Kirk D. Miller, WSBA #40025
Attorneys for Intervenor Center for Justice
KIRK D. MILLER, P.S.
421 W. Riverside Avenue, Suite 660
Spokane, Washington 99201-0410
Telephone: (509) 413-1494
Facsimile: (509) 413-1724
Email: kmiller@millerlawspokane.com

U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELF-MAN, LLC,

Plaintiff,

vs.

RYAN LAMBERSON, an individual,

Defendant.

NO: 2:13-cv-00395-TOR

CENTER FOR JUSTICE'S MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF CHALLENGING THE SEALING OF COURT RECORDS

Note on Motion Calendar: 11/30/17

6:30 PM - Without Oral Argument

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

I. INTRODUCTION

The Center for Justice ("CFJ") respectfully requests leave to intervene, pursuant to Fed. R. Civ. P. 24(b), for the limited purpose of challenging the sealing of court records in this case.

Specifically, the CFJ seeks to intervene to challenge the sealing of six exhibits attached to a series of motions and supporting declarations filed by the parties from July 2014 through January 2015. The sealed exhibits are directly relevant to the CFJ's mission of providing greater access to justice to low-wage Washingtonians and ensuring that government and courts operate in an open and transparent manner.

This case presents a rare and important opportunity to shine a light on why innocent Washingtonians find themselves named as defendants in copyright infringement lawsuits and how film companies, lawyers and "independent" investigators have deputized federal courts to facilitate a shakedown. The CFJ therefore respectfully requests that this Court grant it leave to intervene under Rule 24(b) in order to challenge the sealing of these exhibits.

II. STATEMENT OF FACTS

This is a case about alleged copyright infringement and the entities responsible for the growing wave of "copyright trolling" lawsuits. Plaintiff Elf-Man, LLC, producer of the motion picture *Elf-Man*, sued Defendant Ryan

Lamberson along with twenty-eight other "Doe" defendants, identified by the Internet Protocol ("IP") addresses assigned by their Internet Service Provider ("ISP"). The complaint alleged that Elf-Man had recorded each Defendant copying and publishing *Elf-Man* via BitTorrent, an interactive peer-to-peer file transfer technology. ECF Nos. 1 at ¶ 60 and 2 at ¶ 137. To support this assertion, Plaintiff alleged that its investigator had downloaded the motion picture from each Defendant. *Id.* After sending subpoenas to the ISPs based on the table of IP addresses allegedly connected to infringing, *see* ECF No. 1-1, Elf-Man amended its complaint to name Lamberson. *See* ECF No. 2 at ¶ 83.

After this Court granted the parties' stipulated motion for a boilerplate protective order, ECF No. 32, the parties filed several documents separately under seal. *See* ECF Nos. 39-1, 39-2, 43-5, 43-6, 51-2, 65-2. These documents reportedly trace the bizarre relationship between Elf-Man and the investigators who formally declared they had "observed" the alleged infringing activity, forming the basis of Elf-Man's entire case. Apparently, Elf-Man, through its "sales agent," retained a company called Anti-Piracy Management Company ("APMC") to "manage its piracy efforts, including but not limited to this litigation." ECF No. 57 at 3 (quoting Elf-Man's response to interrogatories). This contract, including how revenue from "anti-piracy" efforts was divided, if any, remains under seal.

In short, several of the documents filed under seal may expose how film companies, investigators and lawyers have coordinated an illegal settlement factory, sending threatening and deceptive letters to hundreds of targets, and seeking quick settlements priced just low enough that it is less expensive for the defendant to pay rather than to defend the claim.

Based on undersigned counsel's review of the record, it appears that this occurred without any showing of need for secrecy or any specific judicial findings that the need for secrecy outweighed the public's presumptive right of access to court records. Instead, it appears that these records were sealed simply because they contained, or made reference to, documents that were designated confidential pursuant to the parties' stipulated protective order. In fact, the protective order did not define "confidential," rather, it allowed the producing party to designate documents, testimony, written responses or other materials as "confidential" if it has a "good faith basis for asserting is confidential [sic] under the applicable legal standards." ECF No. 23-1.

III. INTEREST OF MOVANT

As described in the attached Declaration of the CFJ's Rick Eichstaedt, CFJ is a non-profit organization dedicated to providing greater access to justice and creating more transparency in the judicial system. *See* Eichstaedt Dec. at ¶ 1. The CFJ also works to curb predatory consumer practices, which

disproportionately affect low-income individuals that are a majority of CFR's clients. *Id.*

The CFJ's position is simple: if foreign data collectors and local lawyers are feeding on the subpoena power of federal courts to extract settlements from innocent people, then the public deserves to know. Unfortunately, improper use of confidentiality designations in litigation prevents the type of investigation needed to fully understand the scope of the issues.

What makes this case so important is that, based on the unsealed exhibits and declarations, it appears that a German operation is providing the "investigators" and "experts" that claim to identify infringing activities, but its investigators apparently have a direct financial interest and the "software" is questionable at best. ECF Nos. 53 at ¶ 9; 57 at 7; 58 at ¶ 5; 64 at 3. The entire lawsuit may have been a sham.

Which is where CFJ comes in. Money and information remain the most significant hurdles for those being named as defendants in lawsuits like this one who receive threatening settlement letters like the one Mr. Lamberson received. Even if an accused infringer has the resources to hire counsel, defense lawyers are unfamiliar with these cases, costing a potential defendant more in legal bills than the cash settlement offered by the copyright trolls. By the time the average lawyer has figured out how to respond, she has sunk more hours into a case than it would

cost to settle. This creates a perverse incentive, where Washingtonians settle cases with no merit, which encourages the trolls' continuing meritless litigation.

CFJ's goal is to level the playing field and reduce the plaintiffs' informational advantage. The common-law right of access to judicial records is especially important where, as here, the copyright "trolling" risks infecting the judicial system. Exposing the copyright trolls' mushrooming enterprise depends on accessing court documents, such as the six documents CFJ seeks to unseal.

For all these reasons, the CFJ believes that the sealing of the records in this case prevents access to materials of significant public concern, a concern that goes to the core of the CFJ's mission. The CFJ therefore respectfully requests that this Court unseal six exhibits in this case.

IV. AUTHORITY AND ARGUMENT

A. CFJ Meets The Standard For Permissive Intervention Under Federal Rule Of Civil Procedure 24(b).

It is well established that "[n]onparties seeking access to a judicial record in a civil case may do so by seeking permissive intervention under Rule 24(b)(2)." *San Jose Mercury News v. U.S. Dis. Court-N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999). Where, as here, the CJF does not seek to litigate a claim on the merits, but rather seeks to intervene for the limited purpose of challenging the sealing of court records, an independent jurisdictional basis and a

common question of fact or law are not required. *Id.* at 1100. *See also Beckman Indus., Inc. v Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992) (holding an independent jurisdictional basis and strong nexus of fact or law are not required where an intervenor merely seeks to challenge a protective order, because the intervenor is merely asking the court to exercise a power it already has: the power to modify its order); *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1176 (9th Cir. 2006) (nonparty granted permissive intervention for limited purpose of modifying protective order and challenging sealing of court records).

1. The Motion To Intervene Is Timely.

When faced with a motion to intervene for the purpose of unsealing court records, the only question is whether the proposed intervention is timely. The Ninth Circuit considers three factors to determine whether a motion to intervene is timely: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of [any] delay." *San Jose Mercury News*, 187 F.3d at 1100-01. Of these three factors, whether the existing parties would be prejudiced is "the most important consideration in deciding whether a motion for intervention is untimely." *United States v. State of Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (quoting 7A C. Wright & A. Miller, Federal Practice and Procedure § 1916 (1972)). When the requested intervention will "complicate the issues and prolong the litigation,"

there is prejudice to the other parties from the delay in seeking leave to intervene. *United States v. State of Wash.*, 86 F.3d 1499, 1504 (9th Cir. 1996).

Here, permitting the CFJ to intervene for the limited purpose of unsealing documents will not prejudice the original parties. The CFJ does not seek to intervene in the merits of the lawsuit or to participate in any way. It seeks intervention only because, as explained above, that is the procedural vehicle by which it may request access to court records that—in its view—ought to be public. Because the proceedings are complete, there is no possibility the CFJ's intervention will cause disruption or delay in the proceedings. *See Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (finding it significant that intervention would not cause disruption or delay proceedings); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (explaining that where intervention is limited to the "collateral purpose" of seeking access to court documents, "prejudice in the adjudication of the rights of the existing parties" is not a concern); *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 786 (1st Cir. 1988) (stating "if the desired intervention relates to an ancillary issue and will not disrupt the resolution of the underlying merits, untimely intervention is much less likely to prejudice the parties.").

As to the remaining two factors, the CFJ only recently learned about the sealing of these significant exhibits. Having learned of their existence, the CFJ

acted promptly to file motions to intervene and unseal. Moreover, in the context of requests to unseal documents, "delays measured in years have been tolerated where an intervenor is pressing the public's right of access to judicial records." *San Jose Mercury News*, 187 F.3d at 1101; *see also Perez v. Lantern Light Corp*., No. C12-1406RSM, 2017 WL 2172012 (W.D. Wash. May 17, 2017) ("Although this case has been closed since October of 2015, the Court recently allowed WWCP to intervene in this matter pursuant to Local Civil Rule 5(g)(8) for the sole purpose of making a motion to unseal records."); *S.E.C. v. AOB Commerce, Inc.*, No. CV 07-4507 (CAS), 2013 WL 5405697, at *1 (C.D. Cal. Sept. 23, 2013) (permitting intervention for the purpose of unsealing documents five years after the case settled). Therefore, the fact that this case was resolved in January 2015 is not a bar given the nature of this motion to intervene.

2. There Is No Independent "Common Question Of Law Or Fact" Requirement Where Intervention Is Sought For The Limited Purpose Of Challenging Court Records.

As noted above, the Ninth Circuit has repeatedly upheld the intervention of nonparties for purposes of challenging a protective order in cases where there was no common question except the propriety of the order. *See Kamakana*, 447 F.3d at 1176; *San Jose Mercury News*, 187 F.3d at 1100. In doing so, it has characterized its own caselaw as "holding that . . . [a] strong nexus of fact or law [is] not required where [an] intervenor merely seeks to challenge a protective

order." *San Jose Mercury News*, 187 F.3d at 1100 (citing *Beckman*, 966 F.2d at 473-74).

The reason for this is clear: If courts insisted that intervenors seeking court records raise a common question with the main action beyond the question of whether the records should be sealed, there would be no way for members of the public to gain access to records unless they had some personal interest in the case. This would vitiate the public's right of access to court records. *See Kamakana*, 447 F.3d at 1178-80 (explaining the importance of and justification for the common law right of access to judicial records).

Accordingly, the CFJ's contention that records in this case should be unsealed is sufficient to support its motion for intervention.

V. CONCLUSION

For the foregoing reasons, the CFJ respectfully requests that this Court grant this motion to intervene for the limited purpose of seeking public access to sealed documents.

RESPECTFULLY SUBMITTED AND DATED this 17th day of October, 2017.

KIRK D. MILLER, P.S.

By: /s/ Kirk D. Miller, WSBA #40025

Kirk D. Miller, WSBA #40025
Attorneys for Intervenor Center for Justice
421 W. Riverside Avenue, Suite 660
Spokane, Washington 99201-0410
Telephone: (509) 413-1494
Facsimile: (509) 413-1724
Email: kmiller@millerlawspokane.com

CERTIFICATE OF SERVICE

I, Kirk D. Miller, hereby certify that on Oct. 31st 2017, I 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 Allen Lowe, WSBA #24453
Attorneys for Elf-Man LLC
LOWE GRAHAM JONES PLLC
701 Fifth Avenue, Suite 4800
Seattle, Washington 98104
Telephone: (206) 381-3300
Email: lowe@lowegrahamjones.com

John Christopher Lynch, WSBA #17462
Jeffrey Ray Smith, WSBA #37460
Rhett V. Barney, WSBA #44764
Attorneys for Ryan Lamberson
LEE & HAYES, PLLC
601 West Riverside Avenue, Suite 1400
Spokane, Washington 99201
Telephone: (509) 324-9256
Facsimile: (509) 323-8979
Email: chris@leehayes.com
Email: jeffreys@leehayes.com
Email: rhettb@leehayes.com

Collette C. Leland, WSBA #40686
Attorneys for Interested Party Maureen VanderMay
WINSTON & CASHATT
601 West Riverside Avenue, Suite 1900
Spokane, Washington 99201-0695
Telephone: (509) 838-6131
Facsimile: (509) 838-1416
Email: ccl@winstoncashatt.com

DATED this 31st day of October, 2017.

KIRK D. MILLER, P.S.

By: /s/ Kirk D. Miller, WSBA #40025
Kirk D. Miller, WSBA #40025
Attorneys for Intervenor Center for Justice
421 W. Riverside Avenue, Suite 660
Spokane, Washington 99201-0410
Telephone: (509) 413-1494
Facsimile: (509) 413-1724
Email: kmiller@millerlawspokane.com