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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WIMO LABS, LLC,
Plaintiff,
v.
eBAY, INC., et al.,
Defendants.

Case No. SACV-15-01330-JLS (KES)

TENTATIVE ORDER GRANTING
DEFENDANT EBAY’S MOTION TO
RECOVER ATTORNEY’S FEES AND
COSTS (DKT. 143)

I.
BACKGROUND

Defendant eBay has moved for attorney’s fees under Federal Rule of Civil Procedure 37(b)(2)(C) based on Plaintiff Wimo’s alleged failure to comply with two discovery orders issued by this Court on September 15, 2016 and November 17, 2016. (Dkt. 143 [eBay’s Motion for Fees]; Dkt. 141 [11/17 Order]; Dkt. 116 [9/15 Order].) First, eBay contends that Wimo failed to provide un-redacted versions of documents responsive to eBay’s Requests for Production (“RFPs”) numbers 46 and 47. Second, eBay contends that Wimo produced a privilege log that does not comply with the requirements of the 9/15 and 11/17 Orders. Third, eBay contends that Wimo failed to provide an estimated date by which Wimo would resolve technical difficulties with its production of electronically stored

1 information (“ESI”), as required by the 11/17 Order. eBay seeks \$107, 489.73 in
2 attorney’s fees.¹

3 Wimo opposes the motion. (Dkt. 146.) Wimo argues that it would be unjust
4 to award eBay any fees because Wimo’s non-compliance was the result of
5 “[u]nexpected technical issues,” which Wimo has already spent significant sums
6 attempting to remedy. (*Id.* at 1, 4.) Wimo also argues that an award of fees is
7 inappropriate because the motion to compel was denied in part; the Court’s 11/17
8 Order did not award fees; and “eBay has not demonstrated there is any relationship
9 between the issues determined by the Court on the motion to compel and Wimo’s
10 alleged non-compliance with the Court’s [11/17] Order.” (*Id.* at 3.) Alternatively,
11 Wimo argues that the amount of fees should be reduced, because eBay has not
12 provided competent evidence that the number of hours and hourly rates of its
13 attorneys are reasonable, and because the hours include time reviewing discovery
14 responses and document production, which is not recoverable. (*Id.* at 3-4.)

15 As more fully explained below, the Court finds that eBay is entitled to
16 recover the fees caused by Wimo’s failure to obey the Court’s 9/15 and 11/17
17 Orders, but finds that a reasonable fee is less than the amount eBay requests. In
18 assessing the parties’ arguments, it is helpful first briefly to review the procedural
19 history of this case.

20 **A. eBay’s Motion to Compel via Joint Stipulation and the 9/15 Order.**

21 Plaintiff initiated this trademark infringement action against eBay and others
22 in August 2015. (Dkt. 1; see also Dkt. 58 [current operative pleading, First
23 Amended Complaint].) On January 13, 2016, Judge Staton issued a scheduling
24 order setting a fact discovery cut-off date of January 17, 2017. (Dkt. 71.)

26 ¹ Although eBay’s motion states it is requesting costs as well as attorney’s fees,
27 the supporting documentation indicates that the entire amount sought represents
28 attorney’s fees.

1 On August 23, 2016, eBay moved, via joint stipulation, to compel further
2 responses and production of documents and ESI from Wimo in response to eBay’s
3 first set of interrogatories (“Rogs”) and first set of RFPs. (Dkt. 104.) The parties
4 disputed Wimo’s responses to one Rog and fourteen RFPs. (Id. at 3-4.)

5 Two of the disputed RFPs were 46 and 47, which sought documents related
6 to and communications with a website called The Counterfeit Report (“TCR”) and
7 its principal, Craig Crosby. (Id. at 38-39.) TCR provides consumer information
8 concerning online sales of counterfeit goods; the operative First Amended
9 Complaint alleges that TCR discovered counterfeit products containing Plaintiff’s
10 trademarks on eBay’s website and informed eBay of this. (See, e.g., Dkt. 58 at ¶¶
11 61, 65, 67, 72, 76, 80.) Wimo objected to RFPs 46 and 47 as overbroad and
12 seeking materials protected by the attorney-client privilege or attorney work-
13 product privilege. (Id.)

14 In the 9/15 Order, the Court granted eBay’s motion in part. (Dkt. 116.)
15 Regarding RFPs 46 and 47, the Court found that Wimo had waived any attorney
16 work-product privilege because it had provided an insufficient factual basis for
17 asserting the privilege, including “inconsistent and unsupported assertions of a
18 ‘consulting’ relationship with TCR[.]” (Id. at 22.) The Court ordered Wimo to
19 produce a privilege log as follows:

20 [W]ithin twenty (20) days of this order, Wimo shall produce a
21 privilege log identifying documents responsive to RFP 46 or 47, but
22 withheld on the basis of privilege. *The log shall identify the privilege(s)*
23 *claimed as to each document* and the factual basis for the assertion. For
24 document[s] claimed to be privileged attorney-client communications,
25 Wimo shall identify the lawyer(s) involved, the client or prospective
26 client(s) involved, any other persons who were party to the
27 communication and their role, whether the communication occurred in
28 the course of an actual or prospective representation, the date of the

1 communication, and the general subject matter of the communication.

2 Due to the waiver discussed above, *Wimo shall produce any*
3 *logged document claimed to be protected by the attorney work-product*
4 *privilege only.* After reviewing the privilege log, counsel for the parties
5 shall meet and confer (telephonically or in person) concerning the other
6 privilege log entries, if any. If they cannot reach an agreement, they
7 may contact the Court for further assistance in evaluating Wimo’s
8 assertion of the privilege protecting attorney-client communications.

9 (Id. at 22-23) (emphasis added).

10 **B. Ex Parte Motion for Contempt and the 11/17 Order.**

11 On November 4, 2016, eBay filed an ex parte motion for contempt alleging
12 that Wimo had not complied with the Court’s 9/15 Order as to RFPs 46 and 47, as
13 well as two other RFPs and two Rogs. (Dkt. 139.) eBay also alleged that technical
14 issues with Wimo’s ESI rendered it unusable. (Id. at 7-8.) Regarding RFPs 46 and
15 47, eBay alleged:

16 Wimo produced a privilege log that listed 248 documents allegedly
17 protected by the “work product” doctrine, notwithstanding the Court’s
18 order that Wimo had waived work product as to TCR and Mr. Crosby.
19 When eBay demanded that Wimo produce these documents and gave
20 Wimo notice that it intended to seek relief from the Court, Wimo
21 responded by producing a selected portion of the documents that had
22 been logged without their attachments and in a format that renders them
23 unusable for the litigation: any attempt to print the documents (which
24 are all mass-designated “Highly Confidential: Attorneys’ Eyes Only”) with their bates numbers results in [the error message “Unable to
25 Generate PDF”]. When eBay brought these deficiencies to Wimo’s
26 attention, Wimo made a “supplemental” production that suffered from
27 the same ESI deficiencies such that eBay cannot even review many of
28

1 the documents to fully assess what issues remain.
2 (Id. at 7-8.) eBay argued that Wimo should be required to reimburse its fees and
3 costs under Federal Rule of Civil Procedure 37(b)(2)(C). (Id. at 17.)

4 Wimo opposed the motion for contempt. (Dkt. 140.) Regarding RFPs 46
5 and 47, “Wimo’s counsel acknowledge[d] there were delays involved in the
6 production of the Crosby emails and [took] responsibility for those delays.” (Id. at
7 n.2, citing Klar Decl. at ¶ 12.) Wimo argued it had ultimately produced the relevant
8 documents, but with redactions made “in two circumstances. First, where an email
9 in the email chain did not involve Mr. Crosby and was a privileged communication
10 between counsel.... Second, if an email discussed Wimo and another brand owner,
11 the text of the email discussing the other brand owner was redacted.” (Id. at 11.)
12 Regarding the technical issues, Wimo asserted that the parties had agreed to have
13 their technical experts meet and discuss to resolve the issues. (Id.)

14 On November 16, 2016, the Court held a two-hour telephonic conference
15 with counsel for the parties concerning their discovery dispute. On November 17,
16 2016, the Court granted eBay’s motion by ordering Wimo to make further
17 productions. (Dkt. 141.) Regarding the technical issues affecting production of
18 ESI, the Court noted: “eBay’s ex parte application describes receiving files from
19 Wimo that could not be printed or could not be uploaded into a typical review
20 platform. Some files apparently had metadata stripped during the collection process
21 (such as email messages that all said ‘SUBJECT’ in the metadata field for the
22 subject line).” (Id. at 2.) Noting that Wimo’s counsel had agreed to retain an e-
23 discovery consultant to resolve these issues, the Court ordered Wimo to file and
24 serve a Discovery Status Report on or before November 23, 2016 as follows:

25 That report shall (1) identify Wimo’s retained e-discovery consultant,
26 (2) describe what steps have been taken to diagnose and resolve the
27 issues related to unprintable files and metadata, and (3) *provide an*
28 *estimated date by which such problems will be resolved.* To the extent

1 the problems are resolved by re-producing certain documents, their
2 BATES number shall stay the same to allow for correlation with prior
3 productions. The Discovery Status Report shall also advise the Court
4 whether the parties have agreed to an e-discovery protocol.

5 (Id. at 2.) (emphasis added).

6 Regarding the privilege log for documents responsive to RFPs 46 and 47, the
7 Court noted that counsel for Wimo had admitted, at the telephonic hearing, that:
8 “(1) some of the email attachments were not produced and (2) some redactions
9 were made on the basis of relevancy rather than privilege, and (3) some messages
10 within email chains were redacted to protect attorney-client communications, but
11 the log does not identify which ones.” (Id. at 3.) Wimo’s counsel also admitted
12 that “additional responsive documents were withheld on the basis of the attorney-
13 client communication privilege, but those documents have still never been
14 identified in a privilege log.” (Id.) Wimo argued that these documents were
15 “beyond the scope of discovery, either because (1) they are in the possession of
16 Wimo’s counsel, not Wimo, and/or (2) while they are responsive, they are not
17 relevant because they did not mention Wimo.” (Id.)

18 The Court reiterated that these documents were relevant, “given the broad
19 scope of discovery and the role that information from TCR allegedly played in the
20 initiation of this lawsuit.” (Id. at 3-4.) The Court also ruled that documents in the
21 possession of Wimo’s counsel were discoverable, and that Wimo should re-produce
22 documents without the redactions made for relevance. (Id. at 4.) The Court
23 ordered Wimo as follows:

24 ***On or before November 30, 2016***, Wimo must provide a privilege log
25 identifying all responsive documents in Wimo’s possession, custody or
26 control withheld or redacted on the basis of the attorney-client
27 privilege. The contents of the log shall comply with the Court’s 9/15
28 Order. All attachments to responsive emails shall be either (1) produced

1 in a manner that allows correlation with the “parent” email or (2) logged
2 if withheld on the basis of the attorney-client communication privilege.

3 (Id.)

4 The Court declined to award eBay fees and costs at that time, but noted: “If
5 eBay contends that Wimo has still failed to comply with its discovery obligations
6 by November 30, 2016, then after that date, eBay may submit to the Court evidence
7 of its costs and fees, along with an explanation (not to exceed 3 pages) of the
8 current status and alleged lack of compliance.” (Id. at 5.)

9 **C. Interactions between the Parties after the 11/17 Order.**

10 On November 23, 2016, Wimo timely filed the status report required by the
11 11/17 Order. (Dkt. 142.) Wimo reported it had retained an e-discovery consultant
12 and had conducted a meet-and-confer conference with Wimo’s counsel, the
13 consultant’s technicians, eBay’s counsel, and eBay’s technicians. (Id. at 2.) Wimo
14 explained how Rico planned to remedy the deficiencies, but noted “Wimo has not
15 received an estimated date by which these problems will be resolved.” (Id. at 4.)
16 The consultant informed Wimo that the process would take “at least a week.” (Id.)

17 eBay filed the current motion for fees on December 7, 2016. (Dkt. 143.) On
18 the same day, Wimo’s counsel Deborah Klar emailed eBay’s counsel. (Dkt. 147 at
19 9.) Noting that Crosby had agreed to produce the emails between himself and
20 Wimo’s counsel, she inquired: “If those emails are going to be produced in native
21 format, is there a reason that Wimo needs to go to the expense of reproducing the
22 same emails with metadata?” (Id.) On December 8, eBay’s counsel Justine M.
23 Daniels responded:

24 There are two separate orders requiring Wimo, including its counsel, to
25 produce the communications with TCR and Mr. Crosby. Mr. Crosby’s
26 voluntary agreement to produce certain documents does not change this
27 fact, and eBay will not waive compliance with the court’s orders.
28 Furthermore, (a) there may be material differences between the emails

1 and related metadata possessed and/or retained by Wimo/its counsel
2 and TCR/Crosby and (b) eBay cannot wait until after depositions of
3 Wimo and TCR/Crosby to determine whether either Wimo or
4 TCR/Crosby denies receiving emails that the other party sent.

5 (Id. at 10.)

6 **D. eBay’s Current Motion for Fees.**

7 eBay’s motion seeks attorney’s fees for time billed by 8 attorneys: 1 partner
8 and 2 associates from the law firm of Weil, Gotshal & Manges, LLP (“Weil”), and
9 3 partners and 2 associates from the law firm of O’Melveny & Myers
10 (“O’Melveny”). In support, eBay has attached declarations from Justine M.
11 Daniels, counsel at O’Melveny (Dkt. 143-1) and Randi W. Singer, partner at Weil
12 (Dkt. 143-2), as well as time records for each of the 8 attorneys.

13 In opposition, Wimo has submitted declarations from Deborah A. Klar,
14 counsel of record for Wimo (Dkt. 147); Adam Schryer, a senior project manager
15 employed by Wimo’s newly-hired e-discovery consultant (Dkt. 148); Eric Wilson,
16 an associate at the Parris Law Firm, which represents Wimo (Dkt. 149); and Rex
17 Parris, partner at the Parris Law Firm (Dkt. 150).

18 **II.**

19 **LEGAL STANDARD**

20 Federal Rule of Civil Procedure 37(b)(2)(A) lists sanctions a district court
21 may impose if a party fails to obey an order to provide or permit discovery. The
22 Rule also provides that,

23 Instead of or in addition to the [sanctions listed in subsection (b)(2)(A)],
24 the court must order the disobedient party, the attorney advising that
25 party, or both to pay the reasonable expenses, including attorney’s fees,
26 caused by the failure, unless the failure was substantially justified or
27 other circumstances make an award of expenses unjust.

28 Fed. R. Civ. P. 37(b)(2)(C). “The disobedient party need not willfully disobey the

1 court's order to trigger an award of reasonable expenses under Rule 37." I.E.I Co.
2 v. Advance Cultural Educ., 2011 WL 1335407, at *3 (N.D. Cal. Apr. 7, 2011).

3 The party against whom an award of attorney's fees is sought bears the
4 burden of showing that its failure to comply with a discovery order was
5 "substantially justified" or that "other circumstances make an award of expenses
6 unjust." See Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 784 (9th
7 Cir. 1983); Raygoza v. City of Fresno, 297 F.R.D. 603, 608 (E.D. Cal. Mar. 5,
8 2014); Herb Reed Enterprises, Inc. v. Monroe Powell's Platters, LLC, 2013 WL
9 3729720, at *8 (D. Nev. July 11, 2013).

10 If an award of fees is appropriate, courts generally use the "lodestar" method
11 to determine what amount of fees is "reasonable." See, e.g., Raygoza, 297 F.R.D.
12 at 608; HM Elecs., Inc. v. R.F. Techs, Inc., 2014 U.S. Dist. LEXIS 91209 (S.D.
13 Cal. July 3, 2014); I.E.I Co., 2011 WL 1335407, at *3. Under the lodestar method,
14 the court determines "the number of hours reasonably expended on the litigation
15 multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433
16 (1983). "A district court should exclude from the lodestar amount hours that are
17 not reasonably expended because they are 'excessive, redundant, or otherwise
18 unnecessary.'" Van Gerwen v. Guarantee Mut. Life Co., 214 F.3d 1041, 1045 (9th
19 Cir. 2000) (quoting Hensley, 461 U.S. at 433).

20 III.

21 DISCUSSION

22 A. eBay's Entitlement to Fees.

23 Wimo argues that eBay's fee motion should be denied because Wimo's
24 failure to comply with the Court's order was "substantially justified or other
25 circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C). As
26 noted above, eBay contends that Wimo has not complied with the 9/15 and 11/17
27 Orders in three respects: (1) by failing to provide un-redacted versions of
28 documents responsive to eBay's Requests for Production ("RFPs") numbers 46 and

1 47; (2) by producing a privilege log that does not comply with the requirements of
2 the 9/15 and 11/17 Orders; and (3) by failing to provide an estimated date by which
3 Wimo would resolve technical difficulties with its production of ESI.

4 Wimo argues that issues (1) and (3) are the result of unforeseen technical
5 problems with producing the ESI in a format that will satisfy eBay. (Dkt. 147 at ¶¶
6 15-18 [Klar. Decl., describing “load” problem preventing transfer of documents
7 from Wimo to its new e-discovery consultant]). Regarding issue (1), Wimo’s
8 counsel explains: “[B]ecause of eBay’s complaints that the Crosby emails produced
9 by [Wimo’s counsel] were ‘unreadable,’ I understand the Court’s order to require
10 that unredacted versions of [these] emails be produced when readable copies of the
11 Crosby emails are produced with the required metadata.” (Dkt. 147 at 4 [Klar
12 Decl.].) Wimo argues that an award of attorney’s fees would be unfair because it
13 has limited resources and has already spent significant funds attempting to bring its
14 ESI productions into compliance. (Dkt. 146 at 2; Dkt. 150 [Parris Decl., stating
15 that Wimo spent approximately \$17,500 upgrading its technical ESI capabilities
16 and will pay its e-discovery consultant at least \$70,000].)²

17 The Court recognizes that smaller law firms may have more limited technical
18 resources in dealing with ESI. Nevertheless, “Wimo chose to bring a lawsuit
19 alleging thousands of instances of infringement.... Wimo cannot be heard now to
20 complain about the volume of work required to provide information relevant to its
21 claims.” (Dkt. 141 at 5 [11/17 Order].) Federal Rule of Civil Procedure

22
23 ² Wimo has submitted a declaration from its e-discovery consultant, which
24 opines in part that the emails produced by Wimo’s counsel to eBay on or about
25 October 25, 2016 “do not appear to be unreadable.” (Dkt. 148 at 4 ¶ 8.) To the extent
26 Wimo is arguing that there were no technical problems with its earlier ESI
27 productions, this is contradicted by counsel’s representations at the telephonic
28 conference on November 16, 2016, when “[c]ounsel for Wimo agreed that there were
technical issues affecting Wimo’s production and further agreed to retain an e-
discovery consultant to resolve them.” (Dkt. 141 [11/17 Order] at 2.)

1 34(b)(2)(E)(ii) requires ESI to be produced, at minimum, “in a reasonably usable
2 form or forms[.]” Although Wimo has been on notice of the quickly-approaching
3 January 17, 2017 fact discovery deadline for at least a year, and has been on notice
4 of problems with its ESI productions since at least September of 2016, it has been
5 slow to remedy its difficulties in producing workable ESI.

6 Additionally, and unrelated to technical issues or ESI, Wimo’s opposition
7 fails to address the problems with its privilege logs. Initially, Wimo failed to
8 produce *any* log, despite withholding communications with TCR and Crosby—
9 which were responsive to RFPs 46 and 47—on the basis of privilege. (Dkt. 116
10 [9/15 Order] at 20-21.) This led to the Court’s ruling on September 15th that Wimo
11 had waived attorney work-product privilege regarding these communications. (Id.
12 at 22.) After the Court ordered Wimo to produce a privilege log, Wimo produced a
13 non-compliant log that did not identify what privilege was being claimed. (Dkt.
14 141 at 3 [11/17 Order].) Wimo then attempted to claim that the communications
15 were subject to attorney work-product privilege, which the Court had already ruled
16 was waived; Wimo subsequently claimed they were subject to attorney-client
17 privilege, but without identifying which communications were so privileged. (Id.)
18 Wimo also produced some of the documents in redacted form. (Id.) The Court
19 again ordered Wimo to produce a compliant privilege log. (Id. at 3-4.)

20 The current log, produced on November 30, 2016, still does not comply with
21 the Court’s 9/15 and 11/17 Order, as follows:

22 13. ... The Log does not provide certain facts required by the Court’s
23 September 15 Order, including: “the client or prospective client(s)
24 involved,” “any other persons who [we]re party to the communication
25 and their role,” and “whether the communication occurred in the course
26 of an actual or prospective representation.”

27 14. Moreover, based on the content of the Log, it appears that Wimo
28 has improperly withheld numerous documents. For example:

1 a. Forty-four of the log entries identify Wimo or a unidentified
2 third party as the potential client, yet the log either (i) only identifies
3 Craig Crosby and Wimo’s counsel as parties to the communication and
4 does not list any representative of Wimo/third party; or (ii) shows that
5 Mr. Crosby was included on communications with the assumed
6 representatives of the third parties, thus breaking any purported
7 privilege.

8 b. Twenty-one entries identify documents that Wimo previously
9 produced to eBay or identified as work product in its October 20, 2016
10 amended work-product log of TCR-related documents, but now seeks
11 to withhold on the purported basis of attorney-client privilege. ...

12 c. At least three of the documents appear to be copies of articles
13 from TCR’s website.

14 d. Four entries list a “basis for privilege” and “status of
15 representation” that are inconsistent and undermine a claim of
16 privilege. *e.g.*, claiming that a prospective privileged relationship with
17 Wimo is the “basis” but that the “status” is a prospective privileged
18 relationship with TCR’s Craig Crosby.

19 e. Moreover, even entries that identify Mr. Crosby as the
20 potential holder of the privilege fail to identify (i) the action/potential
21 action at issues; and/or (ii) all parties to the communication, making it
22 impossible to eBay analyze the veracity of the claimed privilege.

23 (Dkt. 143-1 at ¶¶ 13-14 [Daniels Decl.]; see also Dkt. 143-1 at 50-69 [Ex. D, the
24 privilege log, annotated by Daniels].) Thus, Wimo’s privilege log remains cryptic,
25 hampering evaluation of Wimo’s privilege claims, and Wimo has offered no
26 explanation for its failure to produce a proper privilege log.

27 Because of the defects in Wimo’s privilege log, on December 19, 2016, the
28 Court ordered Wimo to lodge the logged documents for an in camera review. (Dkt.

1 151.) Upon reviewing the lodged documents, the Court saw that Wimo’s privilege
2 log failed to describe some of the emails accurately and failed to log any
3 attachments, even though attachments were mentioned in the emails.

4 Accordingly, the Court finds that Wimo has failed to demonstrate that its
5 non-compliance with the Court’s 9/15 and 11/17 Orders was substantially justified,
6 or that other circumstances would render any award of attorney’s fees unjust.

7 **B. Reasonable Amount of Attorney’s Fees.**

8 eBay seeks attorney’s fees representing time billed by 8 attorneys: 1 partner
9 and 2 associates from Weil, and 3 partners and 2 associates from O’Melveny.

10 Wimo argues that: (1) eBay’s attorneys have provided insufficient evidence that
11 their hourly rates are reasonable; (2) the number of hours should be reduced to
12 remove time spent on activities that are secretarial or clerical in nature; and (3) the
13 number of hours should be reduced to remove time spent reviewing Wimo’s
14 document productions. (Dkt. 146 at 3-4.)

15 **1. Only attorney’s fees incurred after September 15th are**
16 **recoverable, because these are the only fees “caused by” Wimo’s**
17 **failure to comply with the 9/15 and 11/17 Orders.**

18 eBay’s motion includes attorney’s fees for time its counsel expended
19 “bringing and litigating the August 23, 2016 Joint Stipulation Regarding eBay’s
20 Motion to Compel Responses to Interrogatory and Requests for Production...,
21 which resulted in the Court issuing the September 15 Order[.]” (Dkt. 143 at 4.)
22 However, eBay’s request for fees was made under Federal Rule of Civil Procedure
23 37(b)(2)(C), based on Wimo’s failure to comply with the Court’s 9/15 and 11/17
24 Orders. (Dkt. 139 at 17 [Ex Parte Motion for Contempt, seeking fees under Rule
25 37(b)(2)(C)]; Dkt. 143 [Motion for Fees, arguing Wimo failed to obey the Court’s
26 9/15 and 11/17 Orders].)

27 The Court finds that fees incurred prior to the 9/15 Order are not recoverable
28 under Rule 37(b)(2)(C), which requires an award of reasonable expenses “caused

1 by” the failure of the opposing party to obey a discovery order. The time eBay
2 spent preparing and litigating the joint stipulation filed on August 23, 2016 is not
3 compensable under Rule 37(b)(2)(C) because, at that time, there was no Court order
4 requiring the disputed discovery to be produced. See generally U.S. for Use & Ben.
5 of Wiltec Guam, Inc. v. Kahaluu Const. Co., Inc., 857 F.2d 600, 602 (9th Cir. 1988)
6 (“Rule 37(b)(2) authorizes sanctions only for failure to obey a discovery order or a
7 pretrial scheduling order”); Toth v. Trans World Airlines, Inc., 862 F.2d 1381, 1386
8 n.2 (9th Cir. 1988) (“Fed. R. Civ. P. 37(b)(2) must be distinguished from Rule
9 37(a), which provides for the award of expenses resulting from efforts to secure an
10 order compelling discovery. ... Thus, attorney-time before and during a hearing in
11 which a court order is imposed is not attorney-time incurred on account of
12 [appellants'] failure to obey an order.”) (citations and quotation marks omitted);
13 Matrix Motor Co., Inc. v. Toyota Motor Sales, USA, Inc., 2003 WL 22466218
14 (C.D. Cal. May 8, 2003) (relying on Toth). Thus, only fees incurred by eBay after
15 the Court issued its 9/15 Order are recoverable via the instant motion.

16 **2. Reasonable Hourly Rate.**

17 “In assessing a reasonable hourly rate, courts consider the prevailing market
18 rate in the community for similar services by lawyers of reasonably comparable
19 skill, experience, and reputation.” Garcia v. Resurgent Capital Servs., L.P., 2012
20 WL 3778852, at *2 (N.D. Cal. Aug. 30, 2012). “The relevant community for
21 purposes of determining the prevailing market rate is generally the ‘forum in which
22 the district court sits.’” Id. (quoting Camancho v. Bridgeport Fin., Inc., 523 F.3d
23 973, 979 (9th Cir. 2008)).

24 “Affidavits of the [moving party’s] attorney and other attorneys regarding
25 prevailing fees in the community, and rate determinations in other cases, ... are
26 satisfactory evidence of the prevailing market rate.” Id. (quoting United
27 Steelworkers of Am. v. Phelps Dodge Corp., 896 F. 2d 403, 407 (9th Cir. 1990)).
28 “When a fee applicant fails to meet its burden of establishing the reasonableness of

1 the requested rates, however, the court may exercise its discretion to determine
2 reasonable hourly rates based on its experience and knowledge of prevailing rates
3 in the community.” MGA Entm’t, Inc. v. Nat’l Prod. Ltd., 2012 WL 182072, at *2
4 (C.D. Cal. Jan. 23, 2012).

5 Wimo argues that eBay has failed to produce competent evidence that the
6 hourly rates sought by its counsel are reasonable. (Dkt. 146 at 3-4.) The Court
7 agrees. eBay has submitted self-serving declarations from its own counsel opining
8 that their rates are reasonable. (Dkt. 143-1 at 4 ¶ 11 [Daniels Decl.]; Dkt. 143-2 at
9 3 ¶ 8 [Singer Decl.].) Yet eBay has provided no other evidence of reasonableness,
10 such as affidavits from other counsel or examples of cases where similar rates have
11 been awarded. See Jordan v. Multnomah Cty., 815 F.2d 1258, 1263 (9th Cir. 1987)
12 (“The fee applicant has the burden of producing satisfactory evidence, *in addition*
13 *to the affidavits of its counsel*, that the requested rates are in line with those
14 prevailing in the community....”) (emphasis added); I.E.I Co., 2011 WL 1335407,
15 at *3 (same).

16 Based on the Court’s own experience and knowledge of prevailing rates in
17 this community, as well as hourly rates awarded in similar cases, the Court finds
18 that the rates charged by eBay’s counsel are, by and large, unreasonable. See, e.g.,
19 Jerry Beeman & Pharmacy Servs., Inc. v. Anthem Prescription Mgmt., Inc., 2016
20 WL 4940297, at *2-3(C.D. Cal. Sept. 14, 2016) (finding an hourly rate of \$595 to
21 be excessive for a fourth year associate); Partners for Health and Home, L.P. v.
22 Seung Wee Yang, 488 B.R. 431 (C.D. Cal. 2012) (finding \$315 was a reasonable
23 hourly rate for a sole practitioner, formerly a partner in a large international law
24 firm, who successfully prosecuted trademark infringement claims). Moreover,
25 “when skilled practitioners of notable reputation ... are engaged in performing
26 services that are ‘not complex’ ... or which involve ‘clerical tasks’ or other ‘simple
27 matters’ ... the Court may reduce the hourly rate and/or number of hours requested
28 by counsel.” Green v. Baca, 225 F.R.D. 612, 616 (C.D. Cal. 2005) (citations

1 omitted) (reducing hourly rate from \$550 per hour to \$300 per hour). Compare
2 Toyo Tire & Rubber Co., Ltd. v. Fitinparts-USA, LLC, 2016 WL 5219465, at *3
3 (C.D. Cal. June 3, 2016) (finding hourly rates of \$790, \$700, \$750, and \$685 were
4 reasonable for partners in the Los Angeles area, where the client had *prevailed on*
5 *the merits* in trademark litigation). The legal issues involved in drafting the motion
6 to compel and the ex parte motion for contempt were not complex. A reduction in
7 the hourly rate is therefore appropriate.

8 The Court finds that a reasonable hourly rate for Randi Singer (partner at
9 Weil) is \$500; for Jessie Mishkin (associate at Weil) is \$300; for Jennifer Ramos
10 (associate at Weil) is \$300; for David Eberhart (partner at O’Melveny) is \$500; for
11 James Bowman (partner at O’Melveny) is \$500; for Justine Daniels (counsel at
12 O’Melveny) is \$400; for Roger Hsieh (associate at O’Melveny) is \$300; for Grant
13 Damon-Feng (associate at O’Melveny) is \$300.

14 **3. Reasonable Number of Hours Expended.**

15 Wimo argues that the number of hours spent by eBay’s counsel should be
16 reduced in several ways. First, Wimo argues that certain time entries should be
17 excluded as secretarial or clerical in nature. (Dkt. 146 at 3.) The Court agrees that
18 such reductions are generally appropriate. See Sinohui v. CEC Entm’t, Inc., 2016
19 WL 3226006, at *1 (C.D. Cal. June 7, 2016) (“[T]he Court will not award attorney
20 fees for activities that can be classified as secretarial or clerical in nature.”).
21 However, none of the entries identified by Wimo—which reflect counsel’s review
22 of discovery responses and preparing for court appearances—appear to the Court to
23 be clerical in nature. (Dkt. 149 at ¶¶ 4, 8 [Wilson Decl., identifying allegedly
24 clerical entries], citing Dkt. 143-1 at 11 [Daniels Decl.]; Dkt. 143-2 at 6-7 [Singer
25 Decl.])

26 Second, Wimo argues that certain time entries should be excluded because
27 they reflect time spent reviewing discovery responses and document production.
28 (Dkt. 146 at 4.) See Green, 225 F.R.D. at 615 (finding “it is not appropriate, as a

1 general matter, to compensate counsel for reviewing the discovery responses which
 2 should have been provided absent ... motion practice”); see also Lund v. 3M Co.,
 3 2016 WL 6205743, at *4 (C.D. Cal. Oct. 24, 2016) (declining to award fees for all
 4 time spent preparing for a deposition that did not take place, because “Plaintiffs’
 5 counsel would have had to prepare for this deposition regardless of Defendant’s
 6 conduct, and will not need to duplicate the entirety of their prior effort in preparing
 7 for the newly-ordered deposition”). Wimo objects to the following time entries on
 8 this basis:

Date	Name	Hours	Narrative
10/18/2016	Daniels, Justine [O’Melveny]	1.7	Review and analyze Wimo’s supplemental responses to Interrogatory No. 1
10/31/2016	Bowman, James [O’Melveny]	1.00	Analyze Crosby Emails produced by Wimo and privilege log
11/30/2016	Daniels, Justine [O’Melveny]	3.10	Download and initial review of November 20, 2016 productions
10/26/2016	Ramos, Jennifer [Weil]	[0.9] of 1.5	Review Wimo production and identify issues with production (.9) ...
10/26/2016	Singer, Randi W. [Weil]	[0.5] of 1	Review emails produced from privilege log (.5) ...
11/2/2016	Ramos, Jennifer [Weil]	1.2	Review documents produced by Wimo re Crosby for production issues (1.2)
11/3/2016	Ramos, Jennifer [Weil]	2.4	Review documents produced by WIMO for production issues (2.4)

24 (Dkt. 149 at ¶¶ 6, 9 [Wilson Decl. in opposition to fees]; Dkt. 143-1 at 9, 11, 13
 25 [Daniels Decl. regarding O’Melveny hours]; Dkt. 143-2 at 5-6 [Singer Decl.
 26 regarding Weil hours].)³ The Court agrees with Wimo and finds these fees to be

27
 28 ³ Regarding Wimo’s objection that “Ms. Daniels spent 1 hour analyzing Crosby emails,” which cites Dkt. 143-1 at 11, the Court assumes that this refers to

1 non-compensable.

2 Third, Wimo contends that the hours eBay's counsel collectively spent
3 drafting and preparing for the hearing on eBay's ex parte motion for contempt were
4 excessive. (Dkt. 146 at 3; Dkt. 149 at ¶ 5(c).) The Court agrees. The record
5 reflects that eBay's counsel collectively billed 37 hours by 6 attorneys in drafting
6 the ex parte motion for contempt, a 21-page motion with an attached 10-page
7 declaration from Daniels (counsel at O'Melveny), as follows:

Date	Name	Billed Hours	Narrative
10/26/2016	Damon-Feng, Grant [O'Melveny]	4.10	Draft motion for sanctions for violation of discovery order
10/27/2016	Bowman, James [O'Melveny]	0.60	Review ex parte application for sanctions
10/28/2016	Daniels, Justine [O'Melveny]	1.80	Review contempt ex parte motion
10/28/2016	Bowman, James [O'Melveny]	2.50	Revise ex parte application for sanctions
10/31/2016	Daniels, Justine [O'Melveny]	3.40	Revise Ex Parte Motion for Contempt
11/1/2016	Eberhart, David [O'Melveny]	4.20	Revise drafts of ex parte motion for contempt, review selected production materials relevant to same, and communicate multiple times with J. Bowman and J. Daniels Regarding the Same
11/1/2016	Bowman, James [O'Melveny]	1.00	Revise ex parte application for sanctions
11/1/2016	Daniels,	1.20	Revise and comment on ex parte

27 the 1 hour Mr. Bowman spent analyze Crosby emails. The cited page does not
28 contain a similar entry for Ms. Daniels.

1		Justine [O'Melveny]		application and correspondence with D. Eberhart and J. Bowman regarding the same
2	11/2/2016	Daniels, Justine [O'Melveny]	1.60	Revise and circulate draft ex parte to eBay and Weil
3	11/3/2016	Daniels, Justine [O'Melveny]	4.80	Revise ex parte to account for changes in Wimo's compliance and failure to comply
4	11/4/2016	Daniels, Justine [O'Melveny]	2.70	Revise and finalize ex parte application
5	11/4/2016	Singer, Randi [Weil]	3.50	Revise ex parte motion to compel compliance with court order on discovery (3.0); revise ex parte following meet and confer (.5)
6	11/4/2016	Ramos, Jennifer [Weil]	2.0	Draft proposed order for application for contempt
7	11/4/2016	Daniels, Justine [O'Melveny]	0.20	Review and revise proposed order
8	11/4/2016	Daniels, Justine [O'Melveny]	3.40	Draft Daniels declaration in support of ex parte application

18 (Dkt. 143-1 at 10-12 [Daniels Decl. regarding O'Melveny hours]; Dkt. 143-2
19 [Singer Decl. regarding Weil hours]; see also Dkt. 139 [ex parte motion for
20 contempt].)

21 The assignment of 6 different attorneys to this matter resulted in unnecessary
22 duplication of effort. See Democratic Party of Washington State v. Reed, 388 F.3d
23 1281, 1286 (9th Cir. 2004) (“[C]ourts ought to examine with skepticism claims that
24 several lawyers were needed to perform a task, and should deny compensation for
25 such needless duplication as when three lawyers appear for a hearing when one
26 would do.”) (footnote omitted); Cruz ex rel. Cruz v. Alhambra Sch. Dist., 601 F.
27 Supp. 2d 1183, 1191 (C.D. Cal. 2009) (noting that “[b]illed time that includes
28

unnecessary duplication of effort should be excluded from the lodestar”; finding it was unnecessarily duplicative to have 5 attorneys work on a class certification motion). The Court will reduce the hours listed above to 10 hours expended by Justine Daniels (counsel at O’Melveny), who appears to have been the lead attorney working on the motion; 2 hours expended by David Eberhart (partner at O’Melveny) to review and revise the motion; and 2 hours expended by Randi Singer (partner at Weil) to review and revise the motion.⁴

4. Calculation of a Reasonable Attorney’s Fee.

Based on the time entries excluded above, and the hourly rates found to be reasonable by the Court, the Court calculates the lodestar as follows:

Firm	Lawyer	Type	Hourly Rate	# of Hours	Total
Weil	Randi Singer	Partner	\$ 500.00	9.4	\$ 4,700
Weil	Jessie Mishkin	Associate	\$ 300.00	2.2	\$ 660
Weil	Jennifer Ramos	Associate	\$ 300.00	4.7	\$ 1,410
Total to Weil					\$ 6,770
O'Melveny	David Eberhart	Partner	\$ 500.00	2	\$ 1,000
O'Melveny	James Bowman	Partner	\$ 500.00	8.6	\$ 4,300
O'Melveny	Justine Daniels	Counsel	\$ 400.00	35.8	\$ 14,320
O'Melveny	Roger Hsieh	Associate	\$ 300.00	0	\$ 0
O'Melveny	Grant Damon-Feng	Associate	\$ 300.00	10.5	\$ 3,150
Total to O'Melveny					\$ 22,770

⁴ Wimo also objects that eBay’s counsel spent excessive time drafting and preparing for the hearing on eBay’s first motion to compel via joint stipulation. (Dkt. 149 at ¶ 5(a)-(b).) The Court finds it unnecessary to reach this argument because it is excluding these hours based on its finding that these fees were not caused by Wimo’s failure to obey the Court’s orders regarding discovery.

Grand Total					\$ 29,540

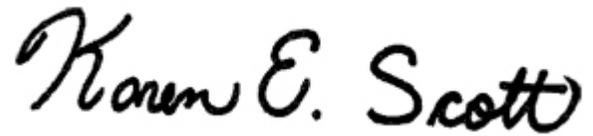
IV.

CONCLUSION

Based on the foregoing, it is hereby ORDERED as follows:

1. Defendant eBay Inc.'s Motion to Recover Attorneys' Fees and Costs (Dkt. 143) is GRANTED.
2. Plaintiff Wimo Labs, LLC and/or Plaintiff's counsel (Klar and Associates and the Parris Law Firm) shall pay Defendant eBay, Inc. the sum of \$29,540.00 in attorney's fees, no later than forty-five (45) calendar days following entry of this Order. While liability for this fee award shall be joint and several, it appears to the Court that decisions by counsel (not Wimo) caused the non-compliance.

Dated: December 28, 2016.



KAREN E. SCOTT
United States Magistrate Judge