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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

P.Y.M.T., a minor, by and through her  
guardian ad litem DEBI ONTIVEROS, an  
individual and as Successor in Interest to  
Decedent, Miguel Moreno Torrez ;  
MARIA CARRILLO, an individual and  
Successor in Interest to decedent, Miguel  
Moreno Torrez,

Plaintiff,

v.

CITY OF FRESNO, THE FRESNO  
POLICE DEPARTMENT and  
DEFENDANT OFFICERS DOES 1-10,

Defendants.

Case No. 1:15-cv-710-JAM-BAM

ORDER GRANTING DEFENDANT'S  
MOTION TO COMPEL AND DENYING  
DEFENDANT'S REQUEST FOR  
ATTORNEYS' FEES AND EXPENSES

(Docs. 29, 31)

Pending before the Court is Defendant City of Fresno's Motion to Compel named Plaintiffs Maria Carillo, Antonio Moreno, and P.Y.M.T., by and through P.Y.M.T.'s Guardian Ad Litem Deibi Ontiveros ("Plaintiffs"), to attend their depositions in the United States. (Doc. 29). The motion also seeks an award of attorneys' fees for Plaintiffs' failure to appear at their depositions, previously scheduled for March 10 and 11, 2016. The parties filed a Joint Statement re Discovery Disagreement on May 13, 2016. (Doc. 31). The Court deemed the motion suitable for decision without oral argument and vacated the hearing scheduled for May 23, 2016. (Doc. 32). Having considered the joint statement, and the entire file, Defendant's Motion to Compel is GRANTED in PART and DENIED in PART.

1 **BACKGROUND**

2 This action arises out of the officer-involved shooting of decedent Miguel Torrez by  
3 officers with the Fresno Police Department on June 21, 2014. The Plaintiffs in the action are the  
4 decedent’s mother Maria Carrillo, the decedent’s father Antonio Moreno, and decedent’s minor  
5 child P.Y.M.T., by and through Guardian Ad Litem Deibi Ontiveros. At all times relevant to this  
6 lawsuit, Plaintiffs have resided in Sinaloa, Mexico. On May 26, 2015, Plaintiffs filed their  
7 complaint for federal civil rights and state law claims in the Eastern District of California.

8 In accordance with Federal Rule of Civil Procedure 30(b)(1), Defendant served Plaintiffs’  
9 notices of depositions on three separate occasions. *See* Declaration of Courtney Arbucci  
10 (“Arbucci Decl.”), at pg. 13, Doc. 29. On February 1, 2016, the most recent occasion, Defendant  
11 served Plaintiffs’ counsel with the deposition notices via U.S. Mail for Plaintiffs’ depositions to  
12 take place on March 10, 2016 at Defendant’s counsel’s San Diego office location. On March 9,  
13 2016, Plaintiffs’ counsel informed Defendant’s counsel that because the Plaintiffs are Mexican  
14 nationals residing in Mexico, they are unable to appear for their depositions anywhere within the  
15 United States because they lack the necessary immigration status to freely travel to the United  
16 States.

17 Despite this information, Defendant declined to re-notice the depositions and on March 10  
18 and 11, 2016, Plaintiffs failed to appear for their noticed depositions at Defendant’s San Diego  
19 office. Due to the failed deposition, on April 26, 2016, counsel for Plaintiffs and Defendant  
20 participated in an informal discovery conference with Judge Barbara A. McAuliffe regarding the  
21 parties’ deposition dispute. Plaintiffs’ counsel argued his desire for Defendant to depose Plaintiffs  
22 in Mexico, if not in person, by video using the services provided at the U.S. consulate in  
23 Mazatlan, Mexico. After the conference, counsel continued to meet and confer but Defendant  
24 refuses Plaintiffs’ proposed alternatives. The instant motion followed.

25 **LEGAL STANDARD**

26 The Federal Rules of Civil Procedure require that a “party who wants to depose a person  
27 by oral questions must give reasonable written notice to every other party [that] must state the  
28 time and place of the deposition and, if known, the deponent’s name and address.” Fed. R. Civ.

1 P. 30(b)(1). The Rules also note that a Court may, for good cause, issue an order to protect a party  
2 from oppression, undue burden or expense, including by “specifying terms, including time and  
3 place, for the disclosure or discovery.” Fed. R. Civ. P. 26(c)(1) & (c)(1)(B).

4 Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, a party propounding  
5 discovery or taking a deposition may seek an order compelling responses when an opposing party  
6 has failed to respond or has provided evasive or incomplete responses. Fed. R. Civ. P.  
7 37(a)(3)(B). The Court, on motion, may order sanctions if a party fails, after being served with  
8 proper notice, to attend his own deposition. Fed. R. Civ. P. 37(d)(1). “[A]n evasive or incomplete  
9 disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.” Fed.  
10 R. Civ. P. 37(a)(4). “If the court where the discovery is taken orders a deponent to be sworn or to  
11 answer a question and the deponent fails to obey, the failure may be treated as contempt of court.”  
12 Fed. R. Civ. P. 37(b)(1).

## 13 ANAYLSIS

### 14 1. Motion to Compel Depositions

15 The parties’ filings raise one question: whether the deposition of foreign Plaintiffs should  
16 occur here in the forum district or in Mexico where Plaintiffs are located. Based on the record  
17 presented, the Court finds that Plaintiffs’ depositions should proceed in California for several  
18 reasons.

19 First, Plaintiffs filed this action in this district and therefore they are subject to this Court’s  
20 jurisdiction and the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 30  
21 governs depositions, and it provides that “[a] party who wants to depose a person by oral  
22 questions . . . must state the time and place of the deposition.” Fed. R. Civ. P. 30(b)(1).  
23 “Generally, this means that the examining party may unilaterally choose a deposition’s location.”  
24 *Cadent Ltd. v. 3M Unitek Corp.*, 232 F.R.D. 625, 628 (C.D. Cal. 2005). Having filed a federal  
25 lawsuit, Defendant is entitled to take Plaintiffs’ depositions in order to defend against this suit.  
26 Therefore, to proceed with this action, Plaintiffs must cooperate in discovery, including being  
27 deposed. Absent a protective order, Plaintiffs have no grounds on which to object to sitting for  
28 their depositions at Defendant’s request.

1           Second, there are general presumptions that a Plaintiff's deposition should proceed in the  
2 forum district because, unlike a Defendant, the Plaintiff is here by choice. Generally, plaintiffs are  
3 required to make themselves available for examination in the district in which suit was brought,  
4 because the plaintiffs selected the forum. See *Fausto v. Credigy Servs. Corp.*, 251 F.R.D. 427,  
5 429 (N.D. Cal. 2008) (quoting *Turner v. Prudential Ins. Co. of Am.*, 119 F.R.D. 381, 383  
6 (M.D.N.C. 1988); see also *South Seas Catamaran, Inc. v. The Motor Vessel "Leeway,"* 120  
7 F.R.D. 17, 21 (D.N.J. 1998) ("[T]he general rule requir[es] plaintiff or its agents to appear for the  
8 taking of depositions in the district in which the suit is brought."). This is because "courts  
9 ordinarily presume that a plaintiff may be deposed in the judicial district where the action was  
10 brought, inasmuch as the plaintiff, in selecting the forum, has effectively consented to  
11 participation in legal proceedings there." *Rulo v. Ricoh Ams. Corp.*, 2015 U.S. Dist. LEXIS  
12 153432, at \*3 (N.D. Cal. Nov. 12, 2015) (quoting *In re Outsidewall Tire Litig.*, 267 F.R.D. 466,  
13 471 (E.D. Va. 2010).

14           However, to overcome the general presumption that a Plaintiff's deposition shall take  
15 place in the district in which the plaintiff filed suit, the "plaintiff has the burden of proving that  
16 undue hardship or exceptional or compelling circumstances justify his refusal to travel to his  
17 chosen forum." *Fenerjian v. Nong Shim Co., Ltd*, 13CV04115WHODMR, 2016 WL 1019669, at  
18 \*2 (N.D. Cal. Mar. 15, 2016); see also *Rulo v. Ricoh Ams. Corp. (Rulo II)*, 2015 U.S. Dist.  
19 LEXIS 153432, 2015 WL 9688060 at \*3, (N.D. Cal. Nov. 12, 2015) (plaintiff must "persuasively  
20 demonstrate" that traveling to the forum for his deposition "would, for physical and financial  
21 reasons, be practically impossible, or that it would otherwise be fundamentally unfair").  
22 Ultimately, the trial court has broad discretion to determine the appropriate place for a deposition.  
23 *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994).

24           Plaintiffs have not demonstrated undue hardship or exceptional or compelling  
25 circumstances to justify their refusal to travel to their chosen forum. The fact that Plaintiffs reside  
26 out of the country and lack the knowledge on how to travel to this country for their properly  
27 noticed depositions does not amount to "extreme hardship" or "compelling circumstances."  
28 Plaintiffs have not shown any evidence why the inconvenience or cost of attendance for Plaintiffs

1 in this case is any greater than it would be in any other case where a plaintiff resides outside the  
2 forum jurisdiction. There is no indication that Plaintiffs are physically unable to travel. Further,  
3 Plaintiffs have not provided any reason why Plaintiffs are unable to obtain visas to attend their  
4 depositions. Consequently, without any evidence or compelling justification, Plaintiffs are  
5 ordered to attend their depositions in the forum that they selected to prosecute this case against  
6 Defendant.

7 Finally, in order for the Plaintiffs to avoid having their depositions taken in the United  
8 States, they must move for a protective order under Federal Rule of Civil Procedure 26(c), which  
9 Plaintiffs have not done. Federal Rule of Civil Procedure 26(c) provides that on a timely motion  
10 a Court, for good cause, may issue an order “to protect a party or person from annoyance,  
11 embarrassment, oppression, or undue burden or expense, including one . . . forbidding inquiry  
12 into certain matters, or limiting the scope of disclosure or discovery to certain matters . . .” Fed.  
13 R. Civ. P. 26(c)(1)(D). To prevail on a motion for protective order, the party seeking the  
14 protection has the burden to demonstrate “particular and specific demonstration[s] of fact, as  
15 distinguished from conclusory statements. . . .” *See Munoz v. PHH Corp.*, No. 08-759- DAD-  
16 BAM, 2016 U.S. Dist. LEXIS 17254, 6-7 (E.D. Cal. Feb. 11, 2016). In assessing the motion,  
17 “the court should also balance the costs and burdens to each side.” *U.S. v. \$160,066.98 from Bank*  
18 *of Am.*, 202 F.R.D. 624, 626 (S.D. Cal. 2001).

19 Rather than filing a motion for a protective order, Plaintiffs responded to the motion to  
20 compel with a brief and conclusory statement that “Plaintiffs continue to be unaware of any legal  
21 process that would allow for them to enter the United States legally.” (Doc. 31 at 13). This  
22 statement is not a “particular and specific demonstration” and is therefore insufficient to carry  
23 Plaintiffs’ burden of establishing a specific prejudice. Indeed, Plaintiffs have not provided the  
24 Court with any evidence supporting their allegations that they are unable to obtain visas and  
25 attend their depositions in the United States. Plaintiffs do not include any declarations supporting  
26 their opposition nor have Plaintiffs included any information about what steps they have  
27 undertaken to obtain visas to travel to the United States for their depositions. Thus, to the extent  
28 that specific evidence supporting Plaintiffs’ failed attempts at obtaining travel visas exists, it is

1 not before the Court.<sup>1</sup>

2 Conversely, Defendant has come forward with evidence to support its position that  
3 conducting the depositions in Mexico would present an extreme burden because the U.S.  
4 Department of State has issued a travel advisory for U.S. citizens traveling to Sinaloa, Mexico  
5 due to threats of safety and security posed by organized criminal groups in the region. Arbucci  
6 Decl., ¶ at 17. Recognizing that one of Mexico’s most powerful criminal organizations is based  
7 in Sinaloa, the U.S. Department of State has specifically cautioned U.S. citizens about visiting the  
8 state, and has recommended that citizens defer all non-essential travel to the state due to a high  
9 rate of violent crimes. Arbucci Decl., ¶ at 17, Exh. K. On balance, Plaintiffs have failed to meet  
10 their burden to demonstrate good cause for why the depositions should not take place here.

11 Accordingly, the depositions should go forward in the United States and Defendant’s  
12 Motion to Compel is GRANTED.

## 13 **2. Monetary Sanctions**

14 In the pending motion to compel, Defendant also seeks monetary sanctions for the  
15 expenses incurred in attempting to take Plaintiffs’ depositions on March 10, 2016. The Ninth  
16 Circuit has explained, “Federal Rule of Civil Procedure 37 authorizes the district court, in its  
17 discretion, to impose a wide range of sanctions when a party fails to comply with the rules of  
18 discovery or with court orders enforcing those rules.” *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d  
19 585, 589 (9th Cir. 1983) (*citing Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639,  
20 643, (1976)). In addition, Rule 37(d) provides that when a party fails to appear for his own  
21 deposition, the Court must award “reasonable expenses, including attorney’s fees, caused by the  
22 failure, unless the failure was substantially justified or other circumstances make an award of  
23 expenses unjust.” Fed. R. Civ. P. 37(b)(2)(C).

24 Here, Defendant fails to present a persuasive reason for the Court to exercise its discretion  
25 to award expenses for the past nonappearance. The record demonstrates that Defendant was on  
26 notice prior to the scheduled depositions that Plaintiffs would be unable to attend. Despite

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27 <sup>1</sup> At the informal conference on April 26, 2016, Plaintiffs’ counsel indicated that he has had difficulty directly  
28 contacting Plaintiffs.

1 Defendant's assertions to the contrary, Plaintiffs did not completely fail to respond to Defendant's  
2 deposition notice. Defendant admits that, the day before the scheduled depositions, Plaintiffs'  
3 counsel notified Defendant that Plaintiffs did not have the proper travel visas. While Plaintiffs'  
4 conduct is noncompliance, the Court cannot say that Plaintiffs have acted in bad faith in failing to  
5 attend their depositions. Additionally, even if Plaintiffs had been more diligent in obtaining visas,  
6 it was reasonably foreseeable for Plaintiffs to experience complications in procuring their U.S.  
7 visas for international travel. The Court cautions Plaintiffs, however, that if they again fail to  
8 appear for their depositions, the Court will reconsider as possible sanctions an award of fees  
9 and/or a recommendation of dismissal of this action pursuant to Rule 37.

### 10 CONCLUSION

11 For the foregoing reasons, it is HEREBY ORDERED that:

- 12 1. Defendant City of Fresno's Motion to Compel Plaintiffs' Attendance at their  
13 Depositions is GRANTED; (Docs. 29, 31);
- 14 2. Plaintiffs MARIA CARRILLO, ANTONIO MORENO, and P.Y.M.T., by and  
15 through Guardian Ad Litem Deibi Ontiveros are ORDERED to attend their  
16 depositions at the time and place noticed by Defendant in this District to occur no  
17 later than June 17, 2016; and
- 18 3. Defendant City of Fresno's request for attorneys' fees and costs is DENIED,  
19 without prejudice.

20 IT IS SO ORDERED.

21 Dated: May 19, 2016

22 /s/ Barbara A. McAuliffe  
23 UNITED STATES MAGISTRATE JUDGE