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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8 Thomas P. Geiss,

No. CV 12-0797-PHX-JAT

9 Plaintiff,

**ORDER**

10 vs.

11 Sara Lee Fresh, Inc., a Delaware  
12 Corporation, a Maryland Corporation,

13 Defendant.  
14

15 Pending before the Court is Defendant's Motion for Attorneys' Fees (Doc. 38).  
16 The Court now rules on the Motion.

17 **I. Background**

18 Pursuant to this Court's Rule 16 Scheduling Order, in the event of a discovery  
19 dispute, the parties must jointly contact the Court via conference call to request a  
20 discovery dispute hearing prior to filing any written discovery motions. (Doc. 14). On  
21 June 11, 2013, Defendant filed a "Request for Telephonic Conference Regarding  
22 Discovery Dispute." (Doc. 29). In the Request, Defendant outlined its efforts to comply  
23 with this Court's Rule 16 Scheduling Order in order to initiate a telephonic conference to  
24 schedule a discovery dispute hearing. (*Id.*). In that Request, Defendant stated that  
25 Plaintiff's counsel<sup>1</sup> refused to respond to Defendant's attempts to meet and confer or  
26 initiate a discovery dispute hearing.

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28 <sup>1</sup> Plaintiff filed this case pro se. On October 19, 2012, Amy Wallace of the law  
firm of Gillespie, Shields, & Durrant ("GSD") appeared as Plaintiff's counsel in this case.  
(Doc. 12). On February 11, 2013, Dan M. Durrant of GSD filed a notice of appearance

1 In that Request, Defendant also outlined its numerous attempts to obtain discovery  
2 from Plaintiff. Summarily, those attempts included: (1) service of non-uniform  
3 interrogatories and requests for production on December 6, 2012 (the “First Request”);  
4 (2) when the First Request was not timely responded to, a letter requesting that Plaintiff  
5 respond by February 8, 2013; (3) when the First Request was again not responded to,  
6 counsel for Defendant contacted counsel for Plaintiff on March 7, 2013 and requested  
7 responses by March 11, 2013; (4) receipt of incomplete responses to the First Request on  
8 March 14, 2013, including untimely and improper objections; (5) a March 22, 2013 letter  
9 to Plaintiff’s counsel detailing the deficiencies in the response to the First Request,  
10 followed by various email and telephone attempts to meet and confer regarding the  
11 deficiencies in the responses to the First Request; (6) service of a second set of requests  
12 for production (the “Second Request”) on April 4, 2013, that remained unanswered as of  
13 June 11, 2013, (7) Defendant noticed Plaintiff’s deposition three times; the first was set  
14 for March 20, 2013, which was cancelled by Plaintiff; the second was set for April 3,  
15 2013 and was cancelled by Plaintiff; the third was set for May 30, 2013 and was  
16 cancelled by Plaintiff on May 29, 2013; and (8) Defense counsel’s unreturned  
17 communications on June 3, 2013 and June 10, 2013 to meet and confer regarding  
18 discovery issues or to set up a time to jointly call the Court in accordance with the  
19 Court’s Rule 16 Scheduling Order.

20 On June 11, 2013, the Court granted Plaintiff’s request (Doc. 29) and set a  
21 discovery dispute hearing for June 20, 2013 at 10:30 a.m. (Doc. 30). On June 20, 2013  
22 at 9:37 a.m., less than an hour before the discovery dispute hearing was set to begin,  
23 Plaintiff’s Counsel filed a response to Defendant’s request for telephonic conference.  
24 (Doc. 32).

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25 on behalf of Plaintiff. (Doc. 20). At all times referenced herein, Amy Wallace or Dan  
26 Durrant of GSD were the listed attorneys of record for Plaintiff. After the events  
27 discussed in this Order, Plaintiff retained new counsel. To the extent that the Court refers  
28 to “Plaintiff’s counsel” throughout this Order, the Court is solely referring to attorneys at  
GSD, Plaintiff’s named counsel at the time of the events referenced in this Order.

1 In that Response, Plaintiff’s counsel claimed that all discovery disputes were now  
2 in the process of resolution pursuant to a letter dated June 20, 2013 (the day of the  
3 discovery dispute) from Plaintiff’s counsel to Defendant’s counsel. (Doc. 32 at ¶ 1; Doc.  
4 32-1). Plaintiff’s counsel also explained that (1) at the end of 2012, pro se Plaintiff  
5 retained Gillespie, Shields & Durrant (“GSD”) attorney, Amy Wallace, to maintain his  
6 action against Defendant; (2) in December, Ms. Wallace was discharged from  
7 employment; (3) no other attorney at GSD was able to take on Plaintiff’s case due to  
8 numerous other cases; (4) GSD determined that Plaintiff would need to find other  
9 counsel, but “would in the meantime assist Plaintiff in responding to outstanding  
10 discovery deadlines and getting his case back on track;” and (5) GSD staff failed to  
11 timely inform Plaintiff of his first three deposition settings. (Doc. 32 at 1-2).

12 At the discovery dispute hearing, the Court noted that GSD’s response (Doc. 32)  
13 “exudes profound professional neglect and professional discourtesies.” (Doc. 37 at 4).  
14 During the hearing, the Court granted leave for Defendant to seek reasonable attorneys’  
15 fees in connection with the discovery issues. (*Id.* at 13).

## 16 **II. Analysis**

17 Defendant now seeks attorneys’ fees in the amount of \$6,913.35 based on its  
18 attempts to obtain discovery. GSD objects to the requested fees as “excessive.” GSD  
19 solely identifies billing entries from January through May 2013 as “excessive,” and  
20 argues that “those fees largely accrued prior the onset of the alleged dispute.” The Court  
21 disagrees. Defendant’s billing entries from January through May 2013 are directly  
22 related to attempts to resolve the discovery dispute during that time. (Doc. 38-2 at 3).

23 GSD then makes the extraordinary assertions that:

24 Plaintiff’s counsel was responsive to Defendant’s requests  
25 and engaged in reasonable discussions regarding the scope of  
26 discovery and timing of the deposition, and delivery of the  
27 requested documents. **Exhibit B.** Alleged delays were caused  
28 by the actions of third-parties and were beyond the control of  
Plaintiff’s counsel or were caused by counsel for the  
Defendant’s own scheduling conflicts. **Exhibit C.**

1 (Doc. 45 at 2). Based on these assertions, GSD argues that no award of fees is warranted.  
2 GSD's assertions are not supported by the Record or the Exhibits cited by GSD.  
3 Moreover, GSD's assertions are directly contradictory to assertions made by GSD in their  
4 "Response" to Defendant's request for a telephonic hearing (Doc. 32) and to the Court  
5 during the discovery dispute hearing.

6 Pursuant to Federal Rule of Civil Procedure 37(d), the Court may award sanctions  
7 when a party fails to appear for a properly noticed deposition, or fails to respond to  
8 properly served interrogatories or requests for production. The fact that such discovery  
9 may have been objectionable does not excuse a party's failure to act. Fed. R. Civ. P.  
10 37(d)(2). Moreover, "the Court must require the party failing to act, the attorney advising  
11 that party, or both to pay the reasonable expenses, including attorney's fees, caused by  
12 the failure, unless the failure was substantially justified or other circumstances make an  
13 award of expenses unjust." Fed. R. Civ. P. 37(d)(3).

14 In this case, Plaintiff failed to appear for his properly noticed deposition on three  
15 occasions and failed to timely file responses or objections to requests for production and  
16 interrogatories. There is no showing in this case that the failure to act was substantially  
17 justified or other circumstances make an award of expenses unjust. Accordingly,  
18 Defendant is entitled to its reasonable attorneys' fees incurred in attempting to obtain the  
19 discovery. Moreover, the Record shows that sanctions are properly awarded against  
20 GSD, Plaintiff's counsel at the time. It was Plaintiff's counsel that agreed to "assist"  
21 Plaintiff, their client, with discovery; it was Plaintiff's counsel who failed to inform  
22 Plaintiff that his deposition was scheduled on three different occasions; and it was  
23 Plaintiff's counsel who failed to timely file objections and/or responses to Defendant's  
24 discovery requests. Moreover, Plaintiff's counsel violated this Court's Rule 16  
25 Scheduling Order by refusing to participate in the discovery dispute procedures set forth  
26 in that Order.

27 While GSD objects to the requested fees as "excessive," and duplicative, GSD  
28 fails to identify any specific time entries or charges that are excessive or duplicative.  
Moreover, although GSD argues that "those fees largely accrued prior the onset of the

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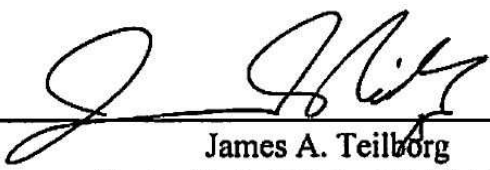
alleged dispute,” GSD does not explain or support this argument. As stated above, the billing entries from January through May 2013 are directly related to attempts to resolve the discovery dispute during that time.

**III. Conclusion**

**IT IS ORDERED** granting Defendant’s Motion for Attorneys’ Fees (Doc. 38) and assessing sanctions in the form of attorneys’ fees against Gillespie Shields & Durrant in the amount of \$6,913.35.

The Clerk of the Court shall deliver a copy of this Order to Plaintiff’s former attorney, Dan Durrant at Gillespie Shields & Durrant.

Dated this 4th day of September, 2013.

  
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James A. Teilborg  
Senior United States District Judge