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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Leroy Haeger, et al.,)	No. CV-05-02046-PHX-ROS
Plaintiffs,)	ORDER
vs.)	
Goodyear Tire and Rubber Co., et al.,)	
Defendants.)	

On November 8, 2012, the Court sanctioned Graeme Hancock, Basil Musnuff, and Goodyear Tire and Rubber Co. (“Goodyear”) based on repeated misconduct during discovery. The amount of sanctions was set as the “fees and costs incurred after Goodyear served its supplemental responses to Plaintiffs’ First Request” for Production of Documents in September 2006. (Doc. 1073 at 64). Because the fees and costs were being awarded as a sanction, Local Rule 54.2 regarding attorneys’ fees requests did not automatically apply. Out of an abundance of caution, however, and to give Mr. Hancock, Mr. Musnuff, and Goodyear an opportunity to object, the Court directed Plaintiffs to submit the documentation contemplated by Local Rule 54.2. Having reviewed that documentation, the Court issues the following order.

I. Background

The Court will not recount in detail the misconduct that served as the basis for sanctioning Mr. Hancock, Mr. Musnuff, and Goodyear. In short, sanctions were necessary because “Goodyear and its attorneys adopted a strategy . . . to resist all legitimate discovery,

1 withhold *obviously* responsive documents, allow Plaintiffs and their experts to operate under
2 erroneous facts, disclose small subsets of documents as late as possible” and otherwise
3 attempt to frustrate the administration of justice. (Doc. 1073 at 65). The latest briefs from
4 Goodyear and its attorneys contain a number of arguments that are, in effect, requests for the
5 Court to reconsider its prior findings. There is no basis to revisit most of those arguments.
6 The only argument worthy of additional discussion involves the alleged absence of a direct
7 causal relationship between the misconduct and the fees and costs awarded by the Court.

8 Given the breadth of the misconduct in this case, it would be exceptionally difficult
9 to link each instance of misconduct with the harm that misconduct caused. When attorneys
10 make repeated misrepresentations in court, a 30(b)(6) witness repeatedly makes
11 misrepresentations during his deposition, and expert witnesses are knowingly misled, a court
12 must have some ability to provide relief. The Court previously concluded it would be
13 appropriate to shift all the fees and costs incurred after it became clear that Goodyear and its
14 attorneys were not acting in good faith. The Court recognizes, however, that Ninth Circuit
15 authority might be read as limiting an award of sanctions to the harm *directly* caused by the
16 misconduct. *Miller v. City of Los Angeles*, 661 F.3d 1024 (9th Cir. 2011). Therefore, to
17 prevent the need for future proceedings, the award of fees and costs will include an
18 alternative amount of the fees and costs incurred as a direct result of sanctionable conduct.

19 Regardless of whether the Court awards *all* the fees and costs after September 2006
20 or only a much smaller subset, it now appears that an inordinately complicated accounting
21 will be required. Therefore, the parties will be instructed to meet and confer in an attempt
22 to agree regarding the appropriate size of the Court’s award. If they are unable to agree, the
23 Court will appoint a special master to conduct the accounting. The Court offers the
24 following in hopes of guiding the parties’ discussions.

25 **II. Determining the Amount of Attorneys’ Fees**

26 The Court previously indicated it would utilize the lodestar method for calculating the
27 amount of fees. (Doc. 1073 at 51 n.23). That method consists of “multiplying the number
28 of hours the prevailing party reasonably expended on the litigation by a reasonable hourly

1 rate.” *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996) (quotation omitted).
 2 Once that calculation is made, the Court “may then adjust the figure upward or downward
 3 taking into consideration twelve reasonableness factors.” *Evon v. Law Offices of Sidney*
 4 *Mickell*, 688 F.3d 1015, 1033 n.11 (9th Cir. 2012) (quotation omitted).

5 **A. Reasonable Hourly Rates**

6 Plaintiffs seek the following hourly rates:

7 Individual	Hourly Rate
8 David L. Kurtz (attorney)	\$500
9 Kerry Chrisman (paralegal)	\$165
10 Michael O’Connor (attorney)	\$445
11 John J. Egbert (attorney)	\$425
12 Paul G. Johnson (attorney)	\$365
13 Garrett Olexa (attorney)	\$345
14 Peter Donovan (attorney)	\$180
15 Michele Maser (paralegal)	\$195
16 Mary Muchmore Hogue (paralegal)	\$165
James Abernethy (attorney)	\$400

17 Goodyear and its attorneys do not object to any of these hourly rates as unreasonable. Based
 18 on the evidence submitted by Plaintiffs, the Court finds these fees reflect the prevailing
 19 hourly rate in Phoenix for lawyers of reasonably comparable skill, experience, and reputation
 20 working on matters of this type. Therefore, any calculation of the lodestar will be based on
 21 these hourly rates.¹

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 26 ¹ Goodyear and its attorneys objected that these rates might not have been the
 27 prevailing rate at the time the services were performed. But this objection is foreclosed by
 28 Supreme Court authority. *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (allowing for
 application of current rates).

B. Hours Reasonably Expended

1 **B. Hours Reasonably Expended**
2 According to the time records submitted by Plaintiffs' counsel, lead counsel David
3 Kurtz spent approximately 3,700 hours on this case during the relevant time while a paralegal
4 at his firm spent approximately 1,000 hours. The attorneys and paralegals at Jennings,
5 Strouss & Salmon, P.L.C. spent approximately 1,200 hours. And attorney James Abernethy
6 spent approximately 120 hours. Goodyear and its attorneys object to these figures, claiming
7 the absolute maximum the Court could find reasonable is approximately 800 hours by Mr.
8 Kurtz and his paralegal, a little over 500 hours from all the staff at Jennings, Strouss &
9 Salmon, and no hours from Mr. Abernethy.

10 The difference between the parties' calculations for the reasonable amount of time
11 spent on this litigation is approximately 4,600 hours. Based on the Court's familiarity with
12 the case, and its participation throughout the litigation, the hours submitted by Plaintiffs
13 appear more reasonable than those proposed by Goodyear and its attorneys. But the Court
14 is not yet prepared to definitively resolve the reasonable number of hours. Instead, the
15 parties will be instructed to attempt to reach settlement on two figures. First, the reasonable
16 number of hours incurred after September 2006. Second, the reasonable number of hours
17 directly attributable to the sanctionable conduct identified in the sanctions order. If the
18 parties are able to reach agreement on these two figures, the Court will adopt the parties'
19 agreement, awarding the higher figure but also deeming the lower figure an appropriate
20 alternative in the event the sanctions must be so limited.

21 If the parties are unable to reach agreement on the number of hours reasonably
22 expended, the appointment of a special master appears appropriate. Fed. R. Civ. P. 53. That
23 special master would be tasked with preparing a report on the appropriate lodestar regarding
24 attorneys' fees. *See, e.g., Agostino v. Quest Diagnostics, Inc.*, 2012 WL 2344865 (D.N.J.
25 June 20, 2012) (appointing special master to prepare report on attorneys' fees dispute). At
26 present, the Court is inclined to require the parties split the cost of a special master equally
27 but the special master would be instructed to submit a recommendation regarding the final
28 allocation of the costs associated with his or her service.

1 Pursuant to Federal Rule of Civil Procedure 53, the Court can appoint a master only
2 after giving “the parties notice and an opportunity to be heard.” Fed. R. Civ. P. 53(b)(1).
3 Therefore, if the parties cannot reach an agreement on the amount of attorneys’ fees, the
4 parties will be ordered to file a joint statement setting forth their position on the following
5 issues: whether appointment of a special master is warranted; how the costs of the special
6 master should be allocated; and the names of three agreed upon individuals qualified to serve.
7 Each interested party will be allowed three pages.

8 **III. Determining Appropriate Costs’**

9 As with the amount of attorneys’ fees, the parties also present very different views
10 regarding the appropriate amount of costs to award. Goodyear and its attorneys argue that
11 the Court should award only those costs that qualify as “taxable” under 28 U.S.C. § 1920.
12 It is unclear why Goodyear and its attorneys believe the award of costs must be so limited.
13 And the award cannot be so limited.

14 The Ninth Circuit has “repeatedly . . . allowed prevailing plaintiffs to recover non-
15 taxable costs where statutes authorize attorney’s fees awards to prevailing parties.”² *Grove*
16 *v. Wells Fargo Financial California, Inc.*, 606 F.3d 577, 580 (9th Cir. 2010). In the specific
17 context of sanctions, the Supreme Court has held a court may award “the entire amount of
18 . . . litigation costs paid to . . . attorneys.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 40 (1991).
19 Therefore, there is no bar to awarding Plaintiffs their taxable and non-taxable costs.

20 Again, the parties will be instructed to attempt to agree regarding costs. As with the
21 attorneys’ fees, there should be an attempt to agree on the costs incurred after September
22 2006 as well as the costs incurred as a result of the sanctionable conduct. If they cannot
23 agree, the special master will be tasked with conducting an accounting.³

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26 ² The prevailing practice in Phoenix is to bill costs separate from an attorneys’ hourly
rate. *Agster v. Maricopa County*, 486 F. Supp. 2d 1005, 1022 (D. Ariz. 2007).

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28 ³ David Kurtz admits he was unable to locate supporting documents for eleven cost
items, totaling \$4,880.73 (Doc. 1112-1 at 8-9). Those costs will not be awarded.

1 **IV. Motions for Clarification**

2 There are two pending requests for clarification. First, Goodyear seeks clarification
3 that the additional information submitted by Spartan Motors, Inc. (Doc. 1083) will not be
4 addressed at this time because of the pending appeal. The additional evidence is a motion
5 for reconsideration regarding the portion of the sanctions order addressed to Spartan's
6 request for sanctions against Goodyear. Because the sanctions order regarding Goodyear is
7 currently on appeal, the Court will not address Spartan's additional evidence at this time.

8 The second request for clarification comes from Plaintiffs. In the sanctions order, the
9 Court apportioned twenty percent of the fees and costs to Mr. Hancock and the remaining
10 eighty percent to Mr. Musnuff and Goodyear. (Doc. 1073 at 64). Plaintiffs now seek
11 clarification on whether the Court intended to impose joint and several liability on Mr.
12 Hancock, Mr. Musnuff, and Goodyear. Goodyear and its attorneys object to the Court
13 addressing this issue given that Goodyear's appeal is pending. Out of an abundance of
14 caution, the Court will defer ruling on this issue until the Ninth Circuit issues the mandate.

15 **V. Attorney Client Privilege**

16 During the sanctions proceedings, Goodyear and its attorneys attempted to justify
17 their behavior by disclosing certain information that might have been subject to the attorney-
18 client privilege. Given that context, the disclosures will be considered a waiver of the
19 privilege. *See Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) ("The
20 privilege which protects attorney-client communications may not be used both as a sword
21 and a shield.").

22 Accordingly,

23 **IT IS ORDERED** the Motion for Attorney Fees and Costs (**Doc. 1082**) is
24 **GRANTED IN PART** as set forth above.

25 **IT IS FURTHER ORDERED** no later than July 19, 2013 the interested parties shall
26 meet and confer regarding the appropriate amount of attorneys' fees and costs. If they are
27 able to reach agreement, no later than July 22, 2013 the parties shall file a joint statement
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1 identifying the appropriate amount of attorneys' fees and costs incurred after September 2006
2 as well as the attorneys' fees and costs incurred as a direct result of the sanctionable conduct.

3 **IT IS FURTHER ORDERED** if the parties cannot agree on the appropriate amount
4 of attorneys' fees and costs, no later than July 26, 2013 they shall file a joint statement of no
5 more than three pages per party with each party setting forth: whether appointment of a
6 special master is warranted and how the costs of the special master should be allocated. The
7 parties should also jointly identify three individuals qualified to serve.

8 **IT IS FURTHER ORDERED** the Motion for Clarification (**Doc. 1089**) is
9 **GRANTED**.

10 **IT IS FURTHER ORDERED** the Motion for Clarification (**Doc. 1114**) is **DENIED**
11 **WITHOUT PREJUDICE**. Plaintiffs should renew their request, if appropriate, within ten
12 days of the mandate being issued.

13 DATED this 26th day of June, 2013.

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17 Roslyn O. Silver
18 Chief United States District Judge
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