

CIRCUIT COURT OF THE STATE OF OREGON

FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 SW FOURTH AVENUE
PORTLAND, OR 97204-3123

STEPHEN K. BUSHONG
JUDGE

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April 9, 2009

Via Facsimile

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Re: Piazza v Keys, Case No. 0801-00911

Dear Counsel:

Plaintiff's motion for expenses pursuant to ORCP 46 C is granted. The court concludes that (1) defendants denied the matters requested in requests 1 and 2 of plaintiff's First Requests for Admission; and (2) thereafter, plaintiff proved the truth of the matters set forth in request 1 and the genuineness of the documents described in request 2. The requests were not previously held objectionable pursuant to ORCP 45 B or C, and the admissions sought in those requests were important in the context of this case. The court does not find that (1) defendants had reasonable ground to believe that they might prevail on the matters that were the subject of the requests; or (2) there were other good reasons for defendants' failure to admit those matters.

In *Valentine v. Equifax Info Servs. LLC*, 543 F Supp 2d 1232 (D Or 2008), Judge Jones declined to award expert witness expenses sought under Fed R Civ P 37 (c). However, the requests for admission at issue in *Valentine* broadly addressed issues going directly to defendant's liability in that case. *Id.* at 1237, n.4. Liability was disputed, and Judge Jones acknowledged in declining to award expenses that "the call is a close one[.]" *Id.* at 1237. Expenses may be awarded under Fed R Civ P 37 (c) even when liability is contested. *See, Marchand v. Mercy Medical Ctr.*, 22 F3d 933, 937 (9th Cir 1994) (affirming trial court's award where plaintiff was "put to the expense of proving negligence and causation" in disputed medical negligence case). Here, defendants disputed liability, but they did not dispute the matters set forth in requests 1 and 2. Defendants did not present any evidence demonstrating that they had reasonable grounds to believe that they might prevail on the matters set forth in those requests.

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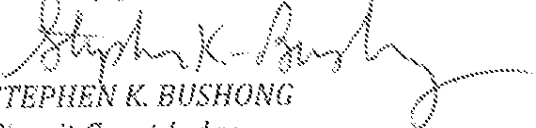
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Defendants offered no evidence or argument at trial to controvert plaintiff's proof on those matters. The court concludes under the circumstances that plaintiff is entitled to recover her expenses under ORCP 46 C.

With respect to the amount of expenses reasonably incurred in proving the matters set forth in the requests, defendants argue that the Nevada deposition costs incurred to establish the genuineness of the Nevada medical records should not be included because plaintiff would have incurred those expenses anyway in order to establish that the records qualified for admission under the business records exception to the hearsay rule. That may or may not be true, but given defendants' refusal to admit the genuineness of the records, it was reasonable and necessary for plaintiff's counsel to incur the cost of the deposition. Accordingly, the court concludes that the amount requested, \$12,377.50, represents reasonable expenses incurred by plaintiff in making the proof necessary to establish at trial the matters set forth in requests 1 and 2. The court further concludes that a supplemental judgment in that amount should be entered pursuant to ORCP 68. Mr. Vangelisti should submit a proposed form of order and supplemental judgment consistent with this letter ruling.

Sincerely yours,



STEPHEN K. BUSHONG
Circuit Court Judge

SKB:slh