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3:03-CV-00588 ESCALANTE V. USA  
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United States Attorney  
2 STEVEN J. POLIAKOFF  
Assistant U.S. Attorney,  
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4 880 Front Street, Room 6293  
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5 Telephone: (619) 557-7117  
6 Attorneys for Defendant  
United States of America

8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

11	EVELYN ESCALANTE,	)	Civil No. 03 CV 0588 LAB (NLS)
12	Plaintiff,	)	
13		)	
14	v.	)	OPPOSITION TO PLAINTIFF'S
15	UNITED STATES OF AMERICA,	)	MOTION TO RECONSIDER
16		)	BILL OF COSTS
17	Defendant.	)	

DATE: September 15, 2004  
TIME: 10:30 a.m.  
CTRM: 9

19 By Order entered April 13, 2004, the Court granted Defendant's Motion for Summary Judgment  
20 and dismissed Plaintiff's action. The Court ruled that Defendant was entitled to summary judgment  
21 because Plaintiff failed to designate an expert witness to support her claim of medical negligence; in  
22 addition, the Court noted that Defendant offered affirmative expert opinion that its health care providers  
23 met the standard of care.

24 Pursuant to Rule 54(d)(1), Fed. R. Civ. P. 28 U.S.C § 1920 and Local Rule 54.1, Defendant  
25 submitted its Bill of Costs which included the costs of Plaintiff's deposition and the copying of  
26 documents, totaling one thousand six hundred thirty-two dollars and twenty-five cents (\$1,632.25). In  
27 support of these costs, Defendant cited Alflex Corp. V. Underwriters Laboratories, Inc., 914 F.2d 175,  
28 177 (9th Cir. 1990), cert.denied, 112 S. Ct. 61 (1991) (the standard for determining whether a specific

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1 item should be taxed is whether it was “necessarily obtained for use in the case”) and Helms v. Wal-  
2 Mart Stores, Inc., 808 F. Supp. 1568, 1970-71 (N.D. Ga. 1992), aff’d, 998 F.2d 1023 (11th Cir. 1993)  
3 (the costs of a deposition are allowable even where the deposition transcript is not introduced at trial).

4 Following a hearing for taxation of costs in which Plaintiff, pro se, and counsel for Defendant  
5 appeared telephonically, the Court filed its Order Settling Costs on May 7, 2004 and awarded Defendant  
6 the \$1,632.25 detailed in Defendant’s Bill of Costs.

7 Plaintiff now appeals this Order and argues that:

8 1. The \$1,077.75, awarded for the deposition costs should not be allowed because it was  
9 unnecessary, not used for trial and should have been classified as “part of anticipated  
10 overhead of practicing law.”

11 2. The \$554.50 costs for exemplification and copies of papers necessarily obtained for  
12 use in the case was unreasonable because some of the documents were duplicated and  
13 medical records are free of charge.

14 3. Plaintiff argues that both she and her husband are “presently unemployed and unable  
15 to pay the costs for the reasons of unemployment and indigency.”

16 Regarding Plaintiff’s first argument, Defendant submits that the above referenced law establishes  
17 that the cost of the deposition is allowable regardless of whether it is introduced at trial. While Plaintiff’s  
18 deposition may not have been used in the summary judgment motion, it was necessarily obtained for use  
19 in the case. Thus, the Court should award \$1,077.75 to Defendant for the costs of Plaintiff’s deposition.

20 Plaintiff’s argument regarding the cost for copying of documents also fails. The cost to the  
21 United States to obtain copies of documents from Scripps Mercy Hospital and UCSD Hospital is detailed  
22 in Exhibit 2 to Plaintiff’s Motion to Reconsider and totals \$554.50. Plaintiff apparently misunderstands  
23 that obtaining these records from Scripps Mercy Hospital and UCSD Hospital required the expense  
24 of a copy service. In addition, Plaintiff fails to acknowledge that while the copies which she requested  
25 from the U.S. Attorney’s Office were provided to her at a significantly reduced cost per page, the costs  
26 to the United States were those of the copy service. Thus, the Court should award \$554.50 as costs for  
27 the exemplification and copies of papers.

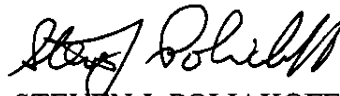
28 Finally, Plaintiff claims that she and her husband are “presently unemployed and unable to pay

1 the taxation of costs for the reasons of unemployment and indigency.” Defendant submits that the  
2 undersigned U.S. Attorney cautioned Plaintiff that if the United States prevailed in this action, Plaintiff  
3 could be subject to paying costs. (Declaration of Steven J. Poliakoff, Ex. 1, attached hereto.) Defendant  
4 further submits that Plaintiff has previously been employed as a bilingual secretary and can, therefore,  
5 be employed. (Ex. 2, attached hereto, p. 19, lines 24-25; p. 20, lines 1-16; p. p. 24, lines 14-16; p. 28,  
6 lines 4-6.) Finally, Defendant submits that the issue of whether the United States should be awarded  
7 costs is distinct from the issue of collection of any costs awarded. Plaintiff may address the latter issue  
8 when it arises.

9 For all the foregoing reasons, Defendant submits that the Court should deny Plaintiff’s Motion  
10 to Reconsider.

11  
12 DATED: September 3, 2004

CAROL C. LAM  
United States Attorney

  
STEVEN J. POLIAKOFF  
Assistant U.S. Attorney

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 2 STEVEN J. POLIAKOFF  
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 6 Attorneys for Defendant  
 United States of America  
 7

8 UNITED STATES DISTRICT COURT  
 9 SOUTHERN DISTRICT OF CALIFORNIA  
 10

11	EVELYN ESCALANTE,	)	Civil No. 03 CV 0588 LAB (NLS)
12	Plaintiff,	)	
13		)	
14	v.	)	DECLARATION OF
15	UNITED STATES OF AMERICA,	)	STEVEN J. POLIAKOFF IN
16		)	OPPOSITION TO PLAINTIFF'S
17	Defendant.	)	MOTION TO RECONSIDER AND
18		)	WAIVER OF COSTS
		)	DATE: September 15, 2004
		)	TIME: 9:00 a.m.
		)	CTRM: 9


19 I, Steven J. Poliakoff, do hereby declare as follows:  
 20 1. I am an Assistant United States Attorney in the Civil Division of the Office of the United  
 21 States Attorney for the Southern District of California.  
 22 2. In that capacity, I represented the United States in the above-captioned civil case brought by  
 23 Plaintiff pursuant to the Federal Tort Claims Act. I was directly responsible for all phases of the  
 24 litigation.  
 25 3. During the course of discovery, I informed Plaintiff that if Defendant should prevail in this  
 26 action, Plaintiff may be responsible for Defendant's costs.  
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EXHIBIT 1

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I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

DATED: 9/3/04

  
\_\_\_\_\_  
STEVEN J. POLIAKOFF  
Assistant U.S. Attorney





UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CERTIFIED COPY

EVELYN ESCALANTE, )

Plaintiff, )

vs. )

UNITED STATES OF AMERICA, )

(As Substituted Defendant Pursuant )

to 28 U.S.C. 2679 (d)) )

Defendant. )

Civil No.

03 CV 0588 K (NLS)

VOLUME I

Deposition of EVELYN ESCALANTE,  
taken at 101 West Broadway, Suite 1500,  
San Diego, California, commencing at  
9:00 A.M., Wednesday, October 29, 2003,  
before Teresa L. O'Beirne, CSR No. 6738

spher

EXHIBIT 2

1 A It's the elementary and then college.

2 Q When does elementary -- at what age do most  
3 people graduate elementary?

4 A Twelve years. From elementary, 12 years of  
5 age.

6 Q And then you go to college?

7 A And then I went to -- I went to another  
8 school for a year, -that could be high school, for one  
9 year. And then I went to college for four years.

10 Q So you went to college when you were 13  
11 years old?

12 A No, like 14.

13 Q And --

14 A I graduated on 19 -- 1971.

15 Q And what was your date of birth, ma'am?

16 A January 12th, 1955.

17 Q And where were you born?

18 A I was born in Hermosillo, Mexico.

19 Q Would you spell that, please?

20 A H-E-R-M-O-S-I-L-L-O, Sonora, S-O-N-O-R-A,  
21 Mexico.

22 Q Where did you go to college?

23 A In Hermosillo.

24 Q And what did you study?

25 A What did I study? Bilingual secretary.

1 Q And what are the languages that you speak?

2 A English and Spanish.

3 Q What does a bilingual secretary do?

4 A Take shorthand in English and in Spanish, do  
5 typing in English and in Spanish. And, in fact, I was  
6 graduated in Ensenada, Mexico because we had to move from  
7 that city to Ensenada, Mexico so I ended up graduating in  
8 Ensenada. It was a transfer. I transferred from one  
9 school to another.

10 Q Would it be fair to say that you're fluent  
11 in both Spanish and English?

12 A Yes, I take shorthand in English and in  
13 Spanish. I type English and in Spanish. I was a  
14 secretary in Mexico. I worked for the American consulate  
15 in Tijuana. I have always been bilingual in Mexico and  
16 here, too.

17 Q Have you had any other education?

18 A Here in the United States?

19 Q Yes.

20 A I have gone to school. Long time ago.  
21 Because I came here in 1976, I was an illegal alien then.  
22 I went to school for electronic assembly here in  
23 downtown. I got a certificate. I started working in 1976  
24 at the Van Camp Foods.

25 Q What was that?

1 Q And how long did you work for them?

2 A I work only seven months because the pay  
3 wasn't good. It wasn't worth the time of going to school  
4 for the minimum wage and I never made the minimum wage. I  
5 was always overpaid for my qualifications.

6 So that was the worst job I ever had so I  
7 had to quit. And then what did I do? Then I went back to  
8 Mexico because I was illegal. And I started working for  
9 the American consulate. It was like 1982, from 1982 to  
10 1983. It was about a year that I worked for the American  
11 consulate.

12 And then I was married at that time to Tony  
13 Diaz so he filed for my immigration and I was a legal  
14 resident then so I came back to the United States. And I  
15 started working for Delimex in 1985 as bilingual  
16 secretary. I was in charge of the accounting, payroll,  
17 shipping and receiving. I was doing everything for the  
18 company.

19 Q Okay, let's back up for a minute. You said  
20 you left work, you left the electronic assembly company in  
21 '78 or '79?

22 A Uh-huh. Yes.

23 Q Okay. And then you went back to Mexico --

24 A I went back to Mexico.

25 Q -- in 1978, '79?

1 A No.

2 Q Were you fired?

3 A No.

4 Q While you were at Delimex you worked as a  
5 bilingual secretary?

6 A Yes.

7 Q And you were in charge of --

8 A Payroll, shipping and receiving.

9 Q And what was your salary at Delimex?

10 A Starting or ending?

11 Q Starting and finishing.

12 A Starting, \$5 an hour. And my ending salary  
13 was \$15 an hour.

14 Q What prompted you to go back to school?

15 A I just didn't like working there anymore. I  
16 wasn't going any farther, you know. I was on the top of  
17 what I could get in that company so there was no need for  
18 me to stay there. There was no more learning, no more  
19 money.

20 I was working so many hours. The owner took  
21 advantage of my knowledge over there so they didn't hire  
22 any other people. I was doing a lot of work on my own,  
23 taking vacations and coming back and doing all my stuff on  
24 weekends after work. And I gave them a lot of time, you  
25 know, and it wasn't worth it.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

EVELYN ESCALANTE,	)	CIVIL NO. 03CV0588-K(NLS)
	)	
Plaintiff,	)	CERTIFICATE OF SERVICE
	)	BY MAIL (Fed Ex)
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	
STATE OF CALIFORNIA	)	SS.
	)	
COUNTY OF SAN DIEGO	)	

IT IS HEREBY CERTIFIED that:

I, Eileen Williams, am a citizen of the United States over the age of eighteen years and a resident of San Diego County, California; my business address is Office of the U.S. Attorney, Federal Office Building, 880 Front Street, Room 6293, San Diego, California 92101-8893; I am not a party to the above-entitled action; and

On September 3, 2004, I deposited in Federal Express mailbox at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of:

**OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER BILL OF COSTS**

addressed to:

EVELYN ESCALANTE  
162 ZENITH STREET  
CHULA VISTA, CA 91911

the last known address at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in San Diego, California on September 3, 2004.

  
EILEEN WILLIAMS