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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DEERPOINT GROUP, INC., an Illinois corporation,

Plaintiff,

v.

AGRIGENIX, LLC, a Delaware limited liability company, *et al.*,

Defendants.

Case No. 1:18-cv-00536-AWI-BAM

**ORDER GRANTING PLAINTIFF’S  
REQUEST FOR EXPERT FEES AND  
DENYING THE REQUEST FOR  
ADDITIONAL ATTORNEY FEES**

(Doc. 220)

**AND RELATED COUNTERCLAIMS.**

On October 31, 2022, this Court granted Plaintiff’s Motion for Sanctions against Defendants Agrigenix, LLC and Sean Mahoney (“Defendants”) for failure to preserve Electronically Stored Information (“ESI”) in violation of Federal Rule of Civil Procedure 37(e). (Doc. 218.) The Court awarded monetary sanctions and granted the request that a curative instruction be given at trial. (*Id.*) In its Motion for Sanctions, Plaintiff also requested an award of expert fees expended in uncovering the spoliated ESI. (Doc. 168, pp. 25–26.)<sup>1</sup> The Court found that it could not rule on the request for expert fees without additional evidence. (Doc. 218, p. 37.) The Court required Plaintiff to provide supplemental evidence as to the expert costs which

<sup>1</sup> Page numbers refer to the Court’s CM/ECF pagination.

1 Plaintiff incurred in its attempt to recover spoliated evidence. (*Id.*)

2 On November 10, 2022, Plaintiff filed its supplemental briefing. (Doc. 220.) On  
3 November 23, 2022, Defendants filed a response to Plaintiff's supplement. (Doc. 221.) Plaintiff  
4 filed its reply on November 28, 2022. (Doc. 222.) Having considered the supplemental briefing  
5 by the parties, the Court GRANTS IN PART and DENIES IN PART Plaintiff's request.

6 **SUMMARY OF THE PARTIES' ARGUMENTS IN THE SUPPLEMENTAL BRIEFS**

7 The factual background and arguments giving rise to Plaintiff's sanctions request are set  
8 forth in detail in the Court's Order Granting Plaintiff's Motion for Sanctions and need not be  
9 repeated here. (Doc. 218.)

10 **A. Plaintiff's Supplemental Briefing**

11 Plaintiff retained Digital Mountain, Inc. and its forensic examiner Chris Beeson for expert  
12 assistance in the spoliation investigation. Mr. Beeson performed approximately 60 hours of  
13 work, billed at \$350 per hour, except for travel time. Digital Mountain also billed for the cost of  
14 shipping laptops and disk drives. Plaintiff previously submitted evidence of Mr. Beeson's  
15 expertise, qualifications, and complexity of his work in the previous briefing and supporting  
16 declarations. (*See* Doc. 168-39.) Mr. Beeson's and Digital Mountain's rates are reasonable and  
17 fair, and they have been used by Plaintiff's counsel in other cases. Their services are reputable,  
18 reliable, trusted, and fairly priced. Plaintiff had contacted a potential alternative source, and the  
19 quotes turned out to be similar. However, the potential alternative source did not include  
20 reviewing and assessing the content of recovered ESI and at one time, had hosted email services  
21 for Agrigenix, which may have posed a conflict.

22 Plaintiff asks for expert fees in the amount of \$24,033.91 (*see* invoices at Doc. 220-1):

23

<b>Date</b>	<b>Vendor / Invoice No.</b>	<b>Amount</b>
February 28, 2022	Digital Mountain / Invoice 7099	\$10,618.85
March 31, 2022	Digital Mountain / Invoice 7121	\$12,452.56
April 30, 2022	Digital Mountain / Invoice 7296	\$962.50
	<b>TOTAL</b>	<b>\$24,033.91</b>

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27 Plaintiff also asks for additional attorney fees for one hour of partner time and three hours  
28 of senior associate time, for additional fees of \$1,450.00. (Doc. 220, p. 4.) Therefore, the total

1 additional amount requested is \$25,483.91.

2 **B. Defendants' Response**

3 Defendants oppose the expert costs because: (1) the expert costs are based in inflated  
4 hourly rates; and (2) the request for additional attorney fees is not fair or equitable because the  
5 evidentiary support should have been provided with the claimed expert fees in the initial motion.

6 Defendants argue that the expert hourly rates are inflated for the Fresno market.  
7 Defendants submit evidence of Digital Mountain's government contracts rates from 2012–2017,  
8 which reflect an hourly rate of \$220 per hour. (Doc. 221, p. 24.) Digital Mountain now is  
9 charging a 60% markup in Fresno as compared to its government rates. In addition, a \$350  
10 hourly rate for data analysis is facially unreasonable considering that the Fresno District Court  
11 has a *de facto* \$400 per hour cap on experienced attorney hourly rates.

12 The requested additional attorney fees are not fair or equitable. Deerpoint failed to offer  
13 admissible evidence for its claimed expert costs in its motion for sanctions. The Court did not  
14 grant leave to seek more attorney fees than the already awarded \$32,500.00 in attorney fees.  
15 Deerpoint failed to support its original request and should not be awarded additional fees for  
16 failing to do so. (Doc. 221, p. 3.)

17 **C. Plaintiff's Reply**

18 Plaintiff argues that an expert rate higher than the *de facto* cap on attorney rates is  
19 irrelevant. Defendants do not cite to any authority that expert rates cannot be higher than attorney  
20 rates. The expert rate requested is fully supported.

21 The second argument by Defendants of “inflated rates” is an expired GSA rate sheet.  
22 (Doc. 221, p. 6.) The price list reflects a 10-year old government rate through “Modification #  
23 30, dated February 13, 2012.” (*Id.*) It also reflects an unidentified discount provided to  
24 government customers. (*Id.* at 11.) The GSA schedule expired in July 2017. Digital Mountain  
25 chose not to renew because it was not “a prudent decision for our company due to economic  
26 factors.” (Doc. 222-1, Supp. Lewis Decl. ¶2.)

27 For the additional attorney fees requested, the Court awarded attorney fees, and the  
28 additional fees are for the expert fees request still pending.

1 **SUPPLEMENTAL AWARD OF FEES**

2 **A. Award of Expert Fees**

3 As a reminder, federal courts have the discretion “to impose a wide range of sanctions  
4 when a party fails to comply with the rules of discovery or with court orders enforcing those  
5 rules.” *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983).

6 In the Court’s Order Granting Plaintiff’s Motion for Sanctions, the Court explained how  
7 and why it relied upon Plaintiff’s expert and that an award of expert fees is warranted in this case.  
8 (*See e.g.*, Doc. 218, pp. 20, 24, 28, 30.) The only issue was the amount of expert fees to be  
9 awarded.

10 The Court will award the requested expert fees of \$24,033.91. The Court has considered  
11 the evidence in support of and in opposition to the award. As stated in the Court’s Order  
12 Granting the Motion for Sanctions, the forensic work performed by Mr. Beeson was critical to the  
13 Court granting the motion.

14 The Court rejects Defendants’ challenge to the expert’s rate of \$350 per hour. As to this  
15 hourly rate, the Court considers the evidence submitted by Julie Lewis (President of Digital  
16 Mountain), both in the supplemental brief and reply brief, and concludes that \$350 per hour is the  
17 market rate for the type of services provided with Mr. Beeson’s expertise. In her declaration, Ms.  
18 Lewis explains how she competitively prices the services. (Doc. 220-2, Lewis Decl. ¶¶4–5; Doc.  
19 222-1, Supp. Lewis Decl. ¶2.) The Court does not find persuasive the evidence submitted by  
20 Defendants of the GSA rate sheet from 2012–2017 for Digital Mountain. The Court agrees with  
21 Plaintiff that the GSA rates were provided at some unspecified discount, and the contract was not  
22 renewed because it was not a prudent business decision due to economic factors. (Doc. 222-1,  
23 Supp. Lewis Decl. ¶2.) Further, the GSA rate sheet expired some five years ago, and rates  
24 undoubtedly have increased. (Doc. 221, p. 6.)

25 In addition, the Court disagrees with Defendants’ argument that expert rates should  
26 approximate attorney hourly rates. The Court can envision expertise which outpaces attorney  
27 rates, such as in medical cases or here, where uncovering spoliated ESI is no easy task. Indeed,  
28 for unique technical expertise as that provided by Mr. Beeson, it is reasonable that a premium rate

1 must be paid for such expertise. The Court also considers that Plaintiff contacted a local forensic  
2 expert, but declined to hire that expert to avoid the potential conflict based on the expert's past  
3 business relationship with Agrigenix and that expert did not provide the analytical services  
4 needed in this case.

5 **B. Additional Attorney Fees**

6 Plaintiff requests an additional award of \$1,450.00 for time spent "for one hour of partner  
7 time and three hours of senior associate time for identifying and engaging the services of Digital  
8 Mountain and Mr. Beeson, as set forth in ECF No. 168-38." (Doc. 220, p. 4.)

9 The Court declines to award any additional attorney fees. The Court agrees with  
10 Defendants' arguments that the evidentiary support should have been provided in the original  
11 motion.

12 **CONCLUSION AND ORDER**

13 For the reasons stated, the Court HEREBY ORDERS:

- 14 1. Plaintiff's supplemental request for fees, (Doc. 220), is GRANTED IN PART and  
15 DENIED IN PART as follows:
- 16 a. The Court GRANTS Plaintiff's request for expert fees; and
  - 17 b. The Court DENIES Plaintiff's request for additional attorney fees; and
- 18 2. Therefore, considering the Court's prior Order, (Doc. 218), Plaintiff is awarded the total  
19 monetary sanction of FIFTY-SIX THOUSAND FIVE HUNDRED THIRTY-THREE  
20 DOLLARS AND NINETY-ONE CENTS (\$56,533.91), against Defendants Agrigenix  
21 and Mahoney, joint and several, which consists of \$32,500.00 in attorney fees and  
22 \$24,033.91 in expert fees.

23  
24 IT IS SO ORDERED.

25 Dated: December 14, 2022

25 /s/ Barbara A. McAuliffe  
26 UNITED STATES MAGISTRATE JUDGE