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2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF CALIFORNIA

4 Devyn SOLO,

5 Plaintiff,

6 v.

7 AMERICAN ASSOCIATE OF

8 UNIVERSITY WOMEN, et al.,

9 Defendants.

Case No.: 15-cv-1356-WQH-AGS

**ORDER GRANTING MOTION FOR
SANCTIONS**

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11 Plaintiff's counsel has violated Court orders four times. In an effort to avoid
12 responsibility, he proffers several excuses, none of which are valid.¹ His rationalization is
13 that he experienced failures with his email and was involved in other litigation. He even
14 attempts to shift blame to opposing counsel by stating they should have notified him.

15 This, however, is Federal Court and an attorney licensed to practice in Federal Court
16 cannot avoid his responsibilities to his client, to the Court, and to opposing counsel so
17 easily. Accordingly, for the reasons set forth below, the Court grants defendant's request
18 for sanctions.

19 **BACKGROUND**

20 The Court, after all parties announced they were available on July 27, 2018, set that
21 date for the Early Neutral Evaluation and Case Management Conference. (ECF No. 105.)
22 The Court ordered the parties to submit confidential settlement statements to chambers, but
23 plaintiff's counsel failed to timely submit such a statement. (*See* ECF No. 104.) Counsel
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26 ¹ The Court found that Mr. Schey's August 13, 2018 pleading (ECF No. 111) was
27 improper and would not be considered. (*See* ECF No. 115.) However, the Court
28 addresses some of the arguments made in that pleading.

1 ultimately made the submission after the Court ordered him to show cause.² (*See id.*) Then,
2 on July 25, 2018, just two days before the ENE, the parties moved to continue the ENE for
3 the second time. (*See* ECF Nos. 90 & 106.) This time, the parties needed to change the
4 ENE date because plaintiff’s counsel was no longer able to attend on July 27, 2018. (*See*
5 ECF No. 106.) The Court set a July 26, 2018 telephonic hearing on the motion to continue
6 and ordered Mr. Schey to initiate a joint call into chambers for the telephonic hearing on
7 the parties’ motion to continue. (ECF No. 107.) Mr. Schey failed to appear despite the fact
8 the continuance was sought at his request. (*See* ECF No. 108.)

9 The Court then ordered Mr. Schey, by July 30, 2018, to file a declaration informing
10 the Court why he did not attend the telephonic hearing and set an attorneys-only status
11 conference for July 31, 2018. (*See id.*) Again, Mr. Schey failed to follow this Court’s order
12 and submitted nothing.

13 Considering plaintiff’s counsel’s record of nonappearance for these those two
14 matters, the July 31, 2018 status conference was vacated and an Order to Show Cause was
15 issued ordering Mr. Schey to attend a show cause hearing on August 8, 2018. (*See* ECF
16 No. 109.) Again, Mr. Schey failed to appear. (*See id.*) Based on this record, the Court
17 ordered AAUW to submit a fee petition for fees and costs incurred after the parties filed
18 the joint motion to continue the ENE on July 25, 2018. (*See* ECF No. 110.)

19 AAUW now seeks monetary sanctions against plaintiff in the amount of \$3,578.50
20 as compensation for the costs incurred, based on the following fees and expenses:

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23 ² Mr. Schey informed the Court that he inadvertently failed to timely file plaintiff’s
24 confidential settlement statement because of his travel abroad with limited access to the
25 internet and his involvement in the *Flores v. Sessions* settlement. (ECF No. 114, at 9.)
26 According to Mr. Schey, his position as class counsel for *Flores* required his “immediate
27 and round-the-clock involvement in monitoring compliance with the settlement at
28 detention sites throughout the country.” (*Id.* at 8-9.)

1	Attorney's fees	\$3,400.00
2	[13.6 hours x \$250.00 hourly rate]	
3	Travel	148.50
4	Parking	30.00

5 (See ECF No. 112.)

6 **LEGAL STANDARD**

7 Magistrate judges have the authority to issue sanctions based on a party's or
8 attorney's failure to obey scheduling or pretrial orders. Federal Rule of Civil Procedure
9 16(f) provides that if a party fails to obey the Court's scheduling or other pretrial order,
10 "the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–
11 (vii)." Fed. R. Civ. P. 16(f)(1). In addition to or in lieu of other sanctions, "the court *must*
12 order the party, its attorney, or both to pay the reasonable expenses—including attorney's
13 fees—incurred because of any noncompliance with this rule, unless the noncompliance was
14 substantially justified or other circumstances make an award of expenses unjust." Fed. R.
15 Civ. P. 16(f)(2) (emphasis added).

16 Further, Civil Local Rule 83.1(a) permits the Court to order sanctions for failure to
17 comply with the Local Rules or the Federal Rules of Civil Procedure. Specifically, Rule
18 83.1(a) provides:

19 Failure of counsel or of any party to comply with these rules,
20 with the Federal Rules of Civil or Criminal Procedure, or with
21 any order of the court may be grounds for imposition by the court
22 of any and all sanctions authorized by statute or rule or within
23 the inherent power of the court, including, without limitation,
24 dismissal of any actions, entry of default, finding of contempt,
25 imposition of monetary sanctions or attorneys' fees and costs,
26 and other lesser sanctions.

25 Civ. L.R. 83.1(a).

1 Schey then violated three Court orders since the joint motion was filed and ultimately
2 caused AAUW to incur additional fees and costs. (*See* ECF Nos. 107-10.)

3 Mr. Schey first argues that he did not intentionally disregard the Court’s Orders. He
4 claims he “was not aware of those court Orders because his domain server stopped
5 forwarding his emails to his email account.” (ECF No. 114, at 4.) Mr. Schey claims he did
6 not receive the Court’s ECF Orders or become aware of the orders until August 11, 2018.
7 (*See* ECF No. 114, at 11.) “For technical reasons neither Plaintiffs’ counsel understands
8 [...],” the emails issued by the ECF system from July 25 to July 31, 2018, were not
9 forwarded to Mr. Schey’s email account. (*Id.* at 12-13.)

10 Mr. Schey, however, accepts no responsibility for his failure to adequately monitor
11 this case. Instead, he asserts he “bear[s] no fault whatsoever for the technical failure that
12 resulted in [his] being unaware of this Court’s Orders issued between July 25 and 31,
13 2018.” (*Id.* at 13.) Moreover, Mr. Schey claims that had he “been aware that emails were
14 not being forwarded to his email account, he would have reviewed PACER on a daily basis
15 to monitor filings in this case.” (*Id.* at 13 n.9.) Such excuses are typically inadequate. *See*
16 *Lucore v. Bank of N.Y. Mellon*, 16-CV-03099-AJB-KSC, 2017 WL 1354798, at *4 (S.D.
17 Cal. Apr. 13, 2017) (noting that parties “are responsible for checking the court docket
18 throughout the filing process to ensure they are aware of any notices of entry of orders
19 from the court”).

20 Further, the proffered excuse avoids addressing the problem. The Court finds it
21 especially troubling that Mr. Schey assumed the parties’ joint motion to continue the ENE
22 would be granted. Aside from his excuses that he was traveling, busy with commitments
23 to other cases, and having email issues, Mr. Schey has provided **NO** explanation why he
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26 date to the proposed July 27, 2018 date. (ECF No. 105.) Even though he was or should
27 have been aware of the conflicting settings, Mr. Schey failed to advise the Court of his
28 conflict until the eleventh hour.

1 failed to check and see if the motion for continuance was granted. Mr. Schey was ordered
2 to appear before the Court for an ENE on July 27, 2018, and there is no dispute he was
3 aware of that setting. On July 25, 2018—just two days before the scheduled ENE date—the
4 parties filed a joint motion to continue the ENE date. According to Mr. Schey, July 25,
5 2018, is the date he started having problems with his email account and stopped receiving
6 notification of the Court’s orders. That Mr. Schey was not receiving email notifications
7 not only did not relieve him of his duty to check the court docket to see if the motion was
8 granted or denied, but it would have made it all the more important. It was entirely
9 inappropriate for counsel to assume the motion was granted and the ENE date continued.
10 Here, the motion was not immediately granted and the parties were ordered to appear on
11 July 26, 2018 for a telephonic hearing. When the joint motion to continue the ENE was
12 filed, Mr. Schey had two options, and assuming the motion would be granted was not one
13 of them. Mr. Schey could either verify that the motion was granted or appear for the
14 scheduled ENE. Instead, Mr. Schey took no action to check the docket and then failed to
15 appear for the hearing. An attorney who assumes the Court will grant a motion, whether
16 opposed or unopposed, makes that assumption at his own peril—especially in a case that is
17 more than three year years old.

18 After failing to appear for the August 8, 2018 show cause hearing, Mr. Schey filed
19 a self-serving declaration explaining why he was not responsible for ignoring multiple
20 Court orders. (*See* ECF No. 111.) Mr. Schey’s submission is inadequate. The Court still
21 does not know the full story. The Court set the show cause hearing to allow Mr. Schey to
22 explain himself and to allow the Court to inquire about specific instances. Because Mr.
23 Schey failed to appear, these questions remain unanswered. While the Court has the power
24 to order another show cause hearing, doing so will only create further delay and expense.
25 Instead, the Court decides counsel’s conduct warrants this assessment of costs.

26 Under Civil Local Rule 83.4(b), “any attorney permitted to practice in this court
27 must be familiar with and comply with the standards of professional conduct required of
28 members of the State Bar of California, which are now adopted as standards of professional

1 conduct of this court.” The California Rules of Professional Conduct provide that an
2 attorney “shall not intentionally, recklessly, or repeatedly fail to perform legal services with
3 competence.” California Rule of Professional Conduct 3-110(A). “Competence” can mean
4 the “diligence [...] reasonably necessary for the performance of such service.” California
5 Rule of Professional Conduct 3-110(B).

6 Although the Court declines to address whether Mr. Schey has breached the duty of
7 diligence owed to plaintiff, the Court stresses the importance for an attorney not to take on
8 more work than they can handle. That Mr. Schey was occupied with his role in the *Flores*
9 matter is no excuse for his lack of diligence in this matter. Mr. Schey agreed to represent
10 plaintiff in this matter and cannot raise his commitment to other matters as a defense for
11 failing to comply with this Court’s orders.

12 The question then, is what is the proper remedy for Mr. Schey’s violations of this
13 Court’s orders. The Federal Rules provide that it is appropriate for the Court to order an
14 attorney to pay as a sanction opposing counsel’s reasonable expenses, including attorney’s
15 fees, incurred because of the attorney’s noncompliance with a court order. Fed. R. Civ. P.
16 16(f)(2). Such an award is mandatory “unless the noncompliance was substantially justified
17 or other circumstances make an award of expenses unjust.” *Id.* As explained previously,
18 the Court finds Mr. Schey’s failure to comply was due to his own lack of diligence, so his
19 noncompliance was not substantially justified. Moreover, as explained in their declaration,
20 AAUW’s counsel wasted considerable time preparing, traveling, and appearing for Court-
21 ordered conferences and hearings Mr. Schey did not attend.

22 Determining whether attorney’s fees are reasonable typically involves calculating the
23 number of hours reasonably expended on the litigation multiplied by a reasonable hourly
24 rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983). The Supreme Court has
25 repeatedly reemphasized that discretion to determine the amount of a fee award lies with
26 the district court. *Id.* at 437. In this case, AAUW’s counsel requests compensatory
27 sanctions in the amount of \$3,578.50, which is comprised of 13.6 hours of work at an
28 hourly billing rate of \$250.00, as well as travel costs and parking fees. (ECF No. 112-1.)

1 AAUW's counsel reviewed the Court's orders, prepared for three Court-ordered hearings,
2 and attended Court-ordered hearings on July 26 telephonically and August 8, 2018 in
3 person. (*See id.*) Given the number of Court-ordered hearings AAUW prepared for and
4 which Mr. Schey failed to attend, the Court finds 13.6 hours to be a reasonable amount of
5 time.⁵ A billing rate of \$250.00 per hour is reasonable for an experienced attorney in the
6 San Diego market, so the Court also finds AAUW's counsel's billing rate to be appropriate.

7 Accordingly, the Court finds the issuance of sanctions, comprised of the fees and
8 expenses incurred by AAUW after the joint motion filed on July 25, 2018, to be warranted
9 against Mr. Schey.

10 CONCLUSION

11 Based on the foregoing, AAUW's motion for their reasonable attorney's fees and
12 expenses is granted. The Court awards AAUW the sum of \$3,578.50 as sanctions for Mr.
13 Schey's violation of Court orders. This amount represents the fees and costs incurred by
14 AAUW as a direct result of Mr. Schey's violations. In light of counsel's repeated
15 misconduct, the Court considered the imposition of additional monetary sanctions.
16 Although the imposition of additional monetary sanctions would be warranted, the Court
17 elects not to do so at this time and instead chooses to ADMONISH and WARN Mr. Schey
18 that future misconduct on his part may result in the imposition of much more severe
19 sanctions.

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23 ⁵ Mr. Schey claims that fees should not be awarded for the costs AAUW incurred to
24 appear at the August 8, 2018 hearing because AAUW's counsel was not required to attend.
25 Although attendance was not required, AAUW's counsel had every right to attend the
26 hearing. The Court is of the opinion AAUW's counsel should have attended in order to
27 properly represent their client. Accordingly, reimbursement for AAUW's cost of
28 attendance is warranted.

1 This sanction is levied solely against plaintiff's counsel Peter Schey. Consequently,
2 Mr. Schey shall pay monetary sanctions in the amount of \$3,578.50, to be delivered directly
3 to AAUW by September 14, 2018. Such costs are not to be charged to Mr. Schey's client
4 or reimbursed out of any settlement or judgment that may occur in the future.

5 **IT IS SO ORDERED.**

6 Dated: August 31, 2018

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8 CLINTON E. AVERITTE
9 UNITED STATES MAGISTRATE JUDGE
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