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*Counsel for Defendant Ryan Lamberson*

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

ELF-MAN, LLC,  
  
vs.  
  
RYAN LAMBERSON,  
  
Plaintiff,  
  
Defendant.

No. 2:13-CV-00395-TOR

DEFENDANT’S MOTION FOR  
ATTORNEYS’ FEES

Without Oral Argument  
DATE: August 20, 2014

1 Defendant Ryan Lamberson is the prevailing party. Judgment was entered.  
2 ECF No. 74. The Order of Dismissal, ECF No. 73, invites this motion for attorneys'  
3 fees and costs. This Motion is supported by the Declaration of J. Christopher Lynch  
4 and previous declarations of counsel. A Cost Bill in the LR 54.1 format of the  
5 District is included.

6 **1. Statutory Costs under 28 U.S.C. §§ 1920, 1923.**

7 28 U.S.C. § 1920 allows statutory costs. A Bill of Costs, upon allowance, is  
8 included in the Judgment. 28 U.S.C. §§ 1920 (2), (3), and (4) are applicable here.  
9 Mr. Lamberson requests: (i) \$154.50 for the court reporter fee (§ 1920(2)); (ii)  
10 \$198.38 for the witness fee and service (§ 1920(3)); (iii) \$997.94 for copies of  
11 materials (§ 1920(4)); and (iv) the \$20 provided by 28 U.S.C. § 1923. The  
12 deposition transcript, the subpoena to Vision Films, the PACER entries and the  
13 photocopy costs are allowable and were necessarily incurred. Lynch Decl. at ¶¶ 2-6.  
14 Fed. R. Civ. P. 54(d)(1) authorizes the award of these costs without motion. The  
15 sum of these allowable costs is \$1,370.82.

16 **2. Statutory Costs and Attorneys' Fees under 17 U.S.C. § 505, RCW**  
17 **4.84.250, and Fed. R. Civ. P. 54(d)(2)(A).**

18 The Copyright Act expressly authorizes payment of "full costs," plus  
19 attorneys' fees as part of the costs:

1 In any civil action under this title, the court in its discretion may allow  
2 the recovery of full costs by or against any party.... Except as  
3 otherwise provided by this title, the court may also award a reasonable  
4 attorney's fee to the prevailing party as part of the costs.

5 17 U.S.C. § 505.

6 In addition, Washington law authorizes attorneys' fees in matters under  
7 \$10,000 if the defendant prevails. RCW 4.84.250. Plaintiff's demand was \$7,400.  
8 Lynch Decl. at ¶ 7. This policy makes sense where foreign corporations are suing  
9 individuals who may have literally no connection to the false allegations.

10 Fed. R. Civ. P. 54(d)(2) addresses awards of attorneys' fees and related non-  
11 taxable expenses. Unlike the statutory Cost Bill, a request for attorneys' fees and  
12 related non-taxable expenses requires a motion. Fed. R. Civ. P. 54(d)(2)(A). Under  
13 Fed. R. Civ. P. 54(d)(2)(B)(i): this motion is timely brought on or before July 24,  
14 2014. Under Fed. R. Civ. P. 54(d)(2)(B)(ii) and (iii): the applicable Judgment is  
15 ECF No. 73, the applicable statutes are 17 U.S.C. § 505 and RCW 4.84.250, and the  
16 requested amount is \$191,264.37, plus reply fees and reply costs.

17 **3. The Case Law Supports the Requested Attorneys' Fees.**

18 In *Fogerty v. Fantasy*, 510 U.S. 517, 534 (1994) the Supreme Court held that  
19 the prevailing party language of 17 U.S.C. § 505 included prevailing defendants.  
The U.S. Constitution at Article I, Section 8, Clause 8 expressly sets a balancing test  
for copyright: advancement of arts and sciences is incentivized by the institution of

1 a limited monopoly – and that balance advances society as a whole. Mr.  
2 Lamberson’s fees are earned in respect of that test – establishing boundaries of that  
3 limited monopoly. Unlike patent (35 U.S.C. § 285) and trademark (15 U.S.C.  
4 § 1117(a)), no “exceptional case” is required for copyright defense attorneys’ fees.  
5 Mr. Lamberson was doing what the law encourages him to do under 17 U.S.C.  
6 § 505.

7 In determining copyright attorneys’ fees, the Court may consider: (1) degree  
8 of success; (2) frivolousness of the losing party; (3) motivation of the losing party;  
9 (4) objective unreasonableness of the losing party; and (5) considerations of  
10 compensation, chilling effect, and deterrence. *Fogerty v. Fantasy*, 510 U.S. 517, 535  
11 n.19 (1994); *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003); *Wall*  
12 *Data v. Los Angeles Cnty. Sheriff’s Dep’t*, 447 F.3d 769, 787 (9th Cir. 2006).

13 The factors all support Mr. Lamberson’s request. (1) Mr. Lamberson fully  
14 prevailed. Plaintiff made no record to the contrary. (2) Plaintiff’s claims were  
15 frivolous: that is, baseless and without reasonable inquiry. An objective  
16 investigation would consider whether a plausible Copyright Act claim case could be  
17 lodged against subscriber names, given questionable admissibility of the foreign  
18 evidence. (3) Plaintiff was motivated to get subscriber information to coerce those  
19 subscribers to pay it money without telling them the truth. Plaintiff was not

1 motivated to participate in discovery on its investigation and evidence. Plaintiff's  
2 motivation is seen in the admission it made in discovery: Plaintiff had not served the  
3 customary DMCA takedown notice against any hosts of the links about which it  
4 complained – in other words, fuel for plaintiff's speculative invoicing program was  
5 more of a priority than stopping the alleged piracy at its source. (4) Plaintiff's  
6 investigation was not objectively sufficient and is the subject of Mr. Lamberson's  
7 Rule 11 Motion filed herewith. (5) This entire matter could have been avoided  
8 immediately after service in October 2013 when Mr. Lamberson offered to be  
9 interviewed or deposed, to have his computer examined, and to accept a dismissal at  
10 that time for no costs or fees before he Answered. Lynch Decl. at ¶ 8.

11 *Pythagoras Intellectual Holdings v. Stegall* awarded defense copyright  
12 attorneys' fees following withdrawal of plaintiff's counsel and the Court's order of  
13 dismissal. Case No. 8:08-cv-0087, ECF No. 376, 2009 WL 3245000 (C.D. Cal.  
14 2009). The Court found for the defendant on all five of the *Wall Data* factors, and  
15 concluded as to factor five:

16 Finally, the Court finds that the need for deterrence here is strong. An  
17 award of fees in this case will deter plaintiffs from filing and arguing  
18 frivolous and baseless claims in the future....Further, an award of fees  
19 will encourage plaintiffs to choose defendants carefully in future suits  
to ensure that plaintiffs have a reasonable basis for each claim against  
each defendant.

1 *Id. Pythagoras* awarded attorneys' fees under the Copyright Act to each requesting  
2 defendant. *See, e.g., Id.*, at ECF No. 388 (awarding \$128,264); and ECF No. 386  
3 (ordering the payment to be made by plaintiff immediately).

4 *Atlantic Recording v. Andersen* awarded attorneys' fees of \$103,175 to  
5 prevailing defendants in a peer-to-peer copyright case. Case No. 3:05-cv-00933, at  
6 ECF No. 199, 2008 WL 2536834 (D. Or. 2008). *Capitol Records v. Foster*  
7 awarded attorneys' fees of \$86,685.23 to prevailing defendants in a peer-to-peer  
8 copyright case. Case No. 5:04-1569, at ECF No. 161, 2007 WL 1028532 (W.D.  
9 Okla. 2007). *Mattel v. Walking Mountain* awarded attorneys' fees of \$1,548,089 to  
10 prevailing defendants in copyright fair use case. Case No. 2:99-cv-08543, ECF No.  
11 388 (C.D. Cal 2004). The Ninth Circuit in *Inhale Inc. v. Starbuzz Tobacco, Inc.*  
12 affirmed an award of \$111,993 in attorneys' fees to prevailing defendants in a  
13 copyright design case. 739 F.3d 446, 450 (9th Cir. 2013) *amended by* 2014 WL  
14 2465052 (9th Cir. 2014). In *Wall Data, supra*, the Ninth Circuit affirmed  
15 attorneys' fees of \$516,271 under copyright's Section 505. All of these cases  
16 support the request here.

17 **4. The Requested Attorneys' Fees were Necessarily Incurred.**

18 Intellectual property cases are complex, especially where the plaintiff  
19 actively avoids discovery. The American Intellectual Property Law Association

1 publishes cost statistics. The 2013 statistics show an average of \$216,000 through  
2 discovery for copyright cases with a value less than \$1,000,000, and an average of  
3 \$373,000 through trial for those small cases. Although *Elf-Man* can be purchased  
4 for under \$10, plaintiff has sought \$30,000 from each defendant in default  
5 judgments and the value of its Washington cases at 181 multiplied by \$30,000 is  
6 over \$5,400,000. The average cost of copyright cases with a value between  
7 \$1,000,000 and \$10,000,000 through discovery is \$415,000, and the cost through  
8 trial for those cases is \$710,000. Lynch Decl. at ¶ 9.

9 Here, the defense requests an award of attorneys' fees for 377.7 hours for  
10 Mr. Lynch, 84 hours for Mr. Smith, and 43.8 hours for Mr. Barney. Although the  
11 time has been lodged to Mr. Lamberson's bills at rates of \$250 for Mr. Lynch and  
12 \$200 for Messrs Smith and Barney, this Motion requests a lodestar of \$400 for Mr.  
13 Lynch, \$300 for Mr. Smith, and \$250 for Mr. Barney. These are reasonable hourly  
14 rates for the relative experience and skill of each counsel and such an award  
15 furthers the policies of the factors. Lynch Decl. ¶¶ 10-13. Mr. Lowe has requested  
16 \$495 per hour for his time and \$450 for Ms. VanderMay in the default judgments.  
17 ECF No. 112-1. The lodestar rate charged to the client carries a strong presumption  
18 of reasonableness, *see, City of Burlington v. Dague*, 505 U.S. 557, 561 (1992), yet  
19 the Court's duty is to use the prevailing market rate for similar services of lawyers

1 of reasonably comparable skill, experience and reputation, *see, Chalmers v. City of*  
2 *Los Angeles*, 796 F.2d 1205, 1210-1211 (9th Cir. 1986). In the end, the Court has  
3 discretion to set reasonable hourly rates for the market and multiply those rates by  
4 the number of hours reasonably spent. *See, Hensley v. Eckerhart*, 461 U.S. 433,  
5 437 (1983). At the hourly rates lodged to Mr. Lamberson's files, the requested  
6 amount for attorneys' fees is \$122,485, plus reply fees. At the requested lodestars,  
7 the requested amount for attorneys' fees is \$191,230, plus reply fees.

8 **5. Non-Taxable Costs were Incurred and should be Awarded.**

9 17 U.S.C. § 505 allows the court to award "full costs" in addition to  
10 attorneys' fees. Here, the incidental costs in addition to those awardable as part of  
11 the Cost Bill under 28 U.S.C. § 1920, are: \$24.63 for postage and federal express;  
12 and \$9.74 for a copy of the *Elf-Man* video. This total request is \$34.37. Lynch  
13 Decl. at ¶ 14.

14 **6. Immediate Payment, Bond, or Security are Appropriate.**

15 The Court has discretion to Order the plaintiff and/or its representatives to  
16 pay costs and attorneys' fees immediately. *Pythagoras Intellectual Holdings v.*  
17 *Stegall*, No. 8:08-cv-0087, at ECF No. 386, 2009 WL 3245000 (C.D. Cal. 2009)  
18 (ordering payment of costs and fees awarded to copyright defendant to be made  
19 immediately). Equity supports payment now rather than forcing Mr. Lamberson to



1 chase the plaintiff back to Maryland or California or Germany for the compensation  
2 he is due. Plaintiff filed numerous federal mass-defendant lawsuits, and plaintiff's  
3 un-named "representatives" are responsible for many more cases. Plaintiff and its  
4 representatives should expect the real cost at this time in this District of having to  
5 immediately compensate those individuals who prevail in the manner of Mr.  
6 Lamberson. Mr. Lamberson never undertook any actions directed toward plaintiff,  
7 or Maryland, or California, or Germany; it would be unfair to require him to venture  
8 to those places to enforce the award that was supposed to make him whole.

9 RCW 4.84.210 allows the Court to order entry of a bond or other security to  
10 cover costs and other charges that may be awarded against a foreign corporation  
11 bringing litigation in the state. Elf-Man LLC is a Maryland LLC. Vision Films, Inc.  
12 is a California corporation. APMC, LLC is a California LLC. None of these  
13 companies is authorized to conduct business in the state of Washington. These  
14 companies have used unlicensed private investigators to create evidence they hoped  
15 to introduce into court in contravention of RCW 18.165.010 *et seq.*

16 Mr. Lamberson's sincere claims of innocence, accurately articulated by his  
17 counsel under the operative law and facts, were ignored by plaintiff who insisted  
18 on payment of \$7,400. The policy of RCW 4.84.210 is to insert a decision point on  
19 litigation for a foreign corporation: filing, then cutting and running is not an option

1 in Washington courts. Washington law expressly allows the requirement of a bond  
2 or other security to cover the assessed costs of a case. *See White Coral Corp. v.*  
3 *Geysler Giant Clam Farms, LLC*, 145 Wn. App. 862, 867-69 (Ct. App. 2008)  
4 (affirming order of \$125,000 bond against defense costs and attorneys' fees). The  
5 requirement of immediate posting of a bond/security, or immediate payment into  
6 the Court would facilitate orderly payment to Mr. Lamberson and allow plaintiff  
7 coordination of plaintiff's requested default judgments with the other attorneys'  
8 fees matters that will presumably follow from the other innocent defendants in the  
9 principal *Elf-Man* case who have answered.

10 Finally, Mr. Lamberson requests that any award herein become a judgment  
11 against plaintiff and its "representatives," including APMC, LLC, the financier of  
12 the case and real party in interest. APMC stood to collect first had Elf-Man LLC  
13 prevailed, so APMC should stand to pay first when Elf-Man LLC loses. Lynch  
14 Decl. at ¶15.

15 **7. Conclusion.**

16 Mr. Lamberson is the prevailing party in the case. The law and the facts  
17 support an award of full costs and attorneys' fees in the amounts sought. Mr.  
18 Lamberson respectfully requests the Court order immediate payment from all real  
19

1 parties in interest, or immediate posting of security from all real parties in interest,  
2 to support the following award and judgment:

3 (i) \$1,370.82 for costs under 28 U.S.C. § 1920, including the \$20  
4 fee under 28 U.S.C. § 1923;

5 (ii) \$191,230 for attorneys' fees under 17 U.S.C. § 505; plus any  
6 fees incurred in reply and argument of its motions filed today;

7 (iii) \$34.37 under 17 U.S.C. § 505 for full costs incurred in addition  
8 to those awarded under 28 U.S.C. §§ 1920, 1923; and

9 (iv) For any and all other monetary or equitable relief this Court  
10 deems just.

11 DATED this 21<sup>st</sup> day of July, 2014.

12 LEE & HAYES, PLLC

13 By: s/ J. Christopher Lynch

14 J. Christopher Lynch, WSBA #17462

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18  
19 *Counsel for Defendant Ryan Lamberson*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 21<sup>st</sup> day of July, 2014, I caused to be  
3 electronically filed the foregoing with the Clerk of the Court using the CM/ECF  
4 system which will send notification of such filing to the following:

5 David A. Lowe [lowe@lowegrahamjones.com](mailto:lowe@lowegrahamjones.com)

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

8 Maureen C. VanderMay  
9 The VanderMay Law Firm  
2021 S. Jones Boulevard  
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10 LEE & HAYES, PLLC

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