

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

CELIA VALDEZ, et al.,)	
)	
Plaintiffs,)	Civil Action No: 1:09-cv-00668 LAM/DJS
)	
v.)	
)	
MARY HERRERA, et al.,)	
)	
Defendants.)	

**RESPONSE TO PLAINTIFFS’ MOTION FOR SANCTIONS AGAINST
THE OFFICE OF THE SECRETARY OF STATE**

Plaintiffs are due some compensation for costs incurred in a fruitless attempt to take the 30(b)(6) deposition of the Secretary of State’s Office (“SOS”) in this litigation. Plaintiffs’ Motion for Sanctions, however, oversteps the bounds of reasonableness and should be denied.

INTRODUCTION

Plaintiffs seek sanctions in the amount of \$24,242.09 for their difficulties in taking the 30(b)(6) deposition of the SOS. That amount is based on an inappropriate attempt to collect from the SOS for costs incurred in conducting other discovery. It is also based on the Washington, D.C. and New York billable rates ostensibly charged by Yolanda Sheffield and Allegra Chapman. The requested amount is unsupportable and the Court should so rule.

ARGUMENT

Plaintiffs’ Motion for Sanctions fails for two principal reasons. First, it attempts to capture costs not properly attributable to the SOS. Second, it is based on billable rates to which Plaintiffs are not entitled.

Plaintiffs are entitled to costs for one – and only one – unsuccessful attempt to secure the 30(b)(6) testimony of the SOS. On May 6, 2010 Plaintiffs appeared to take the deposition of the SOS’s 30(b)(6) witness and were unable to do so because of the witness’s failure to appear.

Plaintiffs seek unreasonable compensation for that failure, however. Plaintiffs' attempts to recover costs associated with any other trip taken to New Mexico are inappropriate.

As Plaintiffs' Motion indicates, counsel for Plaintiffs made three trips to New Mexico in order to take the deposition of the SOS's 30(b)(6) deponent. Two of those trips were expressly for the purpose of taking the 30(b)(6) deposition, and on one of those trips the deposition occurred. The third trip was for taking several depositions, and Plaintiffs cannot recover from the SOS for those costs.

Plaintiffs' counsel's first trip to New Mexico during which they intended to depose the SOS's 30(b)(6) witness was in February 2010. Plaintiffs came to New Mexico to also depose witnesses unrelated to the SOS. Those depositions, as Plaintiffs admit, occurred on February 24 and 25. Plaintiffs nonetheless seek costs, including attorneys' fees, for staying the night in Albuquerque on February 22. This request is unreasonable. Plaintiffs' counsel was coming to New Mexico in order to conduct several depositions. The assertion that February 23 was a lost day (*See* Chapman Decl., ¶ 7 and Sheffield Decl. ¶ 7) is without merit. Plaintiffs' counsel were able to use that time to prepare for the February 24 and 25 depositions.

Moreover, the deponent was unavailable as the result of a legitimate medical emergency. The deponent had, the night before, been bitten by a black widow spider and required immediate medical attention. *See* Fulgenzi Affidavit, ¶ 3 (Attached as Exhibit 1). Accordingly, the SOS did not inappropriately avoid its discovery obligations relative to the deposition scheduled for February 23. At a minimum, the Court cannot award the requested fees. Plaintiffs seek \$550 an hour for Ms. Chapman's time and \$490 an hour for Ms. Sheffield's time. Plaintiffs do not submit any justification for these inordinately high rates.

Plaintiffs' counsel's second trip to New Mexico concerning the 30(b)(6) deposition does, in fact, justify the imposition of some sanction against the SOS. On May 6, 2010, the SOS failed

to produce a 30(b)(6) deponent and had no justification for that failure. Plaintiffs overreach, however, on their requested costs. Plaintiffs absorbed lodging and meal expenses for Ms. Chapman of \$192.89. The SOS does not dispute these costs. The SOS likewise does not object to the \$1,294.38 Plaintiffs seek for Ms. Sheffield's costs.¹ Plaintiffs do, however, dispute the fees Plaintiffs request.

Plaintiffs seek compensation for 7.4 hours of Ms. Chapman's time "traveling to Santa Fe from Las Cruces, waiting for Defendant to produce a designee for deposition, and driving back to Albuquerque, from where my flight departed the following day." Chapman Decl., ¶ 25. It is telling that Plaintiffs do not provide a detailed breakdown of these 7.4 hours. The bulk of that time, of course, was spent driving from Las Cruces to Santa Fe. Plaintiffs cannot be compensated for this time, as Ms. Chapman admits that her flight home departed from Albuquerque, and she would have needed to drive at least to Albuquerque in any event. Plaintiffs do not identify for the Court the number of hours they waited on May 6 for the deposition, because they waited only a few minutes. As Ms. Chapman notes, "[u]pon our arrival at the Secretary of State's office on May 6, 2010, Mr. Fuqua informed Plaintiffs' counsel that [the deponent] had called in sick to work, and failed to timely notify Mr. Fuqua, and would not appear for the deposition." Chapman Decl., ¶ 19. Thus, as soon as Plaintiffs' counsel arrived for the deposition, they learned that it would not happen. Accordingly, because Ms. Chapman drove an hour each way more than she would otherwise have driven, Plaintiffs are entitled to only two hours of her time.

The fees Plaintiffs seek related to Ms. Sheffield's time are also unreasonable. Plaintiffs ask for 21.5 hours. Ms. Sheffield fails to identify how those 21.5 hours were spent. Her travel

¹ Some of the meals both Ms. Chapman and Ms. Sheffield submitted are expensive, even by Santa Fe standards, but the SOS is less interested in those costs than in the exorbitant number of hours for which Plaintiffs seek compensation as well as the rate at which they seek it.

time is compensable; any time she spent preparing for the deposition is not, however, because that time was not wasted in light of the 30(b)(6) deposition that occurred only three weeks later. Without a more detailed explanation of these 21.5 hours, the Court cannot determine what the appropriate amount of sanctions is.

Finally, the SOS takes exception to the hourly rates Plaintiffs seek. Plaintiffs have offered nothing to justify their rates, which are their home rates and clearly not supportable in New Mexico. Plaintiffs fail to identify how many years of experience either Ms. Chapman or Ms. Sheffield have and fail to explain how either has the type of specialized experience to justify what are, on their face, premium rates. The Court is well aware that the New Mexico legal market does not generally support rates of \$550 and \$480 an hour. Without more information, however, the Court cannot determine what the appropriate hourly fee for Ms. Chapman and Ms. Sheffield should be.

Plaintiffs were able to take the SOS's 30(b)(6) deposition on their last trip to New Mexico, and Plaintiffs do not seek fees or costs connected with that trip. Instead, Plaintiffs seek fees for the time involved in preparing a filing a Motion to Compel the 30(b)(6) deposition, one hour for Ms. Chapman and two hours for Ms. Sheffield. Notably, Plaintiffs failed to attach a copy of that Motion to Compel to their Motion for Sanctions. The motion to which Plaintiffs' refer, Document 59 on the docket for this case, is seven pages long. The majority of that motion is directed to Plaintiffs' request to modify the discovery schedule. Regarding the motion to compel the SOS's 30(b)(6) witness, the motion reads, in its entirety:

Plaintiffs request an order to compel Defendant Herrera to produce for deposition on May 26, 2010 an individual to be deposed pursuant to Rule 30(b)(6). Plaintiffs will seek to reach agreement with the Defendant on a time and location mutually convenient for counsel and the deponent. As noted, Defendant Herrera does not oppose this motion.

For this, Plaintiffs seek \$550 for an hour of Ms. Chapman's time and \$980 for two hours of Ms. Sheffield's time. That request must be denied.

First, Plaintiffs' request is predicated on their bare assertion that the Motion to Compel was necessary. In light of the SOS's lack of opposition to the Motion to Compel, it was not. Second, the assertion that the above-quoted paragraph required a combined three hours of Plaintiffs' counsel's time is absurd.

Ultimately, Plaintiffs' analysis of Rule 37(d) of the Federal Rules of Civil Procedure is incomplete. They emphasize for the Court that an award of sanctions for failure to appear at a 30(b)(6) deposition are mandatory, but fail to account for the caveat found in Rule 37(d)(3): sanctions are appropriate "unless the failure was substantially justified or other circumstances make an award of expenses unjust." As noted above, the failure to produce a witness on February 23, 2010 was justified by a legitimate medical emergency. And while the SOS concedes that some sanction is appropriate for the May 6 deposition, the expenses Plaintiffs seek in connection with that deposition are unjust.

CONCLUSION

For the foregoing reasons, the Secretary of State respectfully requests that the Court deny in part Plaintiffs' Motion for Sanctions Against the Office of the Secretary of State, award a reasonable sanction against the Secretary of State not to exceed \$5,000.00, and provide to the Secretary of State any additional relief to which she may be justly entitled.

DATED: August 9, 2010.

Respectfully submitted,

GARY K. KING
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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing answer on Plaintiffs' counsel of record via electronic filing with the CM/ECF filing system on August 9, 2010.

/s/ Scott Fuqua
Scott Fuqua