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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Virgil Popescu,  
Plaintiff,  
v.  
City of San Diego, et al.,  
Defendants.

Case No.: 15-cv-01657-BAS-JLB  
**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' EX PARTE MOTION FOR ATTORNEY'S FEES**  
**[ECF No. 50]**

Before the Court is Defendants' motion seeking attorney's fees and costs incurred in connection with their successful motion to compel. (ECF Nos. 30, 50.) The motion is unopposed as pro se Plaintiff Virgil Popescu failed to file an opposition to the motion.

**I. BACKGROUND**

On August 18, 2016, this Court issued an order setting this case for an Early Neutral Evaluation Conference and a Case Management Conference. (ECF No. 18.) The order set forth mandatory directions for the parties, including that the parties were required to submit settlement statements and a joint discovery plan to the Court. (*Id.* at ¶¶4, 7.) Pro se Plaintiff Virgil Popescu failed to both submit a settlement statement and participate in the discovery plan that was filed on behalf of Defendants only. (*See* ECF No. 20.) Thus, on September 6, 2016 and as a prelude to the Early Neutral Evaluation Conference, Magistrate Judge Jill L. Burkhardt admonished Plaintiff that moving forward he would need to follow court orders regardless of his view on the value of what was being ordered.

Later on September 6, 2016 after the conclusion of the Early Neutral Evaluation Conference, this Court held an in-person Case Management Conference with Plaintiff and counsel for Defendants present. (ECF No. 21.) During the Case Management Conference, Magistrate Judge Jill L. Burkhardt communicated to the parties that a scheduling order

1 would issue setting December 16, 2016 as the deadline for all parties to complete all fact  
2 discovery. Judge Burkhardt further explained the timing and procedural requirements for  
3 addressing discovery disputes between the parties under her chambers rules. Plaintiff  
4 communicated to the Court that he has a legal background as a lawyer in Romania. Further,  
5 the Court provided Plaintiff with a courtesy paper copy of both the Standing Order for Civil  
6 Cases for the Honorable Cynthia Bashant (*see* ECF No. 22 at ¶1) and the Civil Chambers  
7 Rules for Magistrate Judge Jill L. Burkhardt.

8 The scheduling order for this case issued on September 7, 2016, setting December  
9 16, 2016 as the deadline for all parties to complete all fact discovery. (ECF No. 22.) The  
10 scheduling order also instructed that, “**Counsel shall promptly and in good faith meet  
11 and confer with regard to all discovery disputes in compliance with Local Rule  
12 26.1(a).** . . . . If the parties reach an impasse on any discovery issue, counsel shall file an  
13 appropriate motion within the time limit and procedures outlined in the undersigned  
14 magistrate judge’s chambers rules. **A failure to comply in this regard will result in a  
15 waiver of a party’s discovery issue.**” (*Id.* at ¶5 (emphasis in original).)

16 On November 1, 2016, and in compliance with the procedures outlined in Judge  
17 Burkhardt’s chambers rules, the parties sought Judge Burkhardt’s assistance with  
18 discovery disputes over both a deposition notice and written discovery served on Plaintiff.  
19 (ECF No. 23.) On November 8, 2016, the Court held a telephonic Discovery Conference  
20 to address these disputes. (*Id.*; ECF No. 27.)

21 With respect to the deposition notice, Plaintiff’s only objection was that he believed  
22 his safety would be compromised if Defendants videotaped his deposition. (ECF No. 33.)  
23 Plaintiff affirmatively represented that he did not have any issues to raise with the Court  
24 with respect to the location, date, and time for his deposition. Because Plaintiff had never  
25 provided Defendants with any written response to his deposition notice, the Court advised  
26 Plaintiff that he was to file any objections he had to the deposition being videotaped by  
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1 November 14, 2016 at 4:00 p.m.<sup>1</sup> The Court concluded the Discovery Conference by  
2 directing the parties that they were to proceed with the deposition as noticed and the Court  
3 would be issuing an order as to whether or not the deposition would be videotaped. (ECF  
4 No. 27, 33.)

5 An order issued providing the parties with a briefing schedule, including deadlines  
6 for the parties to brief Plaintiff's objection to having his deposition videotaped. (*Id.*)  
7 Plaintiff did not comply with his court ordered deadline. (ECF No. 33 at 1.) On November  
8 21, 2016, the Court issued the following order:

9 Based on the record before the Court, Plaintiff's objection to sitting for  
10 a videotaped deposition is **OVERRULED** for several reasons: (1) Plaintiff  
11 failed to timely object in writing to Defendants concerning the notice of  
12 deposition; (2) Plaintiff failed to file an objection as ordered by this Court; (3)  
13 Defendants have met their burden to show good cause exists to video record  
14 Plaintiff's deposition; and (4) there is nothing in the record to suggest that  
15 Plaintiff has good cause for his objection.

16 Accordingly, **PLAINTIFF VIRGIL POPESCU IS HEREBY**  
17 **ORDERED to sit for his videotaped deposition on November 29, 2016 at**  
18 **U.S. Legal Support located at 1230 Columbia Street, Suite 400, San**  
19 **Diego, California, 92101 at 10:00 a.m. and is FURTHER CAUTIONED**  
20 **that failure to comply with this order, including a failure to meaningfully**  
21 **participate in the November 29, 2016 deposition, shall constitute grounds**  
22 **for, and may result in, the imposition of TERMINATING AND**  
23 **MONETARY SANCTIONS.** *See Valley Engineers Inc. v. Elec. Eng'g Co.*,  
24 158 F.3d 1051, 1056 (9th Cir. 1998) ("Federal Rule of Civil Procedure  
25 37(b)(2) gives a district judge discretion to 'make such orders . . . as are just'  
26 in regard to a party's failure to obey a discovery order, including dismissal");  
27 *Virtual Vision, Inc. v. Praegitzer Indus., Inc.*, 124 F.3d 1140, 1143-45 (9th  
28 Cir. 1997) (affirming the entry of default judgment against noncompliant  
party where "there is record evidence that noncompliance was due to  
willfulness, bad faith, or fault").

29 The Court further issues the following **PROTECTIVE ORDER: IT IS**  
30 **HEREBY ORDERED** that the video recording of Plaintiff's deposition shall

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31 <sup>1</sup> The Court impressed upon Plaintiff that the Court would need to receive his papers by that deadline and  
32 that Plaintiff was responsible for making arrangements to come to the courthouse to file his papers in  
33 person by the deadline if necessary.

1 not be shared with the San Diego Police Department absent further court  
2 order.

3 (*Id.* at 2-3.) Plaintiff did not sit for his deposition as ordered by the Court.<sup>2</sup>

4 Turning to the parties' dispute over written discovery served on Plaintiff, this also  
5 was addressed at the Court's November 8, 2016 Discovery Conference. (ECF Nos. 23,  
6 27.) At the Discovery Conference, Plaintiff orally objected that the discovery sought was  
7 irrelevant and harassing. Plaintiff also engaged in name-calling directed toward defense  
8 counsel and stated that if he were younger, he "would knock his [(defense counsel's)] head  
9 off." Judge Burkhardt admonished Plaintiff against the use of name-calling and threats.  
10 The order that issued following the Discovery Conference included deadlines both for  
11 Plaintiff to respond in writing to the discovery propounded on him and for the parties to  
12 brief whether an order should issue compelling Plaintiff to respond to document requests,  
13 interrogatories, and requests for admission. (ECF No. 27.) The parties complied with these  
14 deadlines. (ECF Nos. 30, 35, 36.)

15 On December 12, 2016 at 11:26 a.m., while Defendants' motion to compel (ECF  
16 No. 30) was pending, the Court received a joint voicemail message from Plaintiff and  
17 Defendants' counsel. With Defendants' counsel on the line, Plaintiff represented in  
18 pertinent part that he "notified Mr. Phillips that I agree to a videotaped deposition" and that  
19 he [Plaintiff] "decided also that I am going to cooperate. I am going to answer to his  
20 interrogatories the way they were written, and I am going to produce the documents the  
21 way they were requested." Plaintiff made no representations as to when he would provide  
22 the aforementioned discovery to Defendants. Plaintiff made no representations specific to  
23 Defendants' requests for admission or for monetary sanction and attorney's fees.

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26 <sup>2</sup> There are references in the record to the possibility that Plaintiff's poor health prevented him from sitting  
27 for his deposition. (*See, e.g.*, ECF No 43 n.1.) There is no evidence before this Court on this issue. For  
28 example, as noted in this Court's December 12, 2016 Order, "[t]here is no verifiable medical evidence  
providing specifics concerning Plaintiff's health and the Court is not persuaded that his failure to timely  
raise this new objection [(about his "poor health")] was due to circumstances beyond his control." (*Id.*)

1 Following that voicemail message, and also on December 12, 2016, the Court issued  
2 an order compelling Plaintiff to provide Defendants with discovery on or before December  
3 28, 2016 and granting Defendants' request for attorneys' fees and costs incurred in  
4 connection with their motion to compel. (ECF No. 43.) In its Order, the Court warned  
5 Plaintiff as follows: "the Court **CAUTIONS** that future failure by Plaintiff to comply with  
6 discovery obligations and orders may warrant, in addition to the consequences addressed  
7 above, entry of dispositive sanctions. Accordingly, the Court hereby **GIVES NOTICE** to  
8 Plaintiff that further failure to comply with discovery orders or to meaningfully participate  
9 in discovery, even absent an order to compel, may result in the dismissal of Plaintiff's  
10 claims pursuant to Rule 37(b) and/or the Civil Local Rules of this district court." (ECF  
11 No. 43 at 6.)

12 Also in its December 12, 2016 Order, the Court directed the parties to meet and  
13 confer regarding the amount of reasonable fees and costs that Plaintiff would pay to  
14 Defendants as a Federal Rule of Civil Procedure 37 sanction. The Court also issued a  
15 briefing schedule for the parties to seek the Court's determination of the amount of  
16 reasonable fees and costs Plaintiff owes to Defendants for their work in researching,  
17 drafting, and finalizing their successful motion to compel. (*Id.* at 5.)

18 On January 20, 2017, Defendants filed their motion seeking attorney's fees and costs  
19 incurred in connection with their successful motion to compel. (ECF No. 50.) The deadline  
20 for Plaintiff to file an opposition was January 30, 2017. (ECF No. 43 at 5.) No opposition  
21 was filed on January 30, 2017, or thereafter.

## 22 **II. LEGAL STANDARD**

23 Federal Rule of Civil Procedure 37(a)(5)(A) provides that if the court grants a motion  
24 to compel discovery, it "must" order the non-moving party to pay the moving party's  
25 "reasonable expenses incurred in making the motion, including attorney's fees." Fed. R.  
26 Civ. P. 37(a)(5)(A). However, the Rule recognizes various exceptions, such as where the  
27 court finds the non-moving party's nondisclosure, response, or objection was substantially  
28 justified or "other circumstances make an award of expenses unjust." *Id.* A third exception

1 is where “the movant filed the motion before attempting in good faith to obtain the  
2 disclosure or discovery without court action.” Fed. R. Civ. P. 37(a)(5)(A)(i).

3 “By the very nature of its language, sanctions imposed under Rule 37 must be left to  
4 the sound discretion of the trial judge.” *O’Connell v. Fernandez–Pol*, 542 F. App’x. 546,  
5 547-48 (9th Cir. 2013) (unpublished memorandum disposition) (citing *Craig v. Far West*  
6 *Eng’g Co.*, 265 F.2d 251, 260 (9th Cir. 1959)). “Overall, sanctions imposed under Rule  
7 37 should deter the [disobedient party’s] conduct, and remedy any prejudice it caused the  
8 [obedient party].” *S. Cal. Stroke Rehab. Assocs. v. Nautilus*, No. 09cv744 JLS (AJB), 2010  
9 WL 2998839, at \*2 (S.D. Cal. July 29, 2010) (citing *Pioneer Drive, LLC. v. Nissan Diesel*  
10 *America, Inc.*, 262 F.R.D. 552, 560 (D. Mont. 2009)).

### 11 **III. DISCUSSION**

12 This Court already determined that Plaintiff must pay Defendants’ reasonable  
13 expenses incurred by the City of San Diego in making its motion to compel responses to  
14 discovery requests, interrogatories, and requests for admission. (ECF No. 43.) The only  
15 issue remaining before the Court is the appropriate amount of expenses to award the City  
16 of San Diego with respect to its motion to compel.<sup>3</sup>

17 In its moving papers, the City of San Diego states that the total cost of bringing the  
18 relevant motion to compel is \$6,050. (ECF Nos. 50, 50-1.) This number reflects 12.1 hours  
19 of Deputy City Attorney Keith Phillip’s attorney time, billable at \$500 per hour. (*Id.*)  
20 Having reviewed the detailed invoice submitted, the Court finds that only the following 6.7  
21 hours of attorney time to be reasonably attributable to making the motion to compel for  
22 which an award of reasonable expenses was ordered:<sup>4</sup>

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24 <sup>3</sup> This order does not address the appropriateness of sanctions for Plaintiff’s failure to sit for his November  
25 29, 2016 deposition, for violation of this Court’s November 21, 2016 order (ECF No. 33), or for failure to  
26 comply with this Court’s December 12, 2016 Order compelling discovery responses (ECF No. 43), as  
27 these matters are the subject of Defendants’ pending Motion for Terminating Sanctions and/or Monetary  
28 Sanctions (ECF No. 51). Plaintiff’s deadline to file a response to that motion is February 27, 2017.

<sup>4</sup> The Court removed entries that were not attributable to the motion to compel at issue. The Court also  
eliminated entries that appear to be time fairly attributable to meet and confer efforts. The Court’s Local  
Rules require opposing counsel to meet and confer concerning all disputed issues prior to bringing any  
discovery motion before the Court. CivLR 26.1.a. As such, hours spent meeting and conferring generally

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|------------|--|-----|
| 11/14/2016 | Draft Notice of Motion and Motion to Compel, Deem Facts Admitted and Request for Monetary Sanctions and Attorney's Fees.   | .2  |
| 11/14/2016 | Research authorities for motion to compel Interrogatories and Requests for Production of Documents for Motion to Compel.   | .3  |
| 11/14/2016 | Research authorities for Motion to Deem Admissions admitted for Motion.  | .2  |
| 11/14/2016 | Research authorities for Motion for Monetary Sanctions and Attorney's Fees for Motion to Compel.   | .5  |
| 11/14/2016 | Review Chamber rules regarding Motions to Compel and Discovery Motions.  | .1  |
| 11/14/2016 | Research authorities concerning Plaintiff's "Relevance" objection.   | .4  |
| 11/14/2016 | Draft my declaration in support of the Defendants' Motion to Compel, Deem Facts Admitted and Request for Monetary Sanctions and Attorney's Fees.                       | .5  |
| 11/14/2016 | Draft the memorandum of points and authorities in support of Defendants' Motion to Compel, Deem Facts Admitted and Request for Monetary Sanctions and Attorney's Fees. | 2.9 |
| 11/30/2016 | Draft Reply to Plaintiff's Opposition to Motion to Compel, Deem facts admitted, for monetary sanction and attorney's fees.   | .2  |
| 12/29/2016 | Draft declaration concerning calculation of Attorney's Fees.   | 1.4 |

(See ECF No. 50-1 at 6-7.)

According to Defendants, a reasonable hourly rate for a lawyer with Mr. Phillips' skills and experience in San Diego would be over \$500 per hour. While Mr. Phillips may reasonably charge \$500 per hour in the private sector, he is a government attorney. Compare *Trevino v. Gates*, 99 F.3d 911, 925 (9th Cir. 1996) (agreeing with the Eleventh

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should not be included in an attorneys' fees award. See *Matlink, Inc. v. Home Depot U.S.A., Inc.*, No. 07cv1994-DMS (BLM), 2008 WL 8504767, at \*5 (S.D. Cal. Oct. 27, 2008). Because defense counsel would have incurred the fees associated with his meet and confer efforts regardless of their fruitfulness, the Court declines to award time fairly attributable to meet and confer efforts.

1 Circuit’s ruling in *Brooks v. Georgia State Board of Elections*, 997 F.2d 857, 869-70 (11th  
2 Cir. 1993) that “the fee charged by a government attorney is simply irrelevant to the  
3 establishment of a reasonable hourly rate for a Plaintiff’s civil rights lawyer”). Defendants  
4 have not met their burden to establish \$500 per hour is reasonable hourly rate for Mr.  
5 Phillips as a government attorney.

6 More analogous here is the rate awarded to government attorneys under the Equal  
7 Access to Justice Act (“EAJA”), 28 U.S.C. § 2412. As of October 2016, the inflation-  
8 adjusted hourly rate for EAJA attorneys is \$193.20. *United States v. Fuess*, 2016 WL  
9 6124488, No. 15cv1148-BEN (RBB), \*2 (S.D. Cal. Oct. 18, 2016). An award for 6.7 hours  
10 of attorney time at rate of \$193.20 per hour equates to \$1,294.44.

11 In determining the reasonableness of an attorney fee award pursuant to Rule 37,  
12 courts must consider whether circumstances exist that make an award of expenses unjust.  
13 Fed. R. Civ. P. 37(a)(5)(A)(iii). However, “the burden of showing substantial justification  
14 and special circumstances is on the party being sanctioned.” *Hyde & Drath v. Baker*, 24  
15 F.3d 1162, 1171 (9th Cir. 1994). Plaintiff’s opportunity to be heard on the reasonableness  
16 of Defendants’ expenses was January 30, 2017, and he failed to file an opposition to the  
17 instant motion.

18 The circumstances before the Court include a record wherein the Court issued  
19 repeated warnings to Plaintiff that sanctions may issue for his noncompliance with court  
20 orders. Despite these repeated warnings, Plaintiff is seemingly unapologetic for his  
21 intentional failures to participate in discovery. Plaintiff is representing himself in pro per  
22 in this action, but here, Plaintiff has represented to this Court that he is a sophisticated  
23 litigant who has training as a lawyer in Romania.<sup>5</sup> Plaintiff is proceeding in forma pauperis  
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26 <sup>5</sup> In the context of the imposition of a monetary sanction pursuant to Federal Rule of Civil Procedure 11,  
27 the Ninth Circuit has held that pro se plaintiffs are not exempt from monetary sanctions. *See Warren v.*  
28 *Guelker*, 29 F.3d 1386, 1390 (9th Cir.1994) (noting that a contrary conclusion would effectively place all  
unrepresented parties beyond the reach of Rule 11). Similarly, the Ninth Circuit has held that 28 U.S.C.  
§ 1927 sanctions may be imposed upon a pro se plaintiff. *See Wages v. I.R.S.*, 915 F.2d 1230, 1235-36  
(9th Cir.1990).



1 in this case, yet he filed nothing in response to Defendants' motion seeking \$6,050 in  
2 attorney's fees.<sup>6</sup> Plaintiff has not met his burden to demonstrate that an award of fees  
3 would cause him financial hardship.


4 Nevertheless, in the interest of justice and taking into account the unique  
5 circumstances of this case, the Court will further reduce Defendants' requests for fees by  
6 an additional approximately 25%. The Court will award fees for 5.2 hours of attorney time  
7 at the rate of \$193.20 per hour, for a total fee award of \$1,004.64. The Court concludes  
8 that \$1,004.64 is a reasonable award of attorney's fees under Rule 37. As a result, the City  
9 of San Diego is awarded \$1,004.64 in attorney's fees.

#### 10 **IV. CONCLUSION**

11 In sum, this Court already determined that Plaintiff must pay Defendants' reasonable  
12 expenses incurred by the City of San Diego in making its motion to compel responses to  
13 discovery requests, interrogatories, and requests for admission. (ECF No. 43.) The Court  
14 hereby concludes that the appropriate amount of expenses awarded the City of San Diego  
15 under the unique circumstances of this case under Rule 37 is \$1,004.64. **Plaintiff Virgil  
16 Popescu shall pay the City of San Diego \$1,004.64 on or before March 27, 2017.**  
17 Failure to timely pay shall constitute grounds for further sanctions, including terminating  
18 sanctions.

19 **IT IS SO ORDERED.**

20 Dated: February 27, 2017

21   
22 Hon. Jill L. Burkhardt  
23 United States Magistrate Judge

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25 <sup>6</sup> Accordingly, the Court gives little weight to Plaintiff's now stale declaration from 2015, filed without  
26 verifiable documentation, in support of his motion to proceed in forma pauperis. (See ECF No. 2.) There  
27 is nothing in the record to suggest that Plaintiff asserted an inability to pay in the context of his refusal to  
28 meet and confer with defense counsel on fees. (ECF No. 50-1 at 8 (Phillips Decl.: "Mr. Popescu made it  
clear the lengths it would take to get a penny from him: 'I bet my life and I guarantee you 100% that you  
will not going to collect a penny from me. I wish you good luck.'").) Moreover, "financial indigence by  
itself does not necessarily make an award of expenses unjust." *Garity v. Donahoe*, No. 11cv01805, 2014  
WL 1168913, at \*5 (D. Nev. Mar. 21, 2014).