

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WALNUT CREEK MANOR, LLC,
Plaintiff,

v.

MAYHEW CENTER, LLC, and DEAN
DUNIVAN,
Defendants.

No. C 07-5664 CW

ORDER GRANTING
PLAINTIFF'S
MOTIONS FOR
CONTEMPT SANCTIONS
AND ATTORNEYS'
FEES (Docket Nos.
305, 336)

United States District Court
For the Northern District of California

Plaintiff Walnut Creek Manor, LLC moves for contempt sanctions and attorneys' fees against Defendants Dean Dunivan and Mayhew Center, LLC. Defendants oppose both motions. After considering the parties' submissions and oral argument, the Court grants the motions.

BACKGROUND

The relevant facts and procedural history of this action are set forth at length in prior orders. See Docket Nos. 287, 296, 315. Accordingly, this order provides only a brief summary of the background relevant to the instant motions.

In October 2010, the parties settled this action by stipulating to the entry of an injunction requiring Defendants to remedy the tetrachloroethylene (PCE) contamination that they had caused on Plaintiff's property. Docket No. 270, Stipulation & Proposed Injunction, at 1-3. The Court approved the stipulation and entered the parties' proposed injunction on November 23, 2010. Docket No. 273, Order Granting Stipulation. Under the terms of that injunction, Defendants were required to complete cleanup and abatement of the PCE contamination within two years of the date

1 the injunction was entered. Id., Injunction, at 3-6. The
2 injunction specifically required Defendants to reduce the
3 concentration of PCE in Plaintiff's groundwater, soil, and soil
4 vapor to certain "residential standards" set by the Regional Water
5 Quality Control Board (RWQCB). Id. If they failed to achieve
6 these standards by the injunction's November 2012 deadline,
7 Plaintiff would be entitled to recover whatever funds remained in
8 an escrow account that Defendants had created to fund their
9 cleanup and abatement efforts. Id. at 8.

10 Defendants failed to complete their cleanup and abatement
11 obligations by the November 2012 deadline. The Court therefore
12 set a new deadline of July 31, 2013 for Defendants to complete
13 their cleanup and abatement obligations. Docket No. 287, Feb. 1,
14 2013 Order Denying Motion for Extension of Time, at 2. Although
15 Plaintiff was entitled under the injunction to recover whatever
16 funds remained in the escrow account as of November 2012, it
17 agreed to give Defendants continued access to the account until
18 the July 2013 deadline to fund their remediation efforts.

19 Despite this extension, Defendants failed to complete cleanup
20 and abatement by July 31, 2013. Plaintiff moved for contempt
21 sanctions against them based on their failure to comply with the
22 injunction. In its motion, Plaintiff requested various forms of
23 relief, including: (1) recovery of whatever funds remain in the
24 escrow account; (2) an order of contempt directing Defendants to
25 complete cleanup and abatement and to pay back all of the money
26 they withdrew from the escrow account; (3) appointment of a
27 special master to oversee Defendants' ongoing cleanup and
28 abatement efforts; and (4) reasonable attorneys' fees and costs.

1 In December 2013, the Court issued an order resolving some of
2 these issues and soliciting further briefing on others.
3 Specifically, the Court found that Plaintiff was entitled to its
4 reasonable attorneys' fees and whatever funds remained in the
5 escrow account because the injunction expressly provided for this
6 relief. The Court deferred judgment, however, on Plaintiff's
7 request for the appointment of a special master until the parties
8 each had a chance to nominate specific candidates willing to play
9 that role. Docket No. 334, Order Setting Hearing on Plaintiff's
10 Motion for Sanctions, at 13-14. The Court also deferred judgment
11 on Plaintiff's request for an order of contempt so that Defendants
12 could have "one final opportunity to explain why they should not
13 be held in contempt." Id. at 11. The Court directed Defendants
14 to submit "billing records, contractors' receipts, and any other
15 records documenting their expenditures and progress" in
16 implementing their most recent remediation plan. Id. at 12. A
17 hearing was held on these matters on January 23, 2014.

18 DISCUSSION

19 I. Contempt Sanctions

20 A. Finding of Civil Contempt

21 A district court has the inherent authority to enforce
22 compliance with its orders through a civil contempt proceeding.
23 Int'l Union, UMWA v. Bagwell, 512 U.S. 821, 827-28 (1994). "The
24 standard for finding a party in civil contempt is well settled:
25 The moving party has the burden of showing by clear and convincing
26 evidence that the [non-moving party] violated a specific and
27 definite order of the court." FTC v. Affordable Media, LLC, 179
28 F.3d 1228, 1239 (9th Cir. 1999) (quoting Stone v. City & County of

1 San Francisco, 968 F.2d 850, 856 n.9 (9th Cir. 1992)). The
2 contempt "need not be willful, and there is no good faith
3 exception to the requirement of obedience to a court order." In
4 re Dual-Deck Video Cassette Recorder Antitrust Litig., 10 F.3d
5 693, 695 (9th Cir. 1993). "But a person should not be held in
6 contempt if his action appears to be based on a good faith and
7 reasonable interpretation of the court's order." Id. (internal
8 formatting and quotations omitted). "'Substantial compliance'
9 with the court order is a defense to civil contempt, and is not
10 vitiated by 'a few technical violations' where every reasonable
11 effort has been made to comply." Id. (citing Vertex Distrib.,
12 Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 891 (9th Cir.
13 1982)).

14 As explained in the December 2013 order, "Plaintiff has
15 provided ample evidence here to show that Defendants failed to
16 achieve the residential standards required by the [November 2010]
17 injunction." Docket No. 334, at 8. Defendants do not dispute
18 that they failed to achieve these standards by the injunction
19 deadline nor do they dispute that they still have not achieved
20 these standards more than a year later. Although they contend
21 that they have made "significant and substantial efforts and
22 progress toward the remediation," Docket No. 339, Defs.' Supp.
23 Mem., at 3, they have not shown that they made "every reasonable
24 effort" to comply with the injunction, Dual-Deck Video, 10 F.3d at
25 695. Defendants failed to submit any of the "billing records,
26 contractors' receipts, and [] other records" documenting their
27 progress that they were ordered to submit in the Court's prior
28 order. Docket No. 334, at 12. Moreover, the evidence that they

1 did submit -- namely, declarations from Defendant Dunivan and an
2 environmental geologist named Dr. Mansour Sepehr -- focuses
3 primarily on the reductions in PCE levels on their own property,
4 not Plaintiff's property. Most importantly, none of this evidence
5 contradicts the Court's earlier finding, in its February 2013
6 order,¹ that Defendants' failure to complete timely cleanup and
7 abatement was largely a product of their own carelessness and
8 neglect.

9 Defendants' latest excuse for noncompliance, like their prior
10 excuses, ignores their own culpability for delays in the
11 remediation process. Defendants assert that they abandoned their
12 most recent remediation plan -- the October 2012 interim remedial
13 action plan (IRAP) -- because it did not adequately address the
14 groundwater contamination on Plaintiff's property. But they
15 ignore the fact that it was their own responsibility to develop an
16 effective remediation plan with the RWQCB. To the extent
17 Defendants had any concerns with the October 2012 IRAP, they
18 should have resolved these issues more than a year ago rather than
19 waiting until after they had missed their second cleanup and
20 abatement deadline in July 2013. In addition, Defendants should
21 have explained these concerns to the Court in January 2013 when
22 they requested additional time to complete cleanup and abatement.
23 They did not do so and, in fact, specifically represented to the

24
25 ¹ See Docket No. 287, Order Denying Defendants' Motion for an
26 Extension of Time, at 2 ("Defendants failed to provide mandatory
27 insurance forms for their contractors, which delayed work on Plaintiff's
28 property for several months."); id. at 3 ("Defendants also ignore the
fact that they failed to commence work on their own property -- to which
they had full and unrestricted access -- for more than a year after the
injunction issued, despite pleas from the Regional Water Board to begin
much sooner.").

1 Court that they were in the process of implementing the October
2 2012 IRAP at that time.

3 While Defendant Dunivan and Dr. Sepehr both allude in their
4 declarations to the recent removal of a significant mass of
5 subsurface PCE, both neglect to mention that this PCE was removed
6 from Defendants' property rather than Plaintiff's property. See
7 Dunivan Decl. ¶¶ 23-24; Sepehr ¶¶ 22-25. Further, even if this
8 removal had occurred on Plaintiff's property, Defendants have not
9 shown that it would have been significant enough to constitute
10 "substantial compliance" with the November 2010 injunction. See
11 Dunivan Decl. ¶ 24 (estimating, without identifying the basis of
12 the estimate, that "approximately 20% of the total mass of PCE in
13 the subsurface" had been removed). Thus, because Defendants have
14 failed to show that they substantially complied with the November
15 2010 injunction, the Court holds them in contempt.

16 B. Sanctions

17 As explained in the December 2013 order, Plaintiff is
18 entitled to recover whatever funds remained in the escrow account
19 as of July 31, 2013. The November 2010 injunction expressly
20 provides for this relief in the event that Defendants fail to
21 complete timely cleanup and abatement. The injunction does not,
22 however, require that Defendants pay back all of the funds that
23 they withdrew from the escrow account. Accordingly, Plaintiff
24 seeks this relief as a sanction for civil contempt.

25 Civil contempt sanctions are "characterized by the court's
26 desire to compel obedience to a court order, or to compensate the
27 contemnor's adversary for the injuries which result from the
28 noncompliance." Falstaff Brewing Corp. v. Miller Brewing Co., 702

1 F.2d 770, 778 (9th Cir. 1983) (citations omitted). As such, these
2 sanctions are typically "designed to compel future compliance with
3 a court order" and should be made "avoidable through obedience."
4 Int'l Union, 512 U.S. at 827.

5 Here, Plaintiff has not explained how an order directing
6 Defendants to pay back all of the money they withdrew from the
7 escrow account would compel Defendants to complete cleanup and
8 abatement in the future. Only a small portion of the escrow funds
9 has been spent at this point and most of those expenditures were
10 approved by Plaintiff. Thus, any order directing Defendants to
11 pay back the spent escrow funds would be punitive rather than
12 coercive or compensatory. This is not the purpose of civil
13 contempt sanctions.

14 That said, the Court has the authority to compel Defendants
15 to complete their original cleanup and abatement obligations.
16 Int'l Union, 512 U.S. at 827 (recognizing that a court has the
17 authority to enforce compliance with its orders). Defendants are
18 therefore ordered to reduce the concentration of PCE in
19 Plaintiff's groundwater, soil, and soil vapor to the residential
20 standards set forth in the November 2010 injunction. In seeking
21 to achieve these standards, Defendants must comply with any
22 applicable rules or orders issued by the RWQCB. Defendants'
23 failure to satisfy their cleanup and abatement obligations or to
24 comply timely with any RWQCB rules or orders will be considered
25 further contempt of court and result in further sanctions.

26 II. Appointment of a Special Master

27 On January 8, 2014, Plaintiff withdrew its request for the
28 appointment of a special master, stating that "on reflection, it

1 appears near certain that the appointment of a Special Master to
2 oversee any work by Defendant is unlikely in itself to achieve
3 compliance with the Injunction Order." Docket No. 346, Withdrawal
4 of Request for Special Master, at 1-2. In light of Plaintiff's
5 withdrawal of its request and both parties' failure to identify
6 any candidates willing to serve as special master, the Court shall
7 not appoint a special master at this time.

8 III. Attorneys' Fees and Costs

9 As explained in the December 2013 order, Defendants must
10 compensate Plaintiff for its reasonable attorneys' fees and costs
11 expended in responding to Defendants' various motions to delay
12 enforcement of the injunction over the past fourteen months.
13 Specifically, "Plaintiff is entitled to recover its reasonable
14 attorneys' fees and costs expended in opposing (1) Defendants'
15 motion for an extension of time to complete cleanup and abatement,
16 Docket No. 279; (2) Dunivan's motion to enforce the settlement
17 agreement, Docket No. 288; (3) Dunivan's motion for
18 reconsideration, Docket No. 297; (4) Dunivan's motion for an
19 additional extension of time, Docket No. 304; and (5) Dunivan's
20 motion to vacate the injunction, Docket No. 321." Docket No. 334,
21 at 13. Because Plaintiff failed to submit its attorneys' billing
22 records and hourly rates with its original motion for contempt
23 sanctions, the Court directed Plaintiff to submit these documents
24 in a supplemental brief. Plaintiff submitted its supplemental
25 brief, styled as a new motion for attorneys' fees, in December
26 2013. Docket No. 336. In its motion, Plaintiff claims that it
27 spent \$99,551.83 in attorneys' fees and costs in responding to the
28 motions identified in the Court's prior order.

1 Defendants object to this request on several grounds. They
2 contend that Plaintiff's counsel charged unreasonable hourly
3 rates, failed to keep accurate billing records, and billed time
4 for two motions which Plaintiff never opposed. Each of these
5 objections is discussed separately below.

6 A. Hourly Rates

7 Plaintiff has submitted a declaration from the manager of
8 Walnut Creek Manor, Milt Eberle, stating that he reviewed all of
9 Plaintiff's counsel's invoices and believes that the hourly rates
10 charged in those invoices are reasonable. Eberle Decl. ¶¶ 2-5.
11 In addition, Plaintiff has submitted a declaration from Richard
12 Pearl, an expert on local attorneys' rates and fees, asserting
13 that the rates charged by Plaintiff's counsel are within the
14 normal range charged by attorneys in environmental disputes such
15 as this one. Docket No. 347-1, Pearl Decl. ¶¶ 7-10. Pearl's
16 declaration compares Plaintiff's counsel's rates to rates that
17 have been documented in attorney surveys and rates that have been
18 upheld as reasonable by other courts. Id. ¶¶ 11-13. By all of
19 these metrics, the rates charged by Plaintiff's counsel are
20 reasonable. Id.

21 B. Specific Billing Entries

22 Defendants object to several specific billing entries as
23 duplicative, unrelated to the relevant motions, or lacking in
24 specificity. After reviewing the entries identified by
25 Defendants, the Court finds that all but two are non-
26 objectionable. The two problematic entries are Brian Kelly's
27 entries for December 4, 2012 (Invoice #1826939) and December 11,
28 2012 (Invoice #1826939), both of which employ block-billing and

1 appear to exceed the number of hours that should have been logged
2 for the tasks identified. Each entry states that Mr. Kelly spent
3 6.80 hours on activities that should have taken less time and
4 should have been billed separately, including multiple conferences
5 with co-counsel, reviewing work product, and communicating with
6 client representatives. The Court shall therefore award Plaintiff
7 \$4,488 for these services, or fifty percent of the \$8,976 that
8 Plaintiff's counsel originally billed for this time. See Mendez
9 v. Cnty. of San Bernardino, 540 F.3d 1109, 1129 (9th Cir. 2008)
10 (stating that block-billing and excessive billing "are legitimate
11 grounds for reducing or eliminating certain claimed hours, but not
12 for denying all fees").

13 C. Time Logged for Two Unopposed Motions

14 Plaintiff requests a total of \$12,828 for fees expended in
15 responding to Dunivan's motion to enforce the settlement
16 agreement, Docket No. 288, and his subsequent motion for
17 reconsideration, Docket No. 297. Defendants contend that this
18 amount is excessive because Plaintiff never filed an opposition to
19 either of these motions.

20 Plaintiff's failure to file an opposition to either of these
21 motions justifies reducing, but not eliminating, the fees it has
22 requested regarding these motions. Even if Plaintiff ultimately
23 declined to file an opposition to either of Dunivan's motions,
24 Plaintiff's counsel may nevertheless be compensated for the time
25 they spent reviewing the motions, discussing them with their
26 client, and considering whether or not to respond. These tasks
27 should have consumed no more than six hours of counsel's time.
28 Accordingly, the fees awarded for these tasks shall be reduced to

1 \$3240. This figure assumes that Plaintiff's attorneys spent three
2 hours each on these tasks.

3 D. Final Award of Attorneys' Fees

4 Based on the above reductions in Plaintiff's requested fee
5 award, Plaintiff is entitled to \$85,105.83 in attorneys' fees.²

6 CONCLUSION

7 For the reasons set forth above, Plaintiff's motion for
8 contempt sanctions (Docket No. 305) is GRANTED. The Court hereby
9 holds Defendants in contempt for failing to comply with the
10 November 2010 injunction and the February 2013 order denying their
11 request for an extension of time. Defendants are directed to
12 release all remaining escrow funds to Plaintiff immediately.
13 Further, they must complete remediation of the PCE contamination
14 on Plaintiff's property, as set forth in the November 2010
15 injunction, within six months of this order. Failure to do so
16 will be considered further contempt and result in coercive
17 sanctions. In completing the cleanup and abatement in accordance
18 with this order, Defendants must comply timely with all orders of
19 the RWQCB.

20 In addition, Plaintiff's motion for attorneys' fees (Docket
21 No. 336) is GRANTED. Defendants shall immediately pay Plaintiff
22 \$85,105.83 for its reasonable attorneys' fees and costs.

23 IT IS SO ORDERED.

24
25 Dated: 2/12/2014


CLAUDIA WILKEN
United States District Judge

26
27
28 ² The Court has reduced Plaintiff's requested fee award of
\$99,551.83 by a total of \$14,446.