



1 about Defendant’s availability during the specified time frame. Docket No. 238 at 3.

2 On December 2, 2016, the Court issued an order requiring a co-defendant to appear for her  
3 deposition no later than December 16, 2016. Docket No. 169. Plaintiff’s counsel therefore e-mailed  
4 Defendant and his co-defendant to inquire about their availability for depositions on consecutive  
5 dates through December 16, 2016. Docket No. 238-4 at 2.

6 On December 6, 2016, Plaintiff served a deposition notice on Defendant setting his  
7 deposition for 10:00 a.m. on December 15, 2016 in Las Vegas, Nevada. Docket No. 238 at 3. The  
8 same day, Defendant e-mailed Plaintiff’s counsel stating that he would not be available to attend a  
9 deposition before January 9, 2017. Docket No. 238-6 at 2. Plaintiff’s counsel responded that such  
10 a delay was not acceptable, but that counsel could accommodate other dates in December. Docket  
11 No. 238-7 at 2. On December 7, 2016, Defendant replied that he would be unavailable during the  
12 last two weeks of the year because he would be busy and traveling. Docket No. 238-8 at 2.  
13 Plaintiff’s counsel then reiterated his willingness to accommodate a different date in December  
14 rather than delaying the deposition. *Id.* Plaintiff’s counsel further reminded Defendant that he had  
15 initially approached Defendant about scheduling the deposition two and a half months before. *Id.*

16 On December 8, 2016, Defendant e-mailed Plaintiff’s counsel stating that he “received  
17 medical results yesterday and they are not good” and that he was “not currently in a psychological  
18 state to be deposed.” Docket No. 238-10 at 2. Plaintiff’s counsel responded that, while he  
19 understood Defendant’s situation, the deposition must move forward on one of two days in  
20 December. Docket No. 238-11 at 2.

21 On December 15, 2016, less than one hour before his deposition was to begin, Defendant  
22 notified Plaintiff’s counsel by e-mail that he was “at urgent care for a medical emergency” and would  
23 therefore be unable to attend the deposition. Docket No. 238-12 at 2. Plaintiff’s counsel responded  
24 by offering to take Defendant’s deposition the next day, while also reserving the right to pursue  
25 sanctions for the nonappearance. Docket No. 238-13 at 2. Defendant did not appear for his  
26 deposition on either day. *See* Docket No. 238 at 4-5.

1 **II. ENTITLEMENT TO RECOVER EXPENSES**

2 Courts may impose sanctions for the failure of a party or a party’s officer, director or  
3 managing agent to appear for his deposition. Fed. R. Civ. P. 37(d)(1)(A)(I). Sanctions that may be  
4 imposed include those listed in Rule 37(b)(2)(A)(i)-(vi), which include case-dispositive sanctions.<sup>1</sup>  
5 Fed. R. Civ. P. 37(d)(3). Additionally, courts must award reasonable expenses, including attorneys’  
6 fees, unless the failure to appear was substantially justified or other circumstances make an award of  
7 expenses unjust. *Id.* The party facing sanctions bears the burden of establishing substantial  
8 justification or circumstances making an award of expenses unjust. *Hyde & Drath v. Baker*, 24 F.3d  
9 1162, 1171 (9th Cir. 1994) (internal citation omitted). A finding of bad faith is not a prerequisite for  
10 imposing sanctions under Rule 37(d), although a lack of bad faith may be considered in determining  
11 whether the imposition of sanctions would be unjust. *Id.*

12 In this instance, rather than seeking case-dispositive sanctions, Plaintiff seeks to recover  
13 attorneys’ fees and costs arising from Defendant’s failure to appear at his December 15, 2016,  
14 deposition. *See, e.g.*, Docket No. 238 at 2. Plaintiff submits that Defendant’s behavior was not  
15 substantially justified because of his failure to appear despite numerous communications from  
16 Plaintiff’s counsel, his inconsistent reasons for avoiding being deposed, inconsistencies in a doctor’s  
17 note he provided to Plaintiff and the Court, and the fact that he was only treated for abdominal pain.  
18 Docket No. 238 at 5-7. Plaintiff submits that these factors cast doubt on the allegedly urgent nature  
19 of Defendant’s medical condition on the day of the deposition. *Id.* In response, Defendant submits  
20 that his health issues began weeks before he received Plaintiff’s deposition notice, Plaintiff’s counsel  
21 would not reasonably accommodate his needs in scheduling the deposition, and Plaintiff’s December  
22 2, 2016 deposition notice did not provide sufficient warning of the deposition. Docket No. 240 at 3-4.

23 The Court finds that Defendant’s failure to attend his deposition was not substantially justified  
24 and that an award of fees and costs is not unjust in this instance. Plaintiff’s counsel made clear far  
25 in advance their intention to depose Plaintiff between December 5 and 15, 2016, by e-mailing

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27 <sup>1</sup> Unless otherwise stated, references to “Rules” denote the Federal Rules of Civil Procedure.

1 Defendant's former counsel on September 27, 2016. Docket No. 238-2 at 2. Moreover, Defendant  
2 does not dispute the fact that his former counsel advised him of that e-mail. *See, e.g.*, Docket No.  
3 238-11 at 3. Additionally, as Plaintiff submits, Defendant provided a series of inconsistent reasons  
4 for resisting being deposed. *See* Docket No. 238-9 at 2-3 (citing, on December 7, 2016, end of year  
5 travel as a reason not to attend the deposition); Docket No. 238-10 at 2 (stating, on December 8, 2016,  
6 that vague psychological issues prevented him from being deposed); Docket No. 238-12 at 2  
7 (notifying Plaintiff's counsel, less than one hour before the duly noticed deposition, that he was at  
8 urgent care). Further, the treatment notes from Defendant's urgent care visit refer to abdominal pain  
9 and constipation. Docket No. 184-1 at 19. Abdominal pain bears no relation to the alleged  
10 psychological issues that Defendant mentioned days before his visit to the urgent care center and the  
11 treatment provider's notes suggest that his medical condition was not necessarily as urgent as he  
12 submits. *See id.* Defendant has also provided a puzzling medical certificate stating that he was  
13 unable to work from December 15 to December 17, 2016, yet was also able to return to work on  
14 December 15, 2016. Docket No. 240 at 15.

15 Defendant's general resistance to fulfilling his discovery obligations in the instant case also  
16 undermines any assertion that he was substantially justified in failing to attend his deposition. As  
17 Plaintiff submits, Defendant did not respond to Plaintiff's efforts to schedule the December 2016  
18 deposition until he received the deposition notice. *See, e.g.*, Docket No. 238-8 at 2. Additionally,  
19 on January 20, 2017, the Court held a pretrial conference that was necessitated by the repeated failure  
20 of Defendant and his co-defendant to participate in the discovery process, which included Defendant's  
21 failure to appear at the December 15, 2016 deposition. Docket No. 190 at 5-9; Docket No. 206. In  
22 sum, the Court finds that Defendant's pattern of evasion, inconsistent statements, and general conduct  
23 throughout the discovery process demonstrate that his failure to attend the December 15, 2016  
24 deposition was not substantially justified and that an award of fees and costs is therefore reasonable  
25 in this instance. *See, e.g., Peyman v. Rayan*, 2011 WL 976925, at \*1-\*2 (D. Nev. Mar. 18, 2011)  
26 (award of costs was "eminently reasonable" where party canceled deposition at the last minute due  
27 to a vague, inadequately explained illness and had previously engaged in discovery misconduct).

1 **III. LODESTAR CALCULATION**

2 Having determined that Plaintiff is entitled to recover fees and costs resulting from  
3 Defendant’s failure to attend his deposition, the Court turns to the calculation of the fees. Reasonable  
4 attorneys’ fees are generally calculated based on the traditional “lodestar” method. *Camacho v.*  
5 *Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). Under the lodestar method, the Court  
6 determines a reasonable fee by multiplying “the number of hours reasonably expended on the  
7 litigation” by “a reasonable hourly rate.” *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The  
8 lodestar figure is presumptively reasonable. *Cunningham v. Cty. of Los Angeles*, 879 F.2d 481, 488  
9 (9th Cir. 1988).

10 The party requesting attorneys’ fees must show, *inter alia*, that the hourly rates sought are “in  
11 line with those prevailing in the community for similar services by lawyers of reasonably comparable  
12 skill, experience, and reputation.” *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). “Affidavits of  
13 the [movant’s] attorney and other attorneys regarding prevailing fees in the community, and rate  
14 determinations in other cases, particularly those setting a rate for the [movant’s] attorney, are  
15 satisfactory evidence of the prevailing market rate.” *United Steelworkers of Am. v. Phelps Dodge*  
16 *Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). The Court may also rely on its own familiarity with the  
17 rates in the community to analyze those sought in the pending case. *Ingram v. Oroudjian*, 647 F.3d  
18 925, 928 (9th Cir. 2011). “Rate determinations in other cases in the District of Nevada have found  
19 hourly rates as much as \$450 for partners and \$250 for an experienced associate to be the prevailing  
20 market rate in this forum.” *Crusher Designs, LLC v. Atlas Copco Powercrusher GmbH*, 2015 WL  
21 6163443, at \*2 (D. Nev. Oct. 20, 2015) (report and recommendation adopted by Navarro, C.J.).  
22 “Courts awarding attorneys’ fees in intellectual property or other complex cases routinely award fees  
23 based on rates within that range.” *Id.* “As for very experienced paralegals, the prevailing rate is in  
24 the range of \$125.” *Id.* (internal citation omitted).

25 The Court finds the pending motion and supporting materials insufficient to conduct the  
26 lodestar analysis at this time. Plaintiff provides biographical information about attorneys Gregory T.  
27 Lawrence and Michael R. Kealy, which will enable the Court to determine whether their requested

1 hourly rates are reasonable. *See, e.g.*, Docket Nos. 238-17, 238-18. However, Plaintiff’s billing  
2 records also reveal entries by “TMM” and “KSK.” *See, e.g.*, Docket No. 238-19 at 9; Docket No.  
3 238-21 at 2. Plaintiff does not provide any information about the identities, experience, and  
4 qualifications of these two individuals. *See generally* Docket No. 238; Docket Nos. 238-1–238-22.  
5 Without such information, the Court cannot determine whether their requested hourly rates are  
6 reasonable.

7 **IV. CONCLUSION**

8 For the reasons stated above, the pending motion for sanctions is hereby **GRANTED** in part.  
9 Docket No. 238. Plaintiff shall file, no later than May 5, 2017, a renewed motion for attorneys’ fees  
10 that provides all information necessary under the Rules and the case law for the Court to conduct a  
11 proper lodestar analysis. If the renewed motion fails to comply in full with the Rules and the case  
12 law, the Court will deny Plaintiff’s request for fees.

13 IT IS SO ORDERED.

14 DATED: April 5, 2017

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17 NANCY J. KOPPE  
18 United States Magistrate Judge  
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