

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No. SACV 13-0517-CJC (JPRx)

Date: August 18, 2014

Title: Mavrix Photographs LLC v. LiveJournal, Inc. et al.

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**DOCKET ENTRY: Order Granting in Part Defendant’s Request for Attorney’s Fees**

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PRESENT:

**HON. JEAN P. ROSENBLUTH, MAGISTRATE JUDGE**

Bea Martinez  
Deputy Clerk

n/a  
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:  
None present

ATTORNEYS PRESENT FOR DEFENDANTS:  
None present

**PROCEEDINGS: (IN CHAMBERS)**

On June 19, 2014, Defendant filed a request for attorney’s fees. Plaintiff filed opposition on June 26. Defendant filed a reply on July 3. Plaintiff filed an “Objection to New Argument in Defendant LiveJournal Inc.’s Reply” on July 7. On July 10, the Court ordered further briefing. On July 17, Defendant’s counsel filed a supplemental declaration with attachments. On July 24, Plaintiff filed a response, and on July 31, Defendant filed a reply.

For the reasons stated below and in Defendant’s papers, Defendant’s motion for attorney’s fees in the amount of \$13,750 is GRANTED IN PART. Within seven days of the date of this Order, Plaintiff and its counsel must pay Defendant \$10,700, delivered to Defendant’s counsel.

The Court addresses each of Plaintiff’s objections in turn.

1. Plaintiff objects that Defendant never asked for attorney’s fees in connection with the first motion to compel and therefore that it would violate due process for the Court to order them. But it is undisputed that counsel did ask for such fees in connection with the second motion, and the Court is simply using the fees associated with the first motion as a measure of what those sanctions should be, given that Defendant would never have had to oppose a second motion if the first motion had

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been procedurally proper. Indeed, at the hearing on the second motion, the Court specifically said that it wanted to discuss with Defendant's counsel her "request for sanctions," which was made in conjunction with the second motion. (Pl.'s Mot. for Review, Afrasiabi Decl., Ex. 51 at 17.) In any event, as Defendant notes, Federal Rule of Civil Procedure 37(a)(5)(B) provides that when the Court denies a motion to compel, it "must" require the movant or its attorney, or both, to pay the reasonable expenses, including attorney's fees, of the other party. The provision is meant to curb abusive discovery practices. Vitale & Assocs., LLC v. Lowden, No. 2:12-cv-1400-JAD-VCF, 2014 WL 1764715, at \*3 (D. Nev. May 2, 2014). The first motion to compel was denied in its entirety (as was the second) because Plaintiff failed to make even a modest effort to comply with Local Rule 37, a finding Judge Carney has already upheld.<sup>1</sup> Neither of the exceptions in Rule 37 applies, as the motion was not substantially justified and no other circumstances make an award of fees unjust. As to the former, and as the Court stated at the second hearing, it has never seen a discovery motion in which less of an effort was made by the moving party to meet and confer in good faith under Local Rule 37. Moreover, this Court denied the motion a second time, because Plaintiff had made no effort to notify the anonymous third parties of the hearing or of their right to appear,

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<sup>1</sup>Plaintiff has repeatedly objected that it was excused from meeting and conferring because it already knew what Defendant's position would be and thus any meet and confer would have been futile. This argument conflicts with its position that a meet and confer did take place. But in any event, a meet and confer can, when the parties are operating in good faith, promote compromise. For example, as the Court noted at the second hearing, Plaintiff could have suggested deposing the anonymous third parties by telephone, without learning their identities – a resolution reached in some of the case law. See, e.g., Art of Living Found. v. Does 1-10, No. 10-CV-05022-LHK, 2011 WL 5444622, at \*10 & n.7 (N.D. Cal. Nov. 9, 2011) (discussing such alternatives). That way, Plaintiff could have garnered most of the information it sought and Defendant would have been able to maintain the anonymity of its website moderators.

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a finding Judge Carney has already upheld.<sup>2</sup> Thus, the motion was not “substantially justified.” And as explained below, Plaintiff’s counsel has cited no “other circumstances” that make an award of fees unjust. See Vitale, 2014 WL 1764715, at \*3 (noting that losing party has burden of showing applicability of exceptions).

2. Plaintiff objects that defense counsel submitted overly broad “block summary” billing records initially and should not be allowed to have a “second bite at the apple.” But in its very first written request for attorney’s fees, Defendant offered to make its billing records available in camera, later explaining that they contained some privileged material. (Def.’s Req. at 2 n.1; Reply at 6 n.7.) The Court directed Defendant to either do so or file and serve redacted copies of the actual billing records, and it did the latter. Nothing improper or untimely has occurred, as Defendant’s counsel certainly could not have simply delivered to chambers ex parte billing records without the Court’s prior authorization. Moreover, although certain entries in Defendant’s counsel’s actual billing records contain more than one task, as Plaintiff continues to complain, Defendant’s counsel’s declarations adequately explain how the actual costs have been determined. Moreover, with the one exception listed below in number 6, the Court expressly finds, after considering all of Plaintiff’s objections to individual entries, that the hours claimed for the listed tasks in combination are reasonable, no matter how they may be apportioned. Cf. DL v. District of Columbia, 256 F.R.D. 239, 245-46 (D.D.C. 2009) (block billing “not a serious problem” when party seeking fees “prevailed on substantially all of their arguments regarding the second motion to compel”). Indeed, under Rule 37(a)(5)(B), the Court would be justified in awarding Defendant all the fees it incurred in opposing the second motion to compel as well as the first; nonetheless, Defendant’s counsel has substantially reduced the amount of her hourly billing rate and

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<sup>2</sup>Plaintiff objects at length that it could not contact the third parties because most of the email addresses it had for them bounced back as undeliverable when it tried to send them a message unrelated to their right to appear. But Plaintiff conceded at the hearing that it never asked Defendant’s counsel to convey the message for it (Pl’s Mot. for Relief, Afrasiabi Decl., Ex. 51 at 7-9), which was all it needed to do.

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also does not seek compensation for the other two attorneys who worked on the matter, and it is hard to imagine that the costs and fees are anything other than substantially less than Defendant's counsel actually expended opposing the first motion to compel.

3. Plaintiff objects that Defendant's counsel's hours are inflated and that the cited tasks could not possibly have taken the amount of time she describes. But Plaintiff regularly misrepresents the billing summaries. For example, Plaintiff objects, with an exclamation point, that Defendant's counsel billed "one hour" for a meet and confer that Defendant claimed never occurred. But of course, the Court found that the meet and confer did not occur in the manner it should have under Rule 37, not that no even cursory attempt to meet and confer ever happened.<sup>3</sup> Moreover, Defendant's counsel did not bill one hour for a meet and confer. Rather, that time was allotted to reviewing Plaintiff's two short emails, drafting a detailed response citing authority, and communicating with other counsel at the firm and the client. The voice-to-voice dialog required by Local Rule 37 never took place despite Defendant's counsel's offer to make herself available. Instead, Plaintiff's counsel simply went forward with the joint stipulation. Likewise, Plaintiff's counsel's repeated representation that the first joint stipulation discussed only two cases is wrong. In fact, Defendant appropriately cited and discussed many more cases. Indeed, on page 11 alone three cases are cited. Plaintiff should not be heard to complain about the hours Defendant's counsel spent when one of the main problems with the motion was that Plaintiff's counsel didn't spend more time on it. As Judge Carney noted in upholding this Court's rulings denying the motions, Plaintiff's counsel's meet-and-confer correspondence "cited no authority, did not attempt to respond to the authority cited by [Defendant's] counsel, and did not respond to any of the arguments put forth by [Defendant's] counsel." Similarly,

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<sup>3</sup>Plaintiff's counsel also is incorrect when he states that Defendant "never contended in the first motion that it should be denied for failure to meet and confer." It did. (See Apr. 22, 2014 J. Stip at 5, 11 (noting inadequacy of Plaintiff's meet and confer and stating that "[f]or that reason alone, [Plaintiff's] Motion should be denied").)

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Plaintiff's claim that its "email to moderators . . . was not part of the motion to compel" is not true. Indeed, had the Court not denied the motion for failure to comply with Local Rule 37, it would have had to examine the contents of those emails in order to determine whether Plaintiff had properly given notice to the anonymous third parties. That is precisely what it did in connection with the second motion.

4. Plaintiff objects that Defendant's counsel's first declaration was "cagey" and "hiding a deeper truth" and that she may not have told the truth in her verified declaration when she stated that Defendant had "paid" a certain rate for her work. (Opp'n at 7.) But Defendant's counsel's declaration expressly stated that the client had paid at that rate and that the amount of fees Defendant was seeking was "substantially lower" than that amount. (Townsend Decl. ¶ 7.) Plaintiff points to nothing other than speculation that that is not true. Thus, those objections are not well taken (and the Court finds unfortunate the insinuations concerning Defendant's counsel).<sup>4</sup>

5. Plaintiff objects that Defendant's counsel's hourly billing rate – which is \$710 but of which she seeks only \$500 for each hour expended – is too high. But as Plaintiff acknowledges, Defendant's counsel works at a "top tier" law firm (Opp'n at 2), and she has submitted evidence that the client is paying at the cited rate (Townsend Decl., ¶ 7). The amount actually paid to the requesting counsel is a "satisfactory" measure. See United Steelworkers of Am. v. Phelps Dodge Corp., 896 F.2d 403, 407 (9th Cir. 1990); Petroleum Sales, Inc. v. Valero Refining Co., 304 F. App'x 615, 617 (9th Cir. 2008). And again, Defendant's counsel seeks compensation per hour at a rate substantially less than that.

6. Plaintiff is correct that Defendant's counsel has not explained who "S. Mehra" and "J. Jessen" are in the entry on April 17 for 6.10 hours. Thus, it is not clear

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<sup>4</sup>In its motion before the District Judge seeking review of this Court's orders, Plaintiff acknowledged that "an ethics charge is no laughing matter and should not be tossed around lightly."

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that counsel is entitled to compensation for a conference call with them. Because the Court cannot determine how much of that time was spent on the conference call with those two people, the Court deducts the entire 6.10 hours from the hours for which Defendant's counsel seeks compensation.

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Defendant has voluntarily reduced the amount of attorney's fees by seeking only fees relating to one attorney, at a rate substantially lower than she actually billed, and without expenses for work that was used in opposing the second motion. Despite Plaintiff's arguments to the contrary, the request is reasonable, Plaintiff's motions were not substantially justified, and an award to Defendant's counsel of the requested fees (minus those for 6.10 hours) does not work an injustice on Plaintiff or its counsel.

Accordingly, Defendant's fees request is GRANTED IN PART.

cc: Judge Carney

## General Information

<b>Court</b>	United States District Court for the Central District of California; United States District Court for the Central District of California
<b>Nature of Suit</b>	Property Rights - Copyrights[820]
<b>Docket Number</b>	8:13-cv-00517