

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THE ECLIPSE GROUP LLP,

Plaintiff,

v.

TARGET CORPORATION, et al,

Defendants.

Case No.: 15cv1411-JLS (BLM)

ORDER GRANTING IN PART AND DENYING IN PART INTERVENOR'S MOTION TO COMPEL REIMBURSEMENT

[ECF No. 152]

Currently before the Court is Intervenor's October 2, 2017 "MOTION TO COMPEL REIMBURSEMENT OF EXPERTS UNDER RULE 26(b)(4)(E)(i)" [ECF No. 152 ("Mot.")], Defendants' October 16, 2017 opposition to the motion [ECF No. 156 ("Oppo.")], and Intervenor's October 23, 2017 reply [ECF No. 159 ("Reply")]. For the reasons set forth below, Intervenor's motion is **GRANTED IN PART AND DENIED IN PART.**

RELEVANT DISCOVERY BACKGROUND

On March 2, 2017, Defendants noticed a percipient witness deposition for Intervenor (Mr. Lobbin). Mot. at 2; see also ECF No. 152-1, Declaration of Stephen M. Lobbin ("Lobbin Decl.") at Exh. A. On March 3, 2017, Intervenor designated himself as an expert witness along with Mr. Frederick S. Berretta. Id.; see also Lobbin Decl. at 3. On May 12, 2017, prior to Mr. Lobbin's deposition, Defendants served a new deposition notice for "Intervenor's Designated Expert Stephen M. Lobbin and Request for Production of Documents." Id.; see also Exh. C. On July 13,

1 2017, Defendants served an amended notice of deposition of Intervenor, Stephen M. Lobbin,
2 "both as a non-retained expert and percipient witness." Lobbin Decl. at Exh. E.

3 Intervenor appeared for his deposition on August 31, 2017 and Mr. Berretta appeared for
4 his deposition on September 19, 2017 with Mr. Lobbin as counsel. ECF No. 156-2, Declaration
5 of Robert D. Goldberg ("Goldberg Decl.") at Exhs. B and C. When Mr. Berretta's deposition
6 ended, Defendants' counsel gave him a check for \$800 for his one hour of deposition testimony.
7 Oppo. at 10. Mr. Berretta did not submit an invoice to Defendants for unreimbursed time or
8 for travel time to the deposition. Oppo. at 10, 13.

9 On September 19, 2017, Intervenor emailed counsel for Defendants, Mr. Goldberg, and
10 requested an additional \$2,000.00 in reimbursement fees plus some amount to be determined
11 after review of the transcript for Mr. Berretta and \$9,100.00 for himself. Lobbin Decl. at Exh.
12 G. The following day, Mr. Goldberg responded that Defendants did "not believe any further
13 compensation is owed to Mr. Berretta" and that no money was owed to Mr. Lobbin because he
14 was not asked to provide his expert opinion during his deposition and, instead, only testified as
15 to his knowledge as a percipient witness. Id. Mr. Lobbin responded that he would accept
16 \$3,000.00 for Mr. Berretta, \$5,000.00 for himself, or a reasonable counteroffer. Id.

17 **PARTIES' POSITIONS**

18 Intervenor seeks an order from the Court requiring Defendants to reimburse himself and
19 Mr. Berretta in the amounts of \$8800 and \$3200 respectively for their expert depositions
20 including time for preparation, travel, and transcript review. Id. at 7. Alternatively, Intervenor
21 requests that the court at least award \$5000 and \$3,000 respectively. Id. Finally, Intervenor
22 requests that the Court require Defendants to pay reasonable expenses of \$4900 incurred in
23 preparing the instant motion. Id. at 8.

24 In support, Intervenor argues that Defendants are "refusing to comply with well-settled
25 law on travel time, deposition time, and transcript review time." Id. at 4. Intervenor admits
26 that courts in the Ninth Circuit are divided on whether or not preparation time should be
27 reimbursed under Federal Rule of Civil Procedure 26(b)(4)(E)(I), but argues that "all time
28 reasonably spent preparing for the deposition [should be] reimbursable." Id. at 5-6. Intervenor

1 notes that the requested fees are reasonable and that he proposed a reduced fee to Defendants
2 in order to avoid the instant motion, but Defendants failed to respond. Id. at 3, 7.

3 Defendants contend that Intervenor "is not entitled to any expert fees as he did not testify
4 at his deposition regarding any expert opinion that he intended to offer at trial." Oppo. at 4.
5 Defendants additionally contend that Mr. Berretta was paid for his time and never invoiced
6 Defendants for any additional time. Id. Defendants state that Intervenor was noticed to be
7 deposed as a percipient witness on August 31, 2017 at 9:30 a.m. and as an expert witness on
8 August 31, 2017 at 1:30 p.m. Id. at 7. Defendants argue that after deposing Intervenor as a
9 percipient witness, it became clear that any expert opinions of his would either duplicate those
10 of Mr. Berretta or were "extraneous given his testimony as a percipient witness." Id. at 4.
11 Accordingly, Defendants contend that Intervenor's expert deposition never took place. Id. at 7.
12 Defendants further contend that contrary to Intervenor's claims, Intervenor did not respond to
13 the document requests set forth in the notice for the expert witness deposition and that any
14 review of the documents undertaken by Intervenor "was commensurate with the documents
15 [Intervenor] had prepared himself, or reviewed as litigation counsel." Id. Defendants request
16 that the Court award them the \$2,000 incurred in opposing the instant motion. Id. at 14.

17 Intervenor replies that he submitted a declaration substantiating the time that he and Mr.
18 Berretta spent traveling to and preparing for the depositions. Reply at 3. Intervenor also replies
19 that the portions of Mr. Berretta's deposition testimony cited to by Defendants are out of context
20 and that Defendants' position that Intervenor's deposition was not an expert deposition is
21 unreasonable. Id. Intervenor claims that the deposition was not bifurcated and that the
22 deposition involved several questions that drew upon his expertise. Id. at 3-4. Intervenor notes
23 that he "made good faith attempts to amicably and reasonably resolve the issue without
24 resorting to court intervention." Id. at 4. Intervenor spent an additional three hours amounting
25 to \$2100 in preparing his reply. ECF No. 159-1, Declaration of Stephen M. Lobbin in Support
26 of Motion ("Lobbin Reply Decl.") at 2.

27 ///

28 ///

1 **LEGAL STANDARD**

2 Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 26(b)(4)(E) states that

3 [u]nless manifest injustice would result, the court must require that the party
4 seeking discovery: (i) pay the expert a reasonable fee for time spent in responding
5 to discovery under Rule 26(b)(4)(A) or (D); and (ii) for discovery under (D), also
6 pay the other party a fair portion of the fees and expenses it reasonably incurred
7 in obtaining the expert's facts and opinions.

8 Fed. R. Civ. P 26(b)(4)(A) states that a "party may depose any person who has been identified
9 as an expert whose opinions may be presented at trial."

10 **DISCUSSION**

11 1. Mr. Berretta's Deposition

12 The parties agree that Mr. Berretta has thus far been paid \$800.00 for his expert witness
13 deposition. Mot. at 3; see also Oppo. at 10. In support of his request for an additional \$3200
14 in fees for Mr. Berretta, Intervenor argues that (1) Mr. Berretta's hourly rate (which Defendants
15 did not object to) is \$800, (2) on September 18, 2017, Mr. Berretta spent two hours in
16 Intervenor's office preparing for the deposition, (3) Mr. Berretta spent one hour traveling to and
17 from the deposition, and (4) Mr. Berretta will spend at least one hour reviewing his deposition
18 transcript and providing clarifications or corrections. Mot. at 4. Defendants contend that (1)
19 Mr. Berretta has never submitted an invoice for unreimbursed time, (2) they are not required to
20 pay for deposition preparation time, (3) Mr. Berretta has not requested to be reimbursed for
21 travel time, and (4) Intervenor's request that Mr. Berretta be paid for time spent reviewing the
22 deposition transcript is premature and unsupported. Oppo. at 10-15.

23 A. Mr. Berretta's Preparation Time

24
25 With respect to whether an expert's deposition preparation fees must be paid by
26 the deposing party, the courts have generally taken one of four positions. First,
27 some courts have held that the deposing party must pay the expert's fees for time
28 reasonably spent preparing for the deposition. Second, some courts have held that
the deposing party must pay the expert's fees for time reasonably spent preparing

1 for the deposition, except for the time the expert spent consulting with the
2 retaining party's counsel. Third, at least one court has held that the deposing party
3 is not required to pay any fees for the time the expert spent preparing for the
4 deposition. And fourth, some courts have held that the deposing party is required
5 to pay the expert's fees for time reasonably spent preparing for the deposition only
6 in complex cases or in extenuating circumstances.

7 Stevens v. CoreLogic, Inc., 2016 WL 8729928, at *2 (S.D. Cal. May 6, 2016)(internal citations
8 omitted); see also Eastman v. Allstate Ins. Co., 2016 WL 795881, at *4 (S.D. Cal. Feb. 29, 2016)
9 (same). "There is no Ninth Circuit authority on point and no consensus among district courts
10 within this circuit." Eastman, 2016 WL 795881, at *4.

11 The Court agrees with the cases holding that the deposing party should only be
12 responsible for reasonable expert deposition preparation fees in complex cases or in extenuating
13 circumstances. As other courts in this district have noted, there are a number of concerns that
14 support a finding that the deposing party is not always required to pay for the preparation of an
15 opponent's expert including that (1) the deposing party has no control over how much time an
16 expert will spend preparing for a deposition, (2) preparing an expert for deposition may include
17 work undertaken only for the benefit of the retaining party, (3) there is often overlap between
18 deposition and trial preparation, and (4) judges are not in an ideal position to determine if an
19 expert's preparation time is reasonable.). See Stevens, 2016 WL 8729928, at *3-4; see also
20 Eastman, 2016 WL 795881, at *5-6 (same). The Court finds that these concerns are present in
21 the instant case and holds that requiring a deposing party to pay for an expert's deposition
22 preparation time is the exception and not the rule and is only required in complex cases or other
23 extenuating circumstances. See Stevens, 2016 WL 8729928, at *4 ("this Court holds that
24 requiring a deposing party to pay for an expert's deposition preparation fees should not be the
25 rule but the exception, and this exception should apply only in complex cases or in other
26 extenuating circumstances") (citing Eastman, 2016 WL 795881, at *6 ("The Court therefore
27 holds that fee-shifting for expert preparation is the exception, not the rule, and is only required
28 in extenuating circumstances.")).

The Court finds that this case is not particularly complex and there are no extenuating

1 circumstances that justify requiring Defendants to pay for Mr. Berretta's deposition preparation.
2 Mr. Berretta was designated as Intervenor's expert on March 3, 2017 and Defendants noticed
3 his deposition in May 2017. Mot. at 2; see also Lobbin Decl. at Exh. B. The notice was amended
4 on July 13, 2017 and Mr. Berretta's deposition took place on September 19, 2017. Mot. at 2-3;
5 see also Lobbin Decl. at Exh. F. Mr. Berretta's deposition lasted for approximately one hour and
6 when asked if he prepared for the deposition, he testified "Not much. I looked at my report. I
7 just looked over my report basically."¹ Mot. at 3; see also Goldberg Decl. at Exh. C at 61. When
8 asked if he brought any documents in response to the documents requests, Mr. Berretta testified
9 "I have not brought any documents. My understanding was that Mr. Lobbin, the attorney, was
10 handling this and did whatever was required with respect to this production and request." Id.
11 at 57. See Stevens, 2016 WL 8729928, at *4 (stating that had defendants not previously agreed
12 to pay for expert's preparation time, the court was inclined to find that there were no extenuating
13 circumstances where expert's deposition was timely noticed and held, expert was deposed for
14 less than eight hours, and the documents the expert reviewed in preparation for the deposition
15 were not exceptionally voluminous); see also Eastman, 2016 WL 795881, at *6 (finding no
16 extenuating circumstances where the gap in time between the expert's last involvement with
17 the case and the deposition was not especially great and where despite there being voluminous
18 records, the experts should have had a good sense of what the key documents and issues were)
19 and 3M Co. v. Kanbar, 2007 WL 2972921, at *3 (N.D. Cal. Oct. 10, 2007) (denying plaintiff's
20 motion to recover the costs of the expert's deposition preparation time and noting that "[t]his
21 case does not appear to be especially complex. The deposition of 3M's expert took a modest
22 two and a half hours. There are no extenuating circumstances."). While Intervenor notes that
23 five months elapsed between Mr. Berretta preparing his expert report and his deposition, the
24 Court does not find that this is sufficient to create extenuating circumstances requiring
25 Defendants to pay for Mr. Berretta's preparation. Moreover, the scope of Mr. Berretta's expertise
26

27
28 ¹ Defendants state that Mr. Berretta's report was "less than 14 pages in length, double spaced
(without considering the attachments)." Oppo. at 11.

1 is limited and does not include complex issues, the instant litigation is not complex, Mr. Berretta
2 did very little to prepare for his deposition, and the deposition lasted only one hour. Accordingly,
3 Intervenor's request that Mr. Berretta be reimbursed \$1600 for the two hours spent preparing
4 for his deposition is **DENIED**.

5 B. Mr. Berretta's Travel Time

6 Intervenor seeks an additional \$800 in fees for Mr. Berretta for the one hour that he
7 spent traveling to and from his deposition. Mot. at 4; see also Reply at 2. Defendants contend
8 that Mr. Berretta has never requested that he be compensated for his travel time and he has
9 not submitted an invoice for his travel time. Oppo. at 13. Defendants note that Intervenor has
10 not submitted a declaration from Mr. Berretta regarding his travel time or specified the amount
11 of travel time at issue. Id. Accordingly, Defendants contend that they "were not required to
12 accept [Intervenor's] vague characterization of Berretta's travel time or that Berretta was even
13 asking for any reimbursement for his travel time, when [Intervenor] demanded payment." Id.

14 "Time an expert spent traveling to and from the deposition generally is regarded as an
15 expense that should be shifted to the deposing party." Rock River Commc'ns, Inc. v. Universal
16 Music Grp., 276 F.R.D. 633, 637 (C.D. Cal. 2011) (citing Frederick v. Columbia University, 212
17 F.R.D. 176, 177-178 (S.D.N.Y.2003); Haarhuis v. Kunnan Enterprises, Ltd., 223 B.R. 252, 258
18 (D.D.C.1998) aff'd, 177 F.3d 1007 (D.C.Cir.1999); and Magee v. Paul Revere Life Ins. Co., 172
19 F.R.D. 627, 646 (E.D.N.Y.1997).

20 In his reply, Intervenor provided further details regarding Mr. Berretta's travel to and
21 from the deposition, stating that Mr. Berretta traveled to and from the deposition with Intervenor
22 from Del Mar, California to downtown San Diego. Reply at 2; see also Lobbin Reply Decl. at 1-
23 2. While Defendants have not provided any legal support establishing that Mr. Berretta is
24 required to submit an invoice for his travel time, the Court finds it appropriate to require him to
25 do so in this case. If Mr. Berretta seeks reimbursement for his travel time, he must submit an
26 invoice to Defendants by **December 6, 2017**. If the invoice is consistent with or less than the
27 representations made by Intervenor, Defendants must pay the invoiced fee.

28 ///

1 C. Mr. Berretta's Transcript Review Time

2 Intervenor states that Mr. Berretta spent "nearly an hour" reviewing and correcting the
3 transcript from his deposition and seeks \$800 in additional compensation from Defendants.
4 Reply at 3; see also Lobbin Reply Decl. at 2. Defendants contend that an hour is an unreasonable
5 amount of time to spend reviewing a thirty-three page deposition transcript. Oppo. at 14.

6 "Several district courts have held that deposition transcript review and correction do not
7 qualify as 'time spent in responding to discovery.'" Stevens, 2016 WL 8729928, at *5 (citing
8 Rock River Commc'ns, 276 F.R.D. at 635–36 and Patterson Farm, Inc. v. City of Britton, 22 F.
9 Supp. 2d 1085, 1096 (D.S.D. 1998)); but see Ross-Hime Designs, Inc. v. United States, 124
10 Fed. Cl. 69, 76–77 (2015) ("preparing an errata sheet should be part and parcel of an expert's
11 time spent responding to discovery under Rule 26(b)(4)(E)(i), and a reasonable fee related to
12 reviewing the deposition for transcription errors is reimbursable.")² and Underhill Investment
13 Corp. v. Fixed Income Discount Advisory Co., 540 F.Supp.2d 528, 539 (D. Del. 2008). As the
14 court in Patterson Farm, Inc., explained:

15
16 [I]f the party seeking the deposition were always required to pay for the time
17 spent by the deponent reviewing and making changes to the deposition transcript,
18 expert witnesses would be encouraged to review the transcript in every deposition
19 regardless of the necessity of such an action.... If such costs were borne by the
20 expert witness or by the party who retained him or her, the decision to request
21 the review would be made with greater consideration rather than simply as an act
22 to force the party seeking the deposition to pay additional expenses.

23 Patterson Farm, Inc., 22 F.Supp.2d at 1096; see also Rock River Commc'ns, 276 F.R.D. at 635–
24 36 (stating that the finding in Patterson is wise and noting that "[a]lthough a deponent has the

25
26 ² The Court in Stevens agreed with the finding in Ross-Hime Designs and granted in part
27 plaintiff's motion to compel defendant to pay the expert's deposition review fees, but found that
28 the expert's six hour review of 217 page transcript for the 6.25 hour deposition to be
unreasonable and instead, found a reasonable amount of time to be 1.5 hours. Stevens, 2016
WL 8729928, at *6.

1 right to review and correct the transcript of his or her deposition testimony, see Fed. R. Civ. P.
2 30(e)(1), he or she is not obliged to do so, even if the deposing party requests it.”).

3 Intervenor’s request that Mr. Berretta be reimbursed \$800 for the one hour he spent
4 reviewing and correcting his deposition transcript is **DENIED**.

5 2. Mr. Lobbin’s Deposition

6 Mr. Lobbin seeks \$8800 in expert fees in this case in which he is the Intervenor, and in
7 which he designated himself as a non-retained expert on essentially the same issues he raises
8 as the Intervenor. Not surprisingly, Mr. Lobbin does not provide any legal authority supporting
9 expert fees in such a situation. With respect to the expert testimony he actually provided during
10 his deposition as opposed to his percipient witness testimony, Mr. Lobbin provides broad general
11 statements, but no specific examples. For example, Mr. Lobbin stated

12 Defendants indeed asked many questions calling for expert testimony, in the form
13 of Mr. Lobbin’s opinions on many subjects within his expertise and within his
14 planned trial testimony supporting each of Intervenor’s claims, and rebutting each
of Defendants’ defenses.

15 Mot. at 4 n.2. This does not identify any actual expert testimony given by Mr. Lobbin or provide
16 any detail on the “many subjects within his expertise.” Id. Additionally, Mr. Lobbin declared
17 that his

18 deposition testimony includes numerous expert opinions, which were elicited in
19 the questioning of Defendants’ counsel. For example, I was asked “Do you have
20 any expert opinions?” and about my opinions as to a lawyer’s duties in representing
litigation clients.

21 Lobbin Decl. at 3. This statement does not shed any light on whether the opinions he offered
22 were in response to questions about his duties in representing the parties at issue in the instant
23 matter or were truly directed at his “expert” knowledge.

24 In his expert designations, Mr. Lobbin described the subject matter of his expertise as
25 “the reasonable value of the extraordinary results achieved by Intervenor on behalf of clients
26 Target and Kmart,” but does not explain how that knowledge comes from his expertise as
27 opposed to his percipient witness knowledge. Lobbin Decl. at Exh. B (Intervenor’s Expert
28 Designations). Finally, in his reply, Mr. Lobbin

1 acknowledges the overlap with percipient testimony, and does not contend that
2 every deposition question was directed specifically to eliciting expert testimony,
3 [but also contends that] certainly the deposition covered many opinions drawing
on Mr. Lobbin's expertise.

4 Reply at 4. Again, Mr. Lobbin fails to highlight any actual expert testimony he provided and
5 simply assures that Court that he provided "many opinions drawing on [his] expertise." Id.

6 The Court has reviewed the transcript from Intervenor's deposition and agrees with
7 Defendants that Intervenor's testimony covered his percipient witness knowledge and did not
8 delve into his expert opinion. Although Intervenor asserts in his motion that his testimony
9 "included numerous expert opinions which were elicited in the questioning of Defendants'
10 counsel," the example provided by Intervenor consisted only of the question asked by defense
11 counsel: "Do you have any expert opinions?" Mot. at 2-3. The Court finds it very telling that
12 Intervenor does not list or cite to the specific opinions he testified to, but rather identifies only
13 the question he was asked. The Court's review of the deposition transcript shows that the
14 identified question was asked near the end of Intervenor's deposition and no testimony based
15 on Intervenor's expertise was provided after the question was asked.³ See Goldberg Decl. at
16 Exh. B at 47-48. Intervenor has not identified, and the Court has not found, expert opinions
17 provided by Mr. Lobbin during his deposition that are not part of his percipient witness testimony.

18 _____
19 ³ The identified questions and responses are:

20 Q. Do you have any expert opinions that have not been expressed in the report and
declaration of exhibit witness Frederick S. Beretta?

21 A. Well, those are his opinions, not mine. So I'm -- I was designated because I have
expertise on the matters that bear on this case, which, if appropriate at trial, I'll offer. But --

22 Q. All my question is: Do you have any opinions that differ from Mr. Beretta's?

23 A. Oh, that differ? Okay. Well I suppose I have additional opinions on the --issues that
24 Mr. Beretta doesn't address, such as how you run client engagements, how you --as an
experienced attorney, how you handle communications with clients; how do you run a case--
25 when you have, you know, one client paying the bill, the other client being the represented
party, you know, how do you-- you know, what-- what expertise is involved in patent litigation;
26 how often does patent litigation resolve favorably on summary judgment, any number of things;
which are the --the ethical rules required, all that stuff would be subject matters that, at trial, I
27 may offer opinions on.

28 Goldberg Decl. at Exh. B at 47-48.

1 As such, and given the lack of legal and factual authority, the Court finds no basis to require
2 Defendants to pay Mr. Lobbin expert fees for his deposition testimony.

3 Even if Intervenor's deposition had covered topics drawing upon Intervenor's expertise,
4 the Court would have denied Intervenor's request to be reimbursed for four hours of deposition
5 preparation. As stated above, the Court does not find this case to be particularly complex and
6 there are no extenuating circumstances justifying requiring Defendants to pay for expert
7 preparation in this matter. In addition, while Intervenor argues that "he spent at least four
8 hours preparing for the anticipated expert deposition testimony, including reviewing and
9 responding to the 15 document requests, each of which related to matters concerning relevant
10 expertise," the pleadings show that Intervenor had no responsive documents for at least half of
11 the requests and that many of the other requests only required basic responses that did not
12 demand much time or effort from Intervenor other than a review of the pleadings and discovery
13 in the matter (which he presumably did before or would have done for purposes of the litigation
14 regardless of any expert deposition). Mot. at 2; see also Goldberg Decl. at Exh A.⁴

16
17 ⁴ Intervenor's responses to the document requests included:

18 1-My CV and publications are available on my firm's website and via google, and I
19 have no prior expert witness testimony.

20 2-The documents I have reviewed within the scope of my expert designation are
21 limited to the pleadings filed and the discovery served in this action.

22 3-Besides the materials identified *supra*, none.

23 4-Besides the materials identified *supra*, none.

24 5-Besides the materials identified *supra*, none.

25 6-None.

26 7-Besides the materials identified *supra*, none.

27 8-Besides the materials identified *supra*, none.

28 9-None at this time, but will be provided in supplemental disclosure.

10-Besides the materials identified *supra*, none.

11-None.

12-None.

13-None.

14-None.

15-Besides the materials identified *supra*, none.

Goldberg Decl. at Exh. A.

1 The Court also would have denied the request for forty-five minutes of travel time to the
2 deposition as Intervenor also was traveling for his percipient witness deposition and did not
3 incur an additional expense because of the expert deposition. Finally, for the reasons the Court
4 has explained above in regards to Mr. Berretta, the Court also would have denied Intervenor's
5 request to be compensated for the two hours he spent reviewing and correcting his deposition
6 transcript.

7 **SANCTIONS**

8 Intervenor requests the Defendants be ordered to pay \$7,000 for the costs he incurred
9 in making the instant motion. Intervenor declares that he spent seven hours preparing the
10 instant motion and three hours preparing the reply which amounts to \$4,900 and \$2,100
11 respectively. Lobbin Decl. at 4; see also Lobbin Reply Decl. at 2. Defendants request that
12 Intervenor be ordered to pay them \$2,000 for the costs they incurred in opposing the motion.

13 If a motion to compel discovery is granted in part and denied in part, Federal Rule of Civil
14 Procedure 37(a)(5)(C) permits a court to "after giving an opportunity to be heard, apportion the
15 reasonable expenses for the motion."

16 The parties' requests for fees incurred in briefing and opposing the motion are **DENIED**.
17 The Court finds that sanctions are inappropriate given the unusual facts and limited legal
18 authority.

19 **CONCLUSION**

20 Intervenor's request that Mr. Berretta be reimbursed \$1600 for the two hours spent
21 preparing for his deposition is **DENIED**.


22 If Mr. Berretta seeks reimbursement for his travel time, he must submit an invoice to
23 Defendants by **December 6, 2017**. If the invoice is consistent with or less than the
24 representations made by Intervenor, Defendants are **ORDERED** to pay the invoiced fee on or
25 before **December 20, 2017**.

26 Intervenor's request that Mr. Berretta be reimbursed \$800 in expert fees for the one hour
27 he spent reviewing and correcting his deposition transcript is **DENIED**.

28 Intervenor's request that he be paid \$8,800 is **DENIED**.

1 Intervenor's request that Defendants be sanctioned in the amount of \$7,000 is **DENIED**.
2 Defendants' request that Intervenor be sanctioned in the amount of \$2,000 is **DENIED**.
3 **IT IS SO ORDERED.**

4
5 Dated: 11/29/2017


6 Hon. Barbara L. Major
7 United States Magistrate Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28