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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

MP NEXLEVEL, of California, Inc.,  
  
Plaintiff,

v.

CVIN, LLC, d/b/a VAST NETWORKS,  
CALAVERAS COMMUNICATIONS  
COMPANY, SEBASTIAN  
ENTERPRISES, INC., VOLCANO  
COMMUNICATIONS COMPANY,  
STAGELINE COMMUNICATIONS,  
INC., THE PONDEROSA TELEPHONE  
COMPANY, SIERRA TEL  
COMMUNICATIONS GROUP,  
VARNET INC., CAL-ORE TELEPHONE  
COMPANY, THE CORPORATION OF  
EDUCATION NETWORK INITIATIVES  
IN CALIFORNIA, and DOES 1 to 500,  
DEFENDANTS.

**Case No. 1:14-cv-00288-LJO-EPG**  
  
**ORDER RE: MP NEXLEVEL’S MOTION  
FOR SANCTIONS AGAINST CVIN, LLC**

(ECF No. 370)

On July 22, 2016, the Court granted Plaintiff MP Nexlevel’s (“MPN”) Motion to Compel and for Sanctions (ECF No. 370) pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure. (ECF No. 385.) The Court further directed MPN to submit supplemental briefing describing the costs associated with CVIN’s intransigence in discovery. MPN submitted a detailed memorandum of costs and CVIN has submitted objections to that

1 memorandum. (ECF Nos. 387, 390.) After a review of the memorandum and objections, the  
2 Court awards sanctions to MPN as described below.

3 **I. BACKGROUND**

4 On July 22, 2016, the Court heard argument on MPN's Motion to Compel and for  
5 Sanctions and granted the Motion. At the hearing, the Court declined to award terminating  
6 sanctions, but agreed that monetary sanctions were appropriate. In particular, the Court  
7 awarded sanctions for fees and costs incurred in:

- 8 • Drafting and arguing the Motion to Compel and for Sanctions;
- 9 • The June 7, 2016 informal discovery conference and preparation for that  
10 conference (including the letters submitted for that conference); and,
- 11 • Meet and confer communications (in May 2016 and otherwise) regarding  
12 CVIN's non-compliance with the Court's discovery order at issue in the Motion.

13 In its memorandum of costs, MPN divides its expenses into the following categories:

- 14 • May 2016 correspondence /meet and confer expenses: \$6,646.25
- 15 • June 7, 2016 informal discovery expenses: \$1,997.50
- 16 • Drafting the joint statement for the Motion to Compel and for Sanctions (and  
17 associated page and date extension pleadings): \$13,983.75
- 18 • Preparation and argument at the hearing for the Motion to Compel and for  
19 Sanctions: \$10,040.59
- 20 • Drafting and filing the memorandum of costs: \$5,662.50

21 For a total of \$38,330.59 in requested sanction against CVIN. CVIN objects to several  
22 categories of MPN's claimed expenses and argues that MPN is entitled to only \$15,648.81 in  
23 sanctions.

24 **II. DISCUSSION**

25 **A. Legal Standard**

26 Under Rule 37(b)(2) of the Federal Rules of Civil Procedure, a court "must order the  
27 disobedient party, the attorney advising that party, or both to pay the reasonable expenses,  
28 including attorney's fees, caused by the failure" to comply with a court order. The Court has

1 already determined that MPN is entitled to an award of reasonable attorneys' fees under Rule  
2 37(b)(2). The reasonability of attorneys' fees is calculated using the "lodestar" method.  
3 *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). "The 'lodestar' is  
4 calculated by multiplying the number of hours the prevailing party reasonably expended on the  
5 litigation by a reasonable hourly rate." *Id.*, quoting *Ferland v. Conrad Credit Corp.*, 244 F.3d  
6 1145, 1149 n. 4 (9th Cir. 2001). "Although in most cases, the lodestar figure is presumptively a  
7 reasonable fee award, the district court may, if circumstances warrant, adjust the lodestar to  
8 account for other factors which are not subsumed within it." *Id.*

9 **B. MPN's Hourly Rates are Reasonable**

10 To determine "a reasonable hourly rate, the district court should be guided by the rate  
11 prevailing in the community for similar work performed by attorneys of comparable skill,  
12 experience, and reputation." *Webb v. Ada Cnty.*, 285 F.3d 829, 840 (9th Cir. 2002). In the  
13 Fresno area, hourly rates for attorneys of at least \$300/hour have routinely been found  
14 reasonable. *See, e.g., Verduzco v. Ford Motor Co.*, Case No. 1:13-cv-01437-LJO-BAM, 2015  
15 WL 4131384, at \*4 (E.D. Cal. July 9, 2015) (approving rates of \$300/hour and \$380/hour);  
16 *Silvester v. Harris*, Case No. 1:11-cv-2137-AWI-SAB, 2014 WL 7239371, at \*4 (E.D. Cal.  
17 Dec. 17, 2014) ("the current reasonable hourly rates in the Fresno Division are between \$175  
18 and \$380 . . . [t]he current reasonable hourly rate for paralegal work in the Fresno Division  
19 ranges from \$75 to \$150"); *Dolarian Capital, Inc. v. SOC, LLC*, Case No. 1:11-cv-00031-LJO-  
20 SAB, 2013 WL 1006071, at \*4 (E.D. Cal. March 13, 2013) (approving rates of \$300/hour for  
21 lead counsel and \$225/hour for associates).

22 MPN states that it is compensating its counsel at a rate of \$250/hour for partners (Holly  
23 J. Newman, James D. Kremer, J. Benjamin Patrick, and Matthew L. Hawk), \$225/hour for  
24 associates (Olivia M. Kelley), and \$110/hour for paralegals. CVIN does not object to the  
25 hourly rates charged by MPN's counsel. The Court finds that MPN's hourly rates are  
26 reasonable.

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1           **C. May 2016 Meet and Confer Expenses**

2           MPN claims attorneys' fees for 24.65 hours of associate time and 4.4 hours of partner  
3 time. CVIN objects that 22.55 of MPN's claimed associate hours were actually incurred  
4 analyzing CVIN's document production, rather than preparing for any meet and confer, and  
5 would thus have been incurred regardless of CVIN's violation of the Court's discovery order.  
6 The Court agrees with respect to Ms. Kelley's time entries from March 14, 2016 to May 4,  
7 2016; these time entries refer only to analyzing incoming document productions and preparing  
8 them for review (uploading documents to Relativity, for example). (Supplemental Declaration  
9 of James D. Kremer in Support of MP Nexlevel's Fee Request ("Kremer Decl.") Exh. C, ECF  
10 No. 388.) MPN would have had to review the document production even if CVIN had not  
11 committed any discovery violation. Thus, those expenses should not be included in the  
12 sanctions award. *True Health Chiropractic Inc. v. McKesson Corp.*, Case No. 13-cv-02219-  
13 HSG (DMR), 2015 WL 3453459, at \*3, (N.D. Cal. May 29, 2015), *citing Logtale, Ltd. v.*  
14 *IKOR, Inc.*, Case No. C-11-5452 EDL (DMR), 2015 WL 581513, at \*5 (N.D. Cal. Feb. 11,  
15 2015).

16           Ms. Kelley's time entries from May 10 and 11, however, refer specifically to analyzing  
17 the document productions in preparation for the meet and confer efforts. (Kremer Decl. Exh.  
18 C, ECF No. 388.) These expenses are thus recoverable. One other time entry from May 5,  
19 2016 for 1.2 hours reflects time Ms. Kelley spent preparing a meet and confer letter and is not  
20 challenged by CVIN. The Court will thus discount MPN's claimed fees by 13.25 associate  
21 hours and finds that MPN should be compensated for 11.4 associate hours and 4.4 partner  
22 hours, or **\$3,665.00**, for the meet and confer.

23           **D. June 7, 2016 Informal Discovery Conference**

24           MPN requests \$1,997.50 for preparing for and participating in the informal discovery  
25 conference on June 7, 2016. CVIN does not object to the hours Mr. Kremer or Ms. Kelley  
26 billed for this conference. The Court finds the hours spent on this conference reasonable and  
27 awards **\$1,997.50**.

28       ///

1           **E. Drafting the Motion to Compel and for Sanctions**

2           MPN claims attorneys' fees for 28.15 associate hours and 30.6 partner hours for  
3 drafting the Motion to Compel and for Sanctions, requesting an extension to the page limit for  
4 that motion, and for seeking a modification of the scheduling order as order by the Court.  
5 CVIN objects to 8.7 hours of partner time that Mr. Kremer billed for drafting a motion to  
6 request an extension to the page limit and editing MPN's portion of the joint statement down to  
7 the page limit. CVIN also objects to 6.7 hours of associate time that Ms. Kelley billed for  
8 analyzing documents produced by CVIN.

9           Neither of CVIN's objections is sustainable. Before incurring the costs to draft a  
10 motion requesting an extension of the joint statement page limit, Mr. Kremer requested that  
11 CVIN agree to extend the page limit. CVIN refused. Thus, any expenses incurred in drafting  
12 the motion were the result of CVIN's conduct—CVIN cannot now complain that MPN was  
13 running up the tab, so to speak, because Mr. Kremer was required to prepare a motion to extend  
14 the page limit. Nor does it make sense to discount the hours Mr. Kremer billed to edit the joint  
15 statement down to the page limit; editing is (or should be) a necessary part of filing any  
16 document in court.

17           CVIN also requests that the Court discount the hours requested because a portion of the  
18 joint statement discussed CVIN's pre-March 2, 2016 conduct and asked for terminating  
19 sanctions, which were not granted. CVIN argues that these portions of the joint statement were  
20 unnecessary and thus should not be compensated. But CVIN's request is impractical and  
21 incorrect. First, the Court (and the parties, for that matter) is simply unable to parse through  
22 each sentence or paragraph of the joint statement to determine which were "necessary" and  
23 which were "unnecessary" to the relief that was ultimately awarded. Second, as noted on the  
24 record, the Court considered issuing terminating sanctions and looked to CVIN's pre-March 2,  
25 2016 conduct in deciding whether and what to award in sanctions. It is thus incorrect to say  
26 that the request for terminating sanctions was unnecessary. Finally, the Court finds that the 6.7  
27 hours Ms. Kelley spent "analyzing" documents produced by CVIN were necessary in drafting  
28 the joint statement because the billing entries explain that the analysis was done specifically to

1 determine what CVIN had failed to produce. (Kremer Decl. Exh. E, ECF No. 388.) This  
2 information would have been particularly important when drafting the joint statement. MPN is  
3 entitled to **\$13,983.75** for the drafting of the joint statement and other associated pleadings.

4 **F. Preparing and Arguing the Motion to Compel and for Sanctions**

5 MPN requests a variety of expenses for the three attorneys who appeared or assisted in  
6 the preparation for the hearing on the Motion:

7 **James D. Kremer (Partner)**

- 8 • 15.25 hours of travel time<sup>1</sup> for a round trip from Minneapolis to Fresno
- 9 • 13.75 hours to review the joint statement (and associated cases), prepare for the  
10 hearing, and attend the hearing
- 11 • \$1,451.78 in travel expenses, including airfare, hotel, car rental, meals, and  
12 parking

13 **Matthew L. Hawk (Partner)**

- 14 • 6 hours of travel time for a round trip from San Francisco to Fresno
- 15 • 2 hours to attend the hearing
- 16 • \$199.80 in mileage expenses
- 17 • \$17.76 in travel expenses, including parking and a meal

18 **Olivia M. Kelley (Associate)**

- 19 • 7.9 hours preparing for the hearing

20 CVIN objects to: (1) the amount of time spent by Mr. Kremer and Ms. Kelley to  
21 prepare for the hearing; (2) Mr. Kremer's travel time and expenses; and (3) fees spent for more  
22 than one attorney at the hearing. In large part, CVIN simply objects that it was unnecessarily  
23 duplicative for both Mr. Hawk and Mr. Kremer to attend the hearing and that Mr. Kremer  
24 should not have traveled out from Minneapolis. In CVIN's view, only Mr. Hawk should have  
25 attended and argued at the hearing.

26 \_\_\_\_\_  
27 <sup>1</sup> MPN is paying for travel time at one-half of each attorney's standard billing rate, or \$125/hour for partners.  
28 Courts within the Eastern District of California have traditionally found that travel time can be reimbursed "at the  
attorney's normal monthly rate." *Hall v. City of Fairfield*, Case No. 2:10-cv-0508-DAD, 2014 WL 1286001, at  
\*13 n. 21 (E.D. Cal. March 31, 2014) (surveying cases within the Eastern District of California).

1 As an initial matter, the Court notes that “the attendance of more than two attorneys is  
2 not per se duplicative” in calculating attorneys’ fees. *Oberfelder v. City of Petaluma*, No. C-  
3 98-1470 MHP, 2002 WL 472308, at \*7–8 (N.D. Cal. Jan. 29, 2002), *aff’d sub nom. Oberfelder*  
4 *v. Bertoli*, 67 F. App’x 408 (9th Cir. 2003) (attendance of two attorneys at depositions, case  
5 management conferences, settlement conferences, and case investigations not “improper or  
6 superfluous”); *see also True Health Chiropractic Inc. v. McKesson Corp.*, No. 13-CV-02219-  
7 HSG-DMR, 2015 WL 3453459, at \*4 (N.D. Cal. May 29, 2015) (“The court agrees that Mr.  
8 Hara’s and Mr. Jonckheer’s attendance at the hearing was reasonable.”); *Seven Signatures*  
9 *General Partnership v. Irongate Azrep BW LLC*, 871 F.Supp.2d 1040, 1056 (D. Haw. 2012)  
10 (“Two attorneys may recover fees for their appearances at court proceedings when it is  
11 reasonable and necessary for a ‘second chair’ to appear with lead counsel.”). Thus, the mere  
12 fact that Mr. Kremer and Mr. Hawk appeared for the hearing does not make their requested fees  
13 unreasonable or unnecessary.

14 Mr. Kremer’s attendance at the hearing was also justified based on the facts of this case.  
15 As the billing records indicate, Mr. Kremer and Ms. Kelley were the attorneys on point for the  
16 bulk of the work on this Motion. (Kremer Decl. Exhs. D, E, and F, ECF No. 388.) Mr. Kremer  
17 was the attorney who originally entered into the stipulation of March 2, 2016 that was adopted  
18 as the court order CVIN violated. (ECF No. 269.) He then appeared for MPN in the informal  
19 discovery conference regarding the violation of that court order. (ECF No. 348.) That  
20 violation was the impetus for the current Motion—thus, it makes sense that Mr. Kremer (or Ms.  
21 Kelley, who also appears to have invested significant time on this Motion) appear to argue the  
22 Motion.

23 Moreover, some degree of duplication “is inherent in the process of litigating over  
24 time.” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (“By and large the  
25 court should defer to the winning lawyer’s professional judgment as to how much time he was  
26 required to spend on the case; after all, he won, and might not have, had he been more of a  
27 slacker.”). The Motion at issue involved an expansive document production and was the  
28 culmination of a long series of discovery disputes that has stretched over many months in this

1 litigation. The Court thus finds that Mr. Kremer's attendance at the hearing was a necessary  
2 expense and that his preparation efforts were not duplicative with Ms. Kelley's. Nor was the  
3 time billed for that preparation excessive, given the size of the document production and  
4 briefing associated with the Motion. While CVIN would no doubt prefer if it were in a position  
5 to dictate how MPN allocates its legal resources, it does not make sense to second guess  
6 MPN's staffing decisions here.<sup>2</sup>

7 The Court declines to trim MPN's claimed fees and finds that MPN is entitled to  
8 \$6,795.53 for Mr. Kremer's time and expenses, \$1,777.50 for Ms. Kelley's time, and \$1,467.56  
9 for Mr. Hawk's time and expenses. This totals to **\$10,040.59** for preparation and attendance at  
10 the Motion hearing.

#### 11 **G. Drafting and Filing the Memorandum of Costs**

12 MPN asks that the fee award include time spent drafting and filing the Memorandum of  
13 Costs and its supporting documents. In particular, MPN claims that Mr. Kremer billed 19.05  
14 hours and Ms. Kelley billed 4 hours for the preparation and filing of the Memorandum. CVIN  
15 objects to this request, saying that the legal authorities and information in the Memorandum  
16 should have been filed in the original Motion and that CVIN should not be required to pay  
17 "unnecessarily high expenses incurred as a result of [MPN's] own failings." (Objection to  
18 Supplemental Memorandum of Costs 9:26-27, ECF No. 390.)

19 Parties are entitled to recoup fees incurred in "preparing, defending, and appealing"  
20 requests for attorney's fees. *Brown v. Sullivan*, 916 F.2d 492, 497 (9th Cir. 1990); *Rosenfeld v.*  
21 *U.S. Dept. of Justice*, 904 F.Supp.2d 988, 1008 (N.D. Cal. 2012) ("In this Circuit, plaintiffs  
22 may recover attorney's fees for time reasonably expended on a motion for attorney fees and  
23 costs."). The Court, after determining that MPN's motion to compel should be granted,  
24 specifically directed MPN to submit a memorandum of costs and described the specific  
25 categories for which MPN could request costs. Any fees incurred in creating such a

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27 <sup>2</sup> The Court also observes that CVIN appeared at the hearing through William Eliopoulos and Kaveh Badiei of  
28 Rutan and Tucker, both of whom traveled from Palo Alto. Messrs. Eliopoulos and Badiei also brought Kyre  
Stucklin, an attorney and eDiscovery Practice Support Manager, and two client representatives, including the CEO  
of CVIN. CVIN, at least, appears to have thought it prudent to bring more than one attorney to the hearing.



1 memorandum are thus part of the Motion for Sanctions and are compensable. CVIN contends  
2 that MPN should not have spent time including legal authorities and argument in its  
3 Memorandum, but the “argument” that CVIN objects to is largely nothing more than a  
4 narrative describing when, how, and why specific costs were incurred.<sup>3</sup> Had MPN not included  
5 this information, CVIN would likely now be arguing that MPN had not done enough to justify  
6 its fees request and that it should be denied on those grounds.

7 CVIN’s objection is overruled. MPN is entitled to an award of **\$5,662.50** for the  
8 preparation and filing of the Memorandum of Costs and associated exhibits.

9 **III. ORDER**

10 For the foregoing reasons, the Court GRANTS MPN’s Motion for Sanctions (ECF No.  
11 370) and SUSTAINS IN PART and OVERRULES IN PART CVIN’s Objections to MPN’s  
12 Memorandum of Costs (ECF No. 390). The Court awards sanctions in the amount of  
13 **\$35,349.34** against CVIN and in favor of MPN.

14 IT IS SO ORDERED.

15 Dated: October 5, 2016

16 /s/ Eric P. Grogan  
17 UNITED STATES MAGISTRATE JUDGE

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26 <sup>3</sup> For example, MPN discusses the fees associated with the Memorandum of Costs: “In response to the Court’s  
27 directive regarding this submission, MPN has expended time carefully reviewing the documented fees and costs  
28 incurred in connection with this motion to ensure that its request is within the scope of those activities which the  
Court concluded are recoverable by MPN as a Rule 37 sanction. In addition, MPN conducted legal research to  
provide the Court with authority establishing the reasonableness of its counsels’ hourly rates, as well as the  
reasonableness of the hours expended by its counsel on the activities that the Court has indicated are recoverable  
by MPN.” (Supplemental Memorandum of Costs 16:6-12, ECF No. 387.)