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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ISAIAS VASQUEZ and LINDA HEFKE
on behalf of all other similarly situated
individuals,

Plaintiffs,

v.

LEPRINO FOODS COMPANY, a
Colorado Corporation; LEPRINO FOODS
DAIRY PRODUCTS COMPANY, a
Colorado Corporation; and DOES 1-50,
inclusive,

Defendants.

Case No. 1:17-cv-00796-AWI-BAM

**ORDER GRANTING IN PART
DEFENDANTS’ MOTION TO RECOVER
REASONABLE EXPENSES PURSUANT
TO FRCP 30(g)**

(Doc. No. 149)

On November 21, 2019, Defendants Leprino Foods Company and Leprino Foods Dairy Products Company (“Defendants”) filed a Motion to Recover Reasonable Expenses pursuant to Federal Rule of Civil Procedure 30(g). Defendants seek to recover fees and costs in the amount of \$5,987.38 in connection with the scheduled deposition of nonparty deponent, Ronaldo Salvo. (Doc. Nos. 149, 156.) The parties filed a Joint Statement regarding Defendants’ motion on December 6, 2019. (Doc. No. 156.)

The matter was heard on December 13, 2019, before the Honorable Barbara A. McAuliffe. Kitty Szeto appeared by telephone on behalf of Plaintiffs Isaias Vasquez and Linda Hefke. Lisa Pooley appeared in person on behalf of Defendants.

1 Having considered the Joint Statement, the parties’ arguments and the record on file,
2 Defendants’ motion is granted in part.

3 **BACKGROUND**

4 This wage-and-hour class action stems from Defendants’ alleged custom and policy to “de
5 crew,” i.e., sending workers home prior to the start of their scheduled shift without pay because
6 Defendants reportedly misjudged its production or labor needs and from Defendants’ alleged
7 policy of requiring Plaintiffs and workers to remain on call and subject to return to discuss
8 business matters and/or return to their work stations during their rest and meal breaks if called
9 upon to do so by supervisory personnel. (Doc. No. 61, Third Amended Complaint at ¶¶ 5, 7.)

10 On June 6, 2019, Plaintiffs filed their motion for class certification. (Doc. No. 116.)
11 Defendants opposed the motion on August 30, 2019. (Doc. No. 120.) On September 9, 2019, in
12 anticipation of filing their reply, Plaintiffs sought the Court’s leave to exceed Rule 30’s ten-
13 deposition limit to depose putative class members who submitted declarations in support of
14 Defendants’ opposition to the motion for class certification. (Doc. No. 132 at 3.) On September
15 25, 2019, the Court partially granted Plaintiffs’ request, permitting them to conduct seven
16 depositions of the putative class members who submitted declarations in support of Defendants’
17 opposition to the motion for class certification. (Doc. 136). The parties were directed to meet
18 and confer to work out a schedule for the depositions, all of which were to be completed no later
19 than November 8, 2019. (Id.)

20 Following the Court’s order permitting additional depositions, counsel for the parties
21 began communicating to set a schedule for the depositions. Once Plaintiffs identified the persons
22 to be deposed, Defendants inquired about the deponents’ availability for deposition. (Doc. 156-1,
23 Pooley Decl. at ¶¶ 3-4, Exs. B and C.) Defense counsel communicated with Plaintiffs’ counsel
24 about each deponent’s availability and whether defense counsel had been authorized to accept
25 service of a deposition subpoena for each deponent.

26 With regard to deponent Ronaldo Salvo, on October 14, 2019, Plaintiffs sought
27 confirmation of Mr. Salvo’s deposition for October 28, 2019, upon his return to work on October
28 25, 2019. In response, Defendants indicated that given Mr. Salvo’s October 25 return to work, he

1 would not have reasonable notice for a deposition. Defendants advised that, upon his return, they
2 would check on his availability and let Plaintiffs' counsel know his availability for other dates.
3 (Pooley Decl. at ¶ 9, Ex. H.)

4 On October 16, 2019, Plaintiffs' counsel asked if Mr. Salvo's deposition could be
5 scheduled for October 31, 2019. (Pooley Decl. at ¶ 10, Ex. I.) On October 21, 2019, defense
6 counsel indicated that October 31 would not work for Mr. Salvo, but they would check on his
7 availability. Plaintiff's counsel then sent another email asking that they check on October 30 as
8 an alternative to October 31. (Pooley Decl. at ¶ 11, Ex. J.)

9 On October 25, 2019, defense counsel learned that Mr. Salvo was not available for
10 deposition on October 30 or 31, but he could be available on November 5, 2019. Although an
11 offer was made to Mr. Salvo to have defense counsel accept service of a deposition subpoena on
12 his behalf, Mr. Salvo did not authorize defense counsel to accept service on his behalf. Defense
13 counsel notified Plaintiffs' counsel that Mr. Salvo was available on November 5, 2019.
14 Plaintiffs' counsel confirmed the November 5 date and inquired if defense counsel would accept
15 service on behalf of Mr. Salvo. Defense counsel responded that they had not been authorized to
16 accept service on his behalf. (Pooley Decl. at ¶ 12, Ex. K.)

17 On October 28, 2019, defense counsel received Plaintiffs' Amended Notice of Deposition
18 of Ronaldo Salvo, which noticed his deposition for November 5, 2019 at 9:00 a.m., at Esquire
19 Deposition Solutions in Fresno, California. (Pooley Decl. at ¶ 13, Ex. L.)

20 On October 31, 2019, the parties attended the deposition of Alejandro Osuna, taken by
21 Plaintiffs' Counsel, Kitty K. Szeto. Defense counsel Lisa M. Pooley was present at the
22 deposition. (Pooley Decl. at ¶ 14, Ex. M.) During the deposition, Ms. Szeto inquired as to
23 whether Mr. Osuna knew of any facts as to why Mr. Salvo would have been evading service and
24 whether he knew of any facts to help Plaintiffs better serve him. Mr. Osuna did not provide any
25 information in that regard. (Doc. 157, Szeto Decl. at ¶ 4.)

26 On November 4, 2019, Ms. Pooley traveled from San Francisco to Fresno, which took
27 four hours, and stayed overnight in a Fresno hotel. On the morning of November 5, 2019, Ms.
28 Pooley went to Esquire Deposition Solutions, the location for Mr. Salvo's noticed deposition.

1 Upon her arrival, Ms. Pooley was informed by the receptionist that the deposition was not on the
2 calendar and that Plaintiffs had cancelled the deposition on November 1, 2019, four days earlier.
3 Ms. Pooley then sent an email to Plaintiffs' counsel inquiring as to why Defendants had not been
4 advised that Mr. Salvo's deposition had been cancelled. Ms. Pooley then drove back to San
5 Francisco, which took four hours. (Doc. 156-1, Pooley Decl. at ¶ 15.)

6 Defendants now seek recovery of their reasonable expenses incurred on November 4 and
7 5, 2019, for defense counsel attending Mr. Salvo's deposition in the total amount of \$5,987.30
8 (costs and attorney's fees). Defendants also seek recovery for preparing the instant motion and
9 joint statement in the amount of \$2,540.00.

10 Plaintiffs oppose the request, arguing that defense counsel was on notice that the
11 deposition was not going forward as scheduled. Plaintiffs contend that counsel knew that Mr.
12 Salvo was not going to appear for his deposition for several reasons. First, Plaintiffs assert that
13 Defendants were aware that he would not attend because defense counsel refused to accept
14 service on his behalf. Second, Plaintiffs contend that defense counsel knew on October 31, that
15 Mr. Salvo was evading service and defense counsel reportedly made a statement to the court
16 reporter indicating her knowledge that Mr. Salvo's deposition would not proceed. In particular,
17 Plaintiffs point out that during Mr. Osuna's deposition on October 31, Plaintiffs' counsel asked
18 Mr. Osuna if he knew of any facts as to why Mr. Salvo was potentially evading service and
19 whether he had any better information to help them try and serve Mr. Salvo. (Doc. 157, Szeto
20 Decl. at ¶ 4.) At the conclusion of the deposition, Plaintiffs' counsel reportedly heard defense
21 counsel, Ms. Pooley, state to the court reporter, "I guess Tuesday's deposition is not going
22 forward." (*Id.*) Plaintiffs' counsel therefore asserts that she held a good faith belief Ms. Pooley
23 knew the deposition would not be going forward and she subsequently cancelled it. (*Id.*) Third,
24 Plaintiffs suggest that Defendants should not have assumed that Mr. Salvo would be served after
25 October 31 or over the weekend, and the decision to travel to his deposition and then request fees
26 defies common sense. (Doc. 156 at 9.)

27 **LEGAL STANDARD**

28 Federal Rule of Civil Procedure 30(g) provides, in relevant part, that "[a] party who,

1 expecting a deposition to be taken, attends in person or by an attorney may recover reasonable
2 expenses for attending, including attorney's fees, if the noticing party failed to: (1) attend and
3 proceed with the deposition; or (2) serve a subpoena on a nonparty deponent, who consequently
4 did not attend." Fed. R. Civ. P. 30(g). Further, sanctions may be imposed "on a person who
5 impedes, delays, or frustrates the fair examination of the deponent." Fed. R. Civ. P. 30(d)(2).
6 "What constitutes reasonable expenses and appropriate sanctions is a matter for the Court's
7 discretion." Jones v. Lehigh Sw. Cement Co., No. 1:12-cv-00633-AWI-JLT, 2014 WL 346619,
8 at *6 (E.D. Cal. Jan. 30, 2014) (citing Biovail Labs., Inc. v. Anchen Pharm., Inc., 233 F.R.D. 648,
9 654 (C.D. Cal. 2006)).

10 DISCUSSION

11 Plaintiffs noticed the deposition of Mr. Salvo for November 5, 2019, but they did not
12 serve him with a deposition subpoena and did not appear for his deposition. Plaintiffs formally
13 notified the court reporter that the deposition had been cancelled, but there is no indication that
14 Plaintiffs notified defense counsel that the deposition would not proceed. That defense counsel
15 may have been aware of Plaintiffs' difficulties in serving Mr. Salvo or that Ms. Szeto reportedly
16 overheard defense counsel state that she guessed the deposition was not going forward are not
17 sufficient notice. There is nothing before the Court indicating that Plaintiffs took any affirmative
18 steps to notify, or confirm with, defense counsel that the deposition would not proceed as
19 scheduled. Accordingly, the Court finds an award of reasonable expenses for attending the
20 deposition, including attorney's fees, is appropriate pursuant to Rule 30(g). Albee v. Continental
21 Tire North America, Inc., 780 F. Supp.2d 1005, 1013 (E.D. Cal. 2011) (finding an award of
22 reasonable costs, including attorney's fees appropriate, for last-minute cancellation of out-of-state
23 deposition).

24 Defendants' counsel declares that she incurred \$462.88 in expenses for hotel, meals,
25 mileage and bridge toll for travel between Fresno and San Francisco. (Pooley Decl. at ¶ 20.) The
26 Court finds that these costs are properly recoverable. Regarding attorney's fees, Defendants
27 incurred \$5,524.50 in attorney's fees as follows: (1) 8.0 hours travelling to and from Fresno at a
28 rate of \$635 per hour, and (2) .7 hours attending the deposition at a rate of \$635 per hour. (Id.)

1 Although the Court finds that the number of hours requested by Defendants are reasonable, the
2 hourly rate is not.

3 In determining a reasonable hourly rate, district courts are guided by the rate prevailing in
4 the community for similar work performed by attorneys of comparable skill, experience, and
5 reputation. See Chalmers v. Cty. of Los Angeles, 796 F.2d 1205, 1210-11 (9th Cir. 1986).

6 Generally, the hourly rate for competent and experienced attorneys in the Fresno Division of the
7 Eastern District is between \$250 and \$400, “with the highest rates generally reserved for those
8 attorneys who are regarded as competent and reputable and who possess in excess of 20 years of
9 experience.” Avila v. Cold Spring Granite Co., No. 1:16-cv-001533-AWI-SKO, 2018 WL
10 400315, at *10 (E.D. Cal. Jan. 12, 2018) (citation omitted); Freshko Produce Servs., Inc. v. Write
11 On Mktg., Inc., No. 1:18-cv-01703-DAD-BAM, 2019 WL 3798491, at *2 (E.D. Cal. Aug. 13,
12 2019), report and recommendation adopted, No. 1:18-cv-01703-DAD-BAM, 2019 WL 5390563
13 (E.D. Cal. Oct. 22, 2019); Phillips 66 Co. v. California Pride, Inc., No. 1:16-cv-01102-LJO-SKO,
14 2017 WL 2875736, at *16 (E.D. Cal. July 6, 2017), report and recommendation adopted, No.
15 1:16-cv-01102-LJO-SKO, 2017 WL 3382974 (E.D. Cal. Aug. 7, 2017) (finding an hourly rate of
16 \$400 reasonable for attorney with twenty years of relevant experience). The Court takes judicial
17 notice of the State Bar of California website, which shows that Ms. Pooley was admitted to
18 practice in 1993 and has more than twenty-five years of experience. Given this information, the
19 Court finds that a rate of \$400.00 is reasonable for the services of Ms. Pooley. With this hourly
20 rate, the attorney fees incurred by Defendants for Ms. Pooley’s attendance at the deposition total
21 \$3,480.00 (8.7 hours x \$400/hour).

22 Defendants also request an award of attorney's fees incurred in bringing the instant
23 motion. However, the Court declines to award fees beyond those expenses permitted by Rule
24 30(g).

25 **CONCLUSION AND ORDER**

26 Based on the foregoing, Defendants’ motion to recover reasonable expenses pursuant to
27 Federal Rule of Civil Procedure 30(g) is partially GRANTED. Plaintiffs’ counsel are directed to
28 pay Defendants their reasonable expenses, including attorney’s fees, in the amount of

1 \$3,942.88 (\$462.88 in costs and \$3,480.00 in attorney's fees) for attending the noticed deposition
2 of Rolando Salvo on November 5, 2019 in Fresno, California.

3
4 IT IS SO ORDERED.

5 Dated: December 18, 2019

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE

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