

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RALPH COLEMAN, et al.,
Plaintiffs,
v.
GAVIN NEWSOM, et al.,
Defendants.

No. 2:90-cv-0520 KJM DB P

ORDER

Plaintiff/Intervenor Christopher Lipsey is a state prisoner proceeding through counsel. In a July 14, 2020 order, this court granted plaintiff Lipsey's request for an award of attorneys' fees for the attorney time necessary to bring Mr. Lipsey's successful motion to compel. (ECF No. 6756.) Mr. Lipsey's counsel, Kate Falkenstien, filed a statement of attorneys' fees (ECF No. 6785) and defendants filed objections (ECF No. 6795). For the reasons set forth below, this court finds an award of \$11,577.30 in attorneys' fees reasonable and orders defendants to pay that amount to Mr. Lipsey's counsel.

LEGAL STANDARDS

Pursuant to Federal Rule of Civil Procedure 37(a)(5), the attorneys' fees due are those reasonably incurred to make the motion to compel. Plaintiff "bears the burden of submitting detailed time records justifying the hours claimed to have been expended." In re Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1305 (9th Cir. 1994) (citing Chalmers v. City of Los

1 Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986)). Where the documentation of hours is inadequate,
2 the district court may reduce the award accordingly. Id. (citing Hensley v. Eckerhart, 461 U.S.
3 424, 433 (1983)).

REASONABLE ATTORNEYS' FEES

5 Ms. Falkenstien declares that she spent the following time preparing for, writing, and
6 arguing the motion to compel: (1) 13.1 hours reviewing defendants' discovery responses and
7 conferring with their counsel; (2) 30.4 hours writing Lipsey's portion of the joint statement; (3)
8 5.6 hours preparing for and attending the hearing; and (4) 5.5 hours on this briefing regarding
9 fees. She claims a total of 54.6 hours.

10 Included as exhibits to her statement are Ms. Falkenstien’s declaration and time sheets.
11 (ECF Nos. 6785-1, 6785-2.) In her declaration, Ms. Falkenstien states that “[t]he time records
12 have been excerpted to include only those time entries related to the motion to compel and
13 associated discovery disputes.” The only exception is that the time sheets include some time
14 spent preparing a motion for a temporary restraining order. Ms. Falkenstien states that she
15 deducted a percentage of time from these entries to seek compensation for only the time spent on
16 the motion to compel.

17 Finally, Ms. Falkenstien seeks compensation at the rate of \$223.50/hour. This rate is
18 dictated by 42 U.S.C. § 1997e(d)(3). Pursuant to that section, in cases brought by prison inmates
19 under § 1983, “the hourly rate used as a basis for the fee award is limited to 150 percent of the
20 hourly rate used to pay counsel appointed under the Criminal Justice Act.” Heilman v. Cherniss,
21 No. 2:11-cv-0042-JAM-EFB-P, 2019 WL 265108, at *2 (E.D. Cal. Jan. 18, 2019) (citing 42
22 U.S.C. § 19973(d)(3)); see also Webb v. Ada Cty., 285 F.3d 829, 837 (9th Cir. 2002) (cap applies
23 to discovery sanctions). The capped rate is currently \$223.50 per hour. (See ECF No. 6738
24 (awarding plaintiffs’ class counsel \$223.50 per hour).) Thus, the total fee award sought by
25 plaintiff Lipsey is \$12,203.10.

26 Defendants challenge several categories of fees sought by Mr. Lipsey. They argue the
27 following items are not compensable: (1) reviewing the documents produced in discovery; (2)
28 meeting and conferring regarding the subjects of the motion to compel; (3) working on matters

1 regarding interrogatory responses; (4) completing the statement of attorneys' fees; and (5) time
 2 that is not sufficiently specific. Defendants do not challenge the rate of \$233.50 per hour. Each
 3 objection is addressed below.

4 **I. Reviewing Produced Documents**

5 Defendants argue that Ms. Falkenstien's time should be reduced by at least two hours
 6 because review of the produced documents would have been necessary regardless of any
 7 questions about the adequacy of the production. This court agrees that counsel's time spent in her
 8 initial, and standard, review of the produced documents is not related to the motion to compel.
 9 See Heilman, 2019 WL 265108, at *3. Defendants also note that while it is possible some of that
 10 document review time was spent on the motion to compel, Ms. Falkenstien does not make that
 11 distinction. Because there is no precise way to determine what document review time should, and
 12 should not, be compensable, this court will exercise its discretion to reduce the hours sought. See
 13 Welch v. Metro. Life Ins. Co., 480 F.3d 942, 948 (9th Cir. 2007) (affirming district court's
 14 authority to reduce block-billed hours by 10 to 30 percent); Heilman, 2019 WL 265108, at *3
 15 (citing Welch, 480 F.3d at 948).

16 Ms. Falkenstien includes document review in three entries: (1) 5/11/20 – 2.75 hours
 17 sought to "Review produced documents; draft letter to opposing counsel regarding discovery
 18 shortcomings; draft supplemental brief on TRO."¹ (2) 5/22/20 – 1.8 hours for "Review document
 19 production; draft supplemental brief on TRO." (3) 5/26/20 – 3.2 hours for "Review document
 20 production; email correspondence with opposing counsel about Coleman class status; prepare list
 21 of group complainants for opposing counsel."

22 This court finds defendants' suggestion of a two-hour reduction appropriate to account for
 23 plaintiff's counsel's ordinary review of the produced documents unrelated to the motion to
 24 compel.

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26 ¹ As stated above, plaintiff's counsel explained that she deducted time spent on the TRO.
 27 However, plaintiff's counsel gave no indication that she deducted her initial review of the
 28 documents provided. In fact, in the statement of attorneys' fees, Ms. Falkenstien indicates that
 her time sought includes that initial review because she states that her hours involved reviewing
 "the large document production in detail." (ECF No. 6785 at 4.)

1 **II. Meeting and Conferring**

2 Defendants argue that meeting and conferring in advance of a motion to compel is not
 3 compensable. Defendants cite several cases in support of that proposition. Courts have,
 4 however, taken different views on this issue.

5 Judges in several districts in this circuit have held that fees incurred for meeting and
 6 conferring prior to bringing a motion to compel may not be included in the successful party's
 7 attorneys' fee award. See Infanzon v. Allstate Ins. Co., 335 F.R.D. 305, 314 (C.D. Cal. 2020);
 8 Dish Network L.L.C. v. Jadoo TV, Inc., No. 2:18-cv-9768-FMO (KSx), 2019 WL 7166067, at *4
 9 (C.D. Cal. Nov. 8, 2019) (Courts in the Central District have reasoned the compensation for
 10 meeting and conferring does not fall within the language of Rule 37(a)(5)(A), which permits
 11 compensation for "reasonable expenses incurred in making the motion."); Rothrock v. Int'l Ass'n
 12 of Heat & Frost Insulators & Allied Workers, No. 15-cv-2412 DMS (JLB), 2016 WL 6395092, at
 13 *5 (S.D. Cal. Oct. 27, 2016) (declining to award fees for defense counsel's meet and confer
 14 regarding plaintiff's initial disclosures because they would have been incurred regardless of the
 15 motion to compel); Aevoe Corp. v. AE Tech Co., No. 2:12-cv-0053-GMN-NJK, 2013 WL
 16 5324787, at *6 (D. Nev. Sept. 20, 2013) ("[A]ttorneys' fees are not generally awarded in this
 17 District for time spent meeting and conferring on motions to compel." (internal citations
 18 omitted).)

19 A judge in the Southern District of California explained, "[t]he local rules ... require
 20 counsel to meet and confer before filing any discovery motion in an effort to resolve disputes. As
 21 such, fees associated with the initial meet and confer process logically should not always be
 22 included in the fee award." Matlink, Inc. v. Home Depot U.S.A., Inc., No. 07cv1994-DMS
 23 (BLM), 2008 WL 8504767, *5 (S.D. Cal. Oct. 27, 2008) (internal citations omitted). Based on
 24 this analysis, the judge determined that the award of fees for meet and confer was not automatic.
 25 The judge then went on to determine that some award of fees for activity prior to preparation of
 26 the motion to compel was appropriate because plaintiff "stonewalled" defendants by refusing to
 27 meet and confer. Id. at *5.

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1 Other judges, including at least one judge in this district, have held otherwise. Heilman,
 2 2019 WL 265108, at *3 (“Identification of deficiencies in the initial responses and the drafting of
 3 a letter explaining those deficiencies would not have been necessary (or possible) if the responses
 4 had not contained those deficiencies in the first instance.”); W. Mortg. & Realty Co. v. KeyBank
 5 Nat'l Ass'n, No. 1:13-cv-00216-EJL-REB, 2019 WL 5873455, at *4 (D. Idaho Jan. 2, 2019)
 6 (time spent meeting and conferring prior to moving to compel is compensable); Woodland v.
 7 Viacom Inc., 255 F.R.D. 278, 284 (D. D.C. 2008) (Meeting and conferring, as required by the
 8 local rules, was compensable as a discovery sanction because it was an activity “useful and of a
 9 type ordinarily necessary” to properly file the motion to compel.); Procaps S.A. v. Patheon Inc.,
 10 No. 12-24356-CIV, 2013 WL 6238647, at *15 (S.D. Fla. Dec. 3, 2013) (same (citing Woodland,
 11 255 F.R.D. at 283-84)); Intagio Corp. v. Tiger Oak Publications, Inc., No. C-06-3592 PJH
 12 (EMC), 2007 WL 420245, at *2 (N.D. Cal. Feb. 5, 2007) (court granted an award of “reasonable
 13 fees for the motion to compel production of documents, including efforts to meet and confer”).
 14 As one magistrate judge held,

15 “To the extent that non-binding precedents suggest otherwise, the
 16 court disagrees with their rationale. Meeting and conferring (and
 17 preparing for it) is no less important and no less the result of
 18 discovery misconduct than legal research, drafting a joint stipulation,
 defendant had complied with its discovery obligations

19 DCD Partners, LLC v. Transamerica Life Ins. Co., No. 2:15-cv-03238-CAS (GJSx), 2018 WL
 20 6252450, at *3 (C.D. Cal. June 13, 2018) (opinion of the district court quoting magistrate judge
 21 and denying reconsideration of magistrate judge’s discovery order).

22 This court finds the latter approach most reasonable. Under this court’s local rules, a
 23 party may not move to compel discovery responses without first attempting to resolve the dispute
 24 informally through the meet and confer process. E.D. Cal. R. 251. Plaintiff had no choice but to
 25 meet and confer to begin addressing defendants’ inadequate discovery responses, which this court
 26 previously determined were not substantially justified (see ECF No. 6756 at 5-8). In this district,
 27 meeting and conferring is inextricable from moving to compel. This court finds compensating
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1 plaintiff's counsel for time spent meeting and conferring with defendants' counsel is appropriate
 2 under Rule 37(a)(5).

3 **III. Work re Interrogatories**

4 Ms. Falkenstien's time entry for June 9 states: "Review defendants' updated interrogatory
 5 response, revise motion to compel draft accordingly, and email with opposing counsel about
 6 interrogatory response and motion to.²" Ms. Falkenstien has not explained how the interrogatory
 7 responses relate to the motion to compel. Further, this court's order finding an award of
 8 attorneys' fees appropriate specified that plaintiff's counsel should be compensated for the time
 9 spent compelling defendants to fully respond to the request for production of documents. (See
 10 ECF No. 6756.) The order made no mention of interrogatories. The .8 hours for that entry will
 11 be deducted.

12 **IV. Preparing and Litigating Amount of Fees**

13 Defendants argue that plaintiff's counsel's time spent preparing her statement of
 14 attorneys' fees should not be compensated. They cite just one case: Addington v. Mid-Am.
 15 Lines, 77 F.R.D. 750, 751 (W.D. Mo. 1978). However, courts in this circuit have held the
 16 contrary. See Estate of Crawley v. Kings Cty., No. 1:13-cv-02042-LJO-SAB, 2015 WL 4508642,
 17 at *5 (E.D. Cal. July 24, 2015) (including attorney's time spent drafting declaration in support of
 18 fee request in award of attorneys' fees). In Matlink, the court addressed the losing party's similar
 19 claim as follows:

20 Contrary to Plaintiffs' assertion, time spent litigating fee petitions is
 21 compensable. See Anderson v. Dir., Office of Workers Comp.
Programs, 91 F.3d 1322, 1325 (9th Cir.1996) (compensation for time
 22 spent litigating a fee petition "must be included in calculating a
 23 reasonable fee because uncompensated time spent on petitioning for
 24 a fee automatically diminishes the value of the fee eventually
 25 received"); U.S. v. City of San Diego, 18 F.Supp.2d 1090, 1101–1102
 (S.D.Cal.1998) (same); Sure Safe Indus. Inc. v. C & R Pier Mfg., 152
 F.R.D. 625, 627 (S.D.Cal.1993) ("Attorneys' fees in preparation of
 requests for attorneys' fees sanctions are recoverable under Rule
 37").

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28 ² The court's copy of this entry is cut off at this point.

1 Matlink, 2008 WL 8504767, *6. This court will permit plaintiff's counsel to recover fees spent
2 reviewing this court's order granting the motion for sanctions and preparing the statement of
3 attorneys' fees.

4 **V. Specificity of Time Records**

5 This court finds the entries in the time sheets to be sufficiently detailed. “[C]ounsel...is
6 not required to record in great detail how each minute of his time was expended. But at least
7 counsel should identify the general subject matter of his time expenditures.” Hensley v.
8 Eckerhart, 461 U.S. 424, 437 n.12 (1983). The declaration meets that standard. Further, as stated
9 above, billing time in blocks covering several categories is not inappropriate. Welch, 480 F.3d at
10 948. However, it may result in some percentage reductions based on the court's inability to
11 determine the reasonableness of the time spent.

12 Here, this court does not find Ms. Falkenstien's time excessive for addressing the
13 extensive problems with defendants' document production. After Ms. Falkenstien realized
14 defendants' document production was not complete, she had to review “productions and filings in
15 other related cases in order to prove that documents were missing from Defendants' productions.”
16 After she explained that the production was deficient, defendants shifted their position several
17 times. Those shifts required Ms. Falkenstien to repeatedly meet and confer with defendants and
18 re-draft the joint statement. First, defendants “initially refused to identify the Coleman class
19 membership of inmates who signed on to group complaints, claiming they did not track that
20 information.” However, after Ms. Falkenstien “drafted a portion of the joint discovery statement
21 on this issue, Defendants provided the information they had previously claimed was unavailable,
22 rendering the briefing on that issue moot and requiring counsel to revise the briefing.” Second,
23 defendants “initially refused to answer counsel's questions about their search methodology.”
24 They changed course and answered some of the methodological questions, but not until after Ms.
25 Falkenstien had drafted the opening portion of the joint discovery statement. This required
26 further re-drafting of the joint statement. Finally, defendants produced some documents after the
27 motion was filed, but before the court ruled on it. (See ECF No. 6785 at 3-4). Defendants do not
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1 dispute Ms. Falkenstien's description of their changing positions or that she was required to spend
2 significant time reacting to them.

3 This court finds almost all of the hours Ms. Falkenstien spent on the motion to compel
4 were reasonable. Where this court determined some time was not compensable, it has used its
5 discretion to make a deduction. Further, the time records were sufficiently specific for defendants
6 to object to certain categories of time, as they have done.

7 **VI. Conclusion**

8 Plaintiff Lipsey seeks reimbursement for 54.6 hours of counsel's time at the rate of
9 \$223.50/hour for a total of \$12,203.10. For the reasons set forth above, this court finds a
10 deduction of 2.8 hours appropriate. That leaves 51.8 compensable hours for a total of \$11,577.30.

11 For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED that
12 within sixty days of the filed date of this order, defendants shall provide Ms. Falkenstien with a
13 check in the amount of \$11,577.30 for her work reasonably necessary to litigate plaintiff's
14 motion to compel.

15 Dated: February 19, 2021



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18 DEBORAH BARNES
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22 UNITED STATES MAGISTRATE JUDGE
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DLB:9
DB/orders.coleman/cole0520.lipsey atty fee award