours and $3,015 in time spent challenging Plaintiff's counsel's declaration of service based on envelope mailing date. This claim

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was completely baseless and unnecessary, and should be excluded in its entirety. (ECF No. 84 at ¶35).

8. Motion to sever

Early in the case, Defendant sought to sever from the original case. Plaintiff did not oppose this action. Nevertheless, Defendant claims to have spent 22 hours and $4,560 in fees on this unopposed process. This was both unnecessary and excessive, and should be excluded.

9. German investigator

Defendant spent 45 hours and claims $10,815 researching Hague convention and compelling depositions of foreign investigators that were voluntarily offered for deposition by Plaintiff via efficient, less expensive means. This was both unnecessary and excessive, and should be excluded.

10. Fees for generating billing entries

Defendant was obligated to provide billing invoices documenting in detail time claimed in his original motion for attorney's fees. This he failed to do, even after requests by Plaintiff. Had Defendant's counsel maintained contemporaneous time records and actually provided the client with regular invoices, it would have been a simply task to produce the actual billing records. Instead, the Court was forced to request supplemental information, and Defendant now claims to have spent 31 hours and $7,660 in fees on this task. But court-ordered supplemental information should be excluded or significantly reduced both as duplicative of time previously spent on the motion and excessive. *Lahiri*, 606 F.3d at 1223 (9th Cir. 2010) (district court excluded fees incurred because of court-requested supplemental information); *Thompson v. Gomez*, 45 F.3d 1365, 1366-68 (9th Cir. 1995) (arithmetic reduction of an award of

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"fees-on-fees" by the ratio of the fees actually awarded in the underlying fee dispute to the amount therein requested). Moreover, Defendant's counsel would not, and could not, have billed his client $7,660 for the activity of preparing bills to the client. Accordingly, for this additional reason, the fees spent attempting to reconstruct the fees in this case are not properly chargeable to Plaintiff, and should be excluded.

11. Unnecessary fees incurred after rejected offer of settlement

As admitted by Defendant, Plaintiff offered to settle the copyright infringement claim in this case twice between May 13-19, 2014. As described therein, Plaintiff's offer demanded no money; rather:

> very clearly proposed either entry of a consent judgment or, in the alternative, execution of a confidential settlement agreement with a provision that your client agrees not to engage in future infringement of Plaintiff's copyright and destruction of any unauthorized copies. If, in fact, your client does not intend to infringe Plaintiff's copyright in the future and if he has no unauthorized copies, we fail to see how such a confidential agreement would be problematic.

Defendants rejected this offer absent payment of all of Mr. Lamberson's attorney's fees to date. (Lowe Ex. C) As became clear in the short few weeks thereafter in which Plaintiff voluntarily dismissed its claims, there was no further incentive—apart from Defendant's admitted motivation to rack up additional claimed attorney's fees—for the case to continue. As noted by the Court in refusing Plaintiff's fees necessitating in bringing its Anti-SLAPP motion to dismiss Defendant's counterclaims early in this case, Plaintiff's offer to settle its claims militated against any award of fees. (ECF No. 35 at pp. 8-9) Defendants claim to have incurred 211 hours and $51,505 in fees after this settlement offer, all of which should be excluded.

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12. Unnecessary fees incurred after voluntary dismissal

In the alternative, for the same reason, all of Defendant's fees claimed to have been incurred after Plaintiff dismissed with prejudice its claims in the case on June 13, 2014 should be excluded. Defendants claim to have incurred 151 hours and $36,990 in fees after this dismissal, all of which should be excluded.

13. Unnecessary motion to compel after voluntary dismissal

Plaintiff voluntarily dismissed its copyright claim with prejudice on June 13, 2014. Nevertheless, Defendant filed and pursued a completely unnecessary motion to compel documents related to third party APMC, for which he claims 15.2 hours and $3,740 in fees. This was completely unnecessary and should be included in its entirety.

14. Unnecessary motion to strike after voluntary dismissal

Plaintiff voluntarily dismissed its copyright claim with prejudice on June 13, 2014. Nevertheless, Defendant filed and pursued a completely unnecessary and frivolous motion to strike based on an alleged late and over length filing despite admitting no prejudice to Defendant, for which he claims 11 hours and $2,750 in fees. This was completely unnecessary and should be included in its entirety.

E. REASONABLE BILLING RATES

Defendant admits that billing rates to Mr. Lamberson were $250 for Attorney Lynch, $200 for Attorney Smith and $200 Attorney Barney. (ECF No. 75 at p. 7). Plaintiff does not dispute that these rates are commensurate with those in the relevant community and reasonable. Indeed, as a percentage of the attorney's claimed rates, these rates were found reasonable and appropriate in the highly analogous situation in the default judgment cases in *Elf-Man, LLC v. Albright et al.*, Civil Action No. 13-cv-115 (ECF No. 134 at 26). However, Defendant now claims dramatically increased hourly rates of $400 for Attorney Lynch, $300 for Attorney Smith and $250 Attorney

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Barney. There is no indication that any time was actually billed to Mr. Lamberson at these inflated rates, or that such rate inflation is warranted. Defendant bears the burden of any increase in such rates, such rate increase is not warranted in this case. *Blum v. Stenson*, 465 U.S. 886, 895, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984). Accordingly, to the extent that any time is found to be relative, accurate and reasonable, the rate to be applied should be no more than original admitted by Defendant of $250 for Attorney Lynch, $200 for Attorney Smith and $200 Attorney Barney.

F. LODESTAR ANALYSIS AND REASONABLENESS OF ANY FEE AWARD

The "lodestar" method multiplies the prevailing billing rates by the hours reasonably expended on successful claims. *Blanchard v. Bergeron*, 489 U.S. 87, 94, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989). That total can then be adjusted if warranted under the circumstances of the case. *Id*. But there is a strong presumption that a lodestar calculation is reasonable without an enhancement. *Perdue v. Kenny A. ex rel. Winn.*, 559 U.S. 542, 554, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010). The party seeking an enhancement has the burden to prove it is appropriate. *Id*. at 553. This requires "specific evidence that the lodestar fee would not have been adequate to attract competent counsel." *Id* at 554. An enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation. *Id*. Therefore, the novelty and complexity of a case do not usually justify an enhancement, because those factors influence the billable hours. *Id*. The quality of an attorney's performance also does not justify an enhancement since that is presumably reflected in the attorney's hourly rate. *Id*. That is the case here.

There is absolutely no basis for any enhancement factor for any amount that may be awarded in this case. The overriding issue is any attorney's fees award must be "reasonable." This in part is an equitable consideration of what was at stake in the case. Here, Defendant claimed that this was a "$10 case." (ECF No. 95 at ¶ 95). Early in this

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case Plaintiff demanded $7,400 to settle. (ECF No. 75 at p. 3). The Court in parallel cases in this jurisdiction concluded that the copyright claim at issue involved infringement of a $20 movie. Based in part on this analysis, the Court cut by more than half what were otherwise found to be reasonable attorney's fees in a companion case, *Elf-Man, LLC v. Albright et al.*, Civil Action No. 13-cv-115 (ECF No. 134), awarding Plaintiff less than $2,500 as reasonable attorney's fees for a case prosecuted through default judgment by two different attorneys over more than a year. The same should apply in this case.

In point of fact, very little happened in this case related to the only claim for which Defendant is entitled to any award of fees and costs—the claim for copyright infringement of the *Elf-Man* movie. This case involved first and second amended complaints and answers, an unopposed motion to sever and an exchange of written discovery, then it was dismissed. There were no depositions, substantive hearings (only status conferences), dispositive motions, pretrial proceedings, or trial. Start to finish, for a "$10 case" and a "$20 movie," there is no justification for even a fraction of the 578 hours and $137,950 now claimed by Defendant. It simply bears no credible relationship to the case or what was at stake.

As amply demonstrated by even a cursory review of the 293 entries submitted, virtually all of the time was spent pursuing straw man theories and irrelevant arguments, **and there is no evidence whatsoever that Mr. Lamberson was ever billed for any of this time**. Again, this is not academia where esoteric theories can be chased with reckless abandon, particularly where, as here, such activity is grossly disproportionate to the case. Indeed, no client would or should pay for that level of activity for such a small case, and to bill a client under these circumstances would be tantamount to committing malpractice. This further confirms that Defendant was never

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was billed for this effort, and instead counsel chased these issues for sport and now seeks to recover them as "attorney's fees" when they really never were fees.

In point of fact, virtually none of these activities were related to or necessary for the copyright infringement claim brought against Mr. Lamberson. Instead of engaging in a reasonable and professional manner to address the merits of case, Defendant's counsel engaged in a vitriolic, scorched-earth approach solely to run up exorbitant fees. (See ECF Nos. 83, 84 and 86) Attorney Lynch has admitted on several occasions his "unfettered aggression" in this case and motivation to maintain the case solely to seek further attorney's fees. (E.g., ECF No. 95 at ¶ 89). It is neither the purpose nor intent of the copyright statute to finance this type of approach to litigation, and to reward such actions would create a stifling chill on such legitimate pursuit of copyright claims. Indeed, in a highly analogous situation, the Fourth Circuit approved of an across the board reduction by 70% of the fee award, finding multiple frivolous claims, inflated hours and poor case management. *Spell v. McDaniel*, 852 F.2d 762, 767 (4th Cir. 1988) Here, it is patently inconceivable that attorneys defending a straightforward copyright infringement case could spend 578 hours. To the extent there is any award of fees in this case, that must be reasonable and commensurate with the copyright issue at stake.

G. COSTS

Defendant likewise fails to provide any receipt documenting claimed out-of-pocket costs. (ECF No. 84, ¶¶ 11, 33-34; ECF No. 86 at ¶ 13) This precludes any independent verification effort by Plaintiffs, both as to amount and necessity. *See Symantec Corp. v. CD Micro, Inc.*, No. 02-406-KI, 2005 WL 1972563, *5 (D. Or. Aug. 12, 2005) (in Copyright Act case, denying copy costs due to absence of documentation explaining purpose for which copies were made). At a minimum, there can be no award of costs for the $154.50 deposition court reporter fee, $198.38 witness fee and service, and $997.94 Pacer charges, for the reasons

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explained above. At most, Defendant may be entitled to the requested cost under 28 U.S.C. § 1923.

RESPECTFULLY SUBMITTED this 5th day of December, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on December 5, 2014 to all counsel or parties of record who are deemed to have consented to electronic service via the Court's CM/ECF system.

s/ David A. Lowe

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