



1 for a finding of contempt of court shall be DENIED. Additionally, Defendant's counter request for  
2 sanctions shall be DENIED.

### 3 **BACKGROUND**

4 Plaintiff instituted this action on June 30, 2017. In the complaint, Plaintiff alleges that he is  
5 disabled within the meaning of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et*  
6 *seq.* He suffers from cardiovascular disease, loss of hearing, and arthritis for his back, and his ability  
7 to walk and ambulate has been impaired such that he requires the use of a cane and/or walker to for  
8 assistance. (ECF No. 1, Compl. at ¶ 7). On February 20, 2016, Plaintiff patronized Defendant's hotel,  
9 and contends that the shower in his guest room did not have grab bars, the bathroom did not have a  
10 safe, slip-proof floor, the counter for the sink had no handicapped access, with a shelf under the sink  
11 and exposed pipes, and there were no towel racks or bars within 54 inches of the floor or in close  
12 proximity to exiting the shower. When Plaintiff exited the shower, there was no grab bar, and while  
13 attempting to traverse the floor to reach his towel, he slipped and fell, resulting in lacerations to his  
14 right leg. Plaintiff also alleges that accessible accessories were not placed in their proper positions, at  
15 the required heights, making them inaccessible to him, e.g. the towel rack or bar, shower grip bars,  
16 floors not being non-slip, sink counter with no clearance underneath for a handicapped person,  
17 dispenser, mirror, hook on doorway, soap dish and light switch placed too high. (*Id.* at ¶¶ 10-13.)

18 Defendant answered the complaint on August 30, 2017, and the Court held a scheduling  
19 conference on January 16, 2018. (ECF Nos. 7, 22.) Based on the Court's Scheduling Order, the  
20 deadline to complete discovery in this action is June 11, 2018.

21 In February 2018, the parties contacted the Court to request an informal discovery dispute  
22 conference regarding an inspection of the property. Plaintiff reportedly had been requesting inspection  
23 of Defendant's hotel since September 2017, but Defendant ultimately refused any inspection of the  
24 property except the single room reserved for Plaintiff on the day of the injury. Plaintiff therefore  
25 sought an order allowing inspection of the hotel to include (1) all exterior and interior areas open to  
26 the public, (2) all ADA handicapped accessible rooms regardless of type or classification, and (3) all  
27 guest rooms with shower floors flush with the floor.

1 On February 15, 2018, the Court held an informal telephone conference off the record to  
2 discuss Plaintiff's request for an inspection. The parties stipulated to an informal conference in lieu of  
3 a formal noticed motion and to the Court's ruling on the dispute. After considering the parties'  
4 arguments, including their informal briefing, the Court granted Plaintiff's request to conduct a site  
5 inspection of Defendant's hotel premises. (ECF No. 27.) In relevant part, the Court's order stated:

6 Plaintiff will be permitted to have his expert conduct a site inspection of the hotel as  
7 follows: (1) all exterior and interior areas of the hotel open to the public; (2) all  
8 Americans with Disabilities Act ("ADA") handicapped accessible rooms regardless of  
9 type or classification; and (3) all guest rooms that have a shower floor flush with the  
10 bathroom floor. The requested inspection is relevant to the claims and defenses in this  
11 action and proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1); *see also Doran*  
12 *v. 7-Eleven, Inc.*, 524 F.3d 1034, 1034-44 (9th Cir. 2008) (disabled plaintiff in ADA  
13 action entitled to conduct discovery to determine what, if any, other barriers affecting his  
14 or her disability existed at the time he or she brought the claim). IT IS FURTHER  
15 ORDERED that the parties shall meet and confer to select a mutually convenient date and  
16 time for conducting the site inspection, and the inspection shall be completed within  
17 thirty (30) days of the date of this order. Additionally, if one or more of the rooms subject  
18 to inspection is occupied on the relevant date, Plaintiff's expert and counsel may enter the  
19 room with housekeeping, along with Defendant's representative or counsel, to complete  
20 the inspection, provided any requisite notice is given to the occupant.

21 (*Id.*)

22 On March 5, 2018, a partial site inspection was completed by Plaintiff's expert.

23 On March 9, 2018, Plaintiff's counsel submitted an informal letter to both the Court and  
24 defense counsel concerning a dispute regarding the site inspection ordered by the Court, but not  
25 completed. The informal letter did not comply with this Court's informal discovery procedures or the  
26 Local Rules regarding a motion to compel discovery. As a result, the Court informed the parties that it  
27 would take no action on the letter, but directed Plaintiff to file a motion to compel discovery pursuant  
28 to Local Rule 251 in order to resolve the dispute. (ECF No. 28.)

On March 13, 2018, Plaintiff filed the instant motion to compel, complaining that Defendant  
limited the site inspection to five hours, and refused to allow Plaintiff's expert to complete the  
inspection after expiration of the five hours. (ECF No. 29.) Plaintiff now seeks an order to compel the  
completion of the inspection, an order for contempt, and monetary sanctions in the form of attorney's  
fees and costs to travel back to the property to complete the inspection. (*Id.* at p. 7.)

1 On March 23, 2018, Defendant opposed the motion, arguing that the motion to compel is moot  
2 because Defendant does not object to having a second site inspection. Defendant conversely requests  
3 that the Court sanction Plaintiff in an amount equal to the costs incurred to respond to the motion to  
4 compel. (ECF No. 30.)

## 5 DISCUSSION

### 6 I. Parties' Positions

#### 7 A. Plaintiff's Motion

8 In the motion, Plaintiff explains that following the Court's informal ruling, the parties agreed  
9 on March 5, 2018, as the date for the site inspection. Although Defendant proposed a five-hour time  
10 limit for the inspection (12:00 p.m. to 5:00 p.m. or 1:00 p.m. to 6:00 p.m.), Plaintiff would not commit  
11 to such a restriction. Thereafter, Plaintiff's counsel and his expert arrived at the hotel on the morning  
12 of March 5, but were not permitted to begin the inspection before 12:00 p.m. During the inspection,  
13 Plaintiff discovered that there were two buildings to inspect. Five hours proved not enough time to  
14 complete the inspection, in part because Defendant reportedly dictated when and where Plaintiff could  
15 conduct the inspection. (ECF No 29 at p. 5.) At 5:00 p.m., Defendant's representative and defense  
16 counsel stopped the inspection. When Plaintiff's expert attempted to complete the inspection,  
17 Plaintiff's counsel and his expert were instructed to leave the property. Plaintiff reports that the  
18 remaining areas for inspection are public access areas to the main building, and include the breakfast  
19 area, computer area, 2 public restrooms (ADA accessible), fitness room, swimming pool, reception  
20 area, check-in desk and signage. (*Id.*)

21 Plaintiff further explains that the following day, on March 6, 2018, Plaintiff's counsel  
22 attempted to meet and confer with defense counsel and proposed dates and time for an informal  
23 conference with the Court. Defense counsel did not respond. The next day, Plaintiff's counsel called  
24 defense counsel and was forced to leave a message. There was no response. Plaintiff's counsel then  
25 sent an email to the Court and copied it to defense counsel. Later that day, defense counsel responded  
26 by email, refusing to meet and confer and informing counsel that the dates provided for the informal  
27 conference did not work. When Plaintiff's counsel responded wanting to meet and confer, defense  
28 counsel refused. (*Id.* at p. 6.) The instant motion followed.

1 Plaintiff now argues that Defendant (1) denied Plaintiff the ability to complete the inspection;  
2 (2) unilaterally restricted the time of the inspection; (3) denied Plaintiff further access to complete the  
3 inspection within the court-ordered time frame; and (4) refused to meet and confer on the issue.  
4 Plaintiff therefore requests that the Court impose sanctions for Defendant's failure to comply with the  
5 Court's discovery order pursuant to Federal Rule of Civil Procedure 37(b)(2). Plaintiff asks for  
6 sanctions in the amount of his attorney fees and expert costs for having to return to Paso Robles to  
7 complete the inspection. Plaintiff reports that he bills at \$350.00 per hour, and if forced to the return  
8 to the properly to complete the inspection it would require at least 8 hours of driving time, plus food,  
9 lodging and car expense. (Doc. 29, Declaration of Mark A Thiel at ¶ 23.) Plaintiff further declares  
10 that the expert, Cris Vaughn, charges a rate of \$295 per hour, and if forced to travel to Paso Robles to  
11 complete the inspection, he would expend an additional time of 10 hours, plus food, lodging and car  
12 expenses. (*Id.* at ¶ 26.) Plaintiff further requests that the Court hold Defendant in contempt for failure  
13 to obey a court order pursuant to Rule 37(b)(2), and impose a fine.

#### 14 **B. Defendant's Response**

15 Defendant does not object to having a second site inspection, and thus contends that the motion  
16 to compel is moot. However, Defendant does oppose Plaintiff's request for sanctions and a finding of  
17 contempt, and instead requests that the Court sanction Plaintiff for the failure to meet and confer prior  
18 to filing the instant motion. (ECF No. 30 at p. 7.)

19 Defendant explains that following the February 15, 2018 conference with the Court and the  
20 Court's related order, the parties agreed to re-schedule the site inspection for March 5, 2018, from the  
21 hours of 12:00 p.m. to 5:00 p.m. (ECF No. 31, Declaration of James Van ("Van Decl.") at ¶ 7; ECF  
22 No. 29, Ex. C.) Plaintiff had originally proposed a five-hour timeframe in his Rule 34 Request, and  
23 defense counsel therefore suggested the 12:00 to 5:00 window to accommodate the hotel's tenants.  
24 Plaintiff's counsel reportedly agreed to the timeframe. (*Id.*)

25 The site inspection then took place on March 5, 2018. Present on behalf of Defendant were  
26 Attorney James Van, Attorney Arthur Khurin (co-counsel on premises liability), hotel owner Shawn  
27 Styler, and general manager John Arnold. (Van Decl. at ¶ 9.) The inspection began at 12:00 p.m. as  
28 planned once all parties had convened. (*Id.*) During the inspection, Defendant only directed the

1 expert's inspection with respect to the occupied rooms in order to accommodate the tenants. (*Id.*) At  
2 5:00 p.m., the expert still had not inspected the public access areas of the main building. Plaintiff's  
3 counsel requested that they continue, stating that about one more hour was needed. (*Id.* at ¶ 10.)  
4 Defense counsel James Van informed Plaintiff's counsel that the inspection could not continue. He  
5 and the hotel's representative's had other obligations. In particular, Attorney Van had made plans to  
6 travel to Modesto to attend another matter that same evening, and the hotel was hosting a reception in  
7 the main building. (*Id.*; ECF No. 32, Declaration of Shawn Styler ("Styler Decl.") at ¶ 7.) Defense  
8 counsel told Plaintiff's counsel that the hotel was willing to have a second inspection and that he  
9 would discuss the time and date. (Van Decl. at ¶ 10; Styler Decl. at ¶ 7.) After Attorney Van and  
10 Attorney Khurin left the hotel, Mr. Styler (hotel owner) and Mr. Arnold (general manager) stayed as  
11 long as they could to allow the inspection to continue. (Styler Decl. at ¶ 8.) Around 5:25 p.m.,  
12 Plaintiff's counsel and the expert stated that they needed another 15 minutes to complete the  
13 inspection, but Mr. Styler informed them that they would have to leave because there was no one to  
14 supervise the inspection after that point. (*Id.*)

15 Defendant claims that Plaintiff's counsel did not meet and confer concerning the second  
16 inspection before filing the instant motion. Instead, Plaintiff's counsel sought hearing dates from the  
17 Court. On March 6, 2018, the day after the inspection, Plaintiff's counsel emailed defense counsel and  
18 proposed dates for a court hearing, but did not mention a second inspection. On March 7, 2018,  
19 defense counsel responded regarding the dates and counsel exchanged emails concerning dates  
20 through March 8, 2018. (Ex. E to Van Decl.)

21 On March 7, 2018, Plaintiff's counsel also submitted a letter to the Court concerning the  
22 inspection and stated that he needed another one (1) to one and half (1.5) hours to complete a second  
23 inspection. He did not meet and confer regarding a second inspection prior to submitting the letter.  
24 (Van Decl. at ¶ 12.) Plaintiff's counsel also did not meet and confer regarding the second inspection  
25 prior to submitting the motion to compel on March 13, 2018. (*Id.*)

26 On March 14, 2018, after receiving the motion to compel, defense counsel emailed Plaintiff's  
27 counsel outlining the failure to meet and confer concerning a second site inspection. Defense counsel  
28 reiterated that Defendant was willing to have a second site inspection, requested dates for the

1 inspection and also requested that the motion to compel be withdrawn. (Ex. E to Van Decl.) On  
2 March 15, 2018, Plaintiff's counsel responded, but did not broach the issue of a second inspection or  
3 provide dates. (*Id.*) On March 16, 2018, defense counsel emailed Plaintiff's counsel and suggested  
4 dates for the second inspection, but Plaintiff's counsel did not identify a date and has refused to  
5 withdraw the motion. (*Id.*)

6 With respect to Plaintiff's request for sanctions and finding of contempt, Defendant argues that  
7 such a request is misplaced because Defendant did not refuse to comply with the Court's order.  
8 Defendant asserts that the order did not afford Plaintiff an unlimited amount of time for the inspection,  
9 and the parties mutually agreed to a five-hour inspection. Defendant also argues that there is nothing  
10 in the Court's order that prohibited a second, subsequent inspection from taking place, and Defendant  
11 did nothing to impede a second inspection.

12 Pursuant to Local Rule 110, Defendant now requests that the Court impose sanctions on  
13 Plaintiff in an amount equal to the cost incurred to respond to the motion, which is approximately  
14 \$4,700.00. (Van Decl. ¶ 14.) Defendant contends that sanctions are warranted because (1) Plaintiff  
15 failed to meet and confer before filing this discovery motion as required by Local Rule 251; (2)  
16 Plaintiff failed to meet and confer regarding a second inspection; and (3) Plaintiff failed to prepare and  
17 file a joint statement with his discovery motion as required by Local Rule 251, and did not mention the  
18 joint statement in any correspondence with defense counsel, which compounded the failure to meet  
19 and confer. Defendant contends that if Plaintiff had engaged in meet and confer efforts it would have  
20 been clear that the motion was unnecessary.

### 21 **C. Plaintiff's Reply**

22 Plaintiff agrees that the parties did not meet and confer on the second inspection, but contends  
23 that such failure was the fault of defense counsel, who refused to meet and confer at the hotel when he  
24 stopped the inspection and who refused to respond to emails and a phone call for two days after the  
25 inspection. Plaintiff further contends that the parties did not mutually agree that the inspection would  
26 end at 5:00 p.m.

27 Plaintiff also disputes what took place at 5:00 p.m. on the date of the inspection. In particular,  
28 Plaintiff contends that defense counsel Van approached Plaintiff and his expert and told them that the

1 inspection was over, the inspection did not go on for another 30 minutes, and when Plaintiff attempted  
2 to complete the inspection, the hotel owner stopped him.

3 Plaintiff further argues that the assertion of a function scheduled in the main hotel was a ruse  
4 and contrary to events witnessed by counsel. Plaintiff reportedly parked across the street and watched  
5 for another hour and no such function occurred. Plaintiff also queries why the site inspection could  
6 not have started sooner if there allegedly was an evening function.

## 7 **II. Legal Standard**

8 Rule 34 requests may be used to inspect documents, tangible things, or land in the possession,  
9 custody, or control of another party. Rule 34(a). There is no real dispute but that Plaintiff may inspect  
10 Plaintiff's property in this action. Therefore, the Request for a second inspection will be granted.

11 Sanctions may be imposed against a person or party for failure to obey a prior court order  
12 compelling discovery. Rule 37(b)(2) of the Federal Rules of Civil Procedure provides that if a party  
13 fails to obey an order to provide or permit discovery, the Court may issue further just orders, which  
14 may include treating as contempt of court the failure to obey any order. Fed. R. Civ. P. 37(b)(2)(A).  
15 Instead of or in addition to any such orders, the Court must order the disobedient party, the attorney  
16 advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the  
17 failure, unless the failure was substantially justified or other circumstances make an award of expenses  
18 unjust. Fed. R. Civ. P. 37(b)(2)(C).

19 Additionally, Local Rule 110 provides that "[f]ailure...of a party to comply...with any order of  
20 the Court may be grounds for imposition by the Court of any and all sanctions...within the inherent  
21 power of the Court." District courts have the inherent power to control their dockets and "[i]n the  
22 exercise of that power they may impose sanctions . . . ." *Thompson v. Hous. Auth.*, 782 F.2d 829, 831  
23 (9th Cir. 1986).

## 24 **III. Analysis**

25 After considering the parties' arguments, the Court does not find that Defendant wholly failed  
26 to permit the site inspection at issue, and declines to find Defendant (or defense counsel) in contempt  
27 of court. Instead, it appears that the parties failed to communicate their expectations concerning the  
28 time allotted for the initial site inspection during the meet and confer ordered by the Court. *See* ECF

1 No. 27 (“the parties shall meet and confer to select a mutually convenient date and time for conducting  
2 the site inspection”). The Court, during the informal conference, did not impose any time limitation.  
3 Further, from the discussion regarding Plaintiff’s expert’s travel and availability, it should have been  
4 clear that the inspection was to be completed in a single visit to the hotel premises. In addition, the  
5 parties, particularly Defendant, failed to identify any time constraints or other obligations that might  
6 interfere with completion of the site inspection during a single, five-hour visit to the hotel, e.g., other  
7 events scheduled at the hotel or competing commitments.

8 If the parties had clearly communicated prior to the inspection, then the problem, and the  
9 motion pending before the Court, could have been avoided. The parties have compounded the  
10 problem by (1) failing to engage in genuine meet and confer efforts regarding completion of the site  
11 inspection; (2) failing to engage in genuine meet and confer efforts prior to filing the instant motion to  
12 compel; (3) failing to comply with Local Rule 251, including a filing joint statement of discovery  
13 dispute; and (4) failing to conserve party and judicial resources by utilizing the Court’s informal  
14 discovery procedures or resolving the matter without court intervention. In short, neither party is  
15 without fault in this dispute.

16 Nevertheless, the Court does find that sanctions are warranted based on Defendant’s failure to  
17 allow for the inspection to be completed in a single-visit and within the thirty (30) day deadline  
18 imposed by the Court. Although Mr. Van explains that he was unable to remain at the hotel “because  
19 he had to attend to another matter,” there is no indication that this unidentified “matter” could not be  
20 rescheduled, delayed, or otherwise attended to at a later time. (ECF No. 31, Van Decl. at ¶ 10.) The  
21 presence of co-counsel also negates any excuse that Mr. Van had to leave and the inspection had to  
22 cease. Indeed, there is no indication in Defendant’s papers demonstrating that co-counsel, Mr. Khurin,  
23 could not have remained on the premises in order to complete the inspection. There also is no  
24 explanation why the additional approximate 15 minutes requested for completion of the inspection  
25 could not have been accommodated by Mr. Styler or Mr. Arnold on March 5, 2018. While Defendant  
26 argues that there was a reception in the main common area, it is not explained why then the timeframe  
27 of 1:00 p.m. to 6:00 p.m. had been proposed as an option. It appears therefore that Defendant  
28 arbitrarily cut-off the inspection.

