

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

CELIA VALDEZ, *et al.*,

Plaintiffs,

v.

DIANNA J. DURAN, *et al.*,

Defendants.

CIVIL ACTION NO. 1:09-cv-668 JCH/DJS

**PLAINTIFF'S AND DEFENDANTS' JOINT RESPONSE  
TO ORDER TO SHOW CAUSE**

Plaintiff Shawna Allers and Defendants HSD and Secretary of State Duran respectfully submit the following response to the Court's February 3, 2011, Order to Show Cause [Doc. 142].

As the Court is aware, the parties have agreed in principle to a consent order that would eliminate the need for trial. The parties did not appear at the pre-trial conference set for Thursday, February 3, because it was their understanding, based on their telephone call to the Court on Monday, January 31, that the pre-trial conference was being continued. On Thursday, February 3, in the afternoon, the parties learned from this Court's Order, as well as from the Clerk's Minutes [Doc. 143], that they were mistaken, i.e., the pre-trial conference in fact had not been continued. Counsel regret and apologize for the misunderstanding and for the resulting inconvenience to the Court. Counsel take their responsibility to meet the Court's schedule with the utmost seriousness and would have appeared or made further inquiry had there been any question in their mind as to the status of the pre-trial conference.

The parties understand that scheduling issues must be addressed in writing. Accordingly, the parties are now filing, contemporaneous with this response, a joint motion for continuance of

the trial date. The parties remain committed to settlement and anticipate that a proposed consent order will be submitted shortly to this Court for the Court's approval.

In further explanation for what occurred, the parties wish to provide the following additional background information. Plaintiff and Defendants have engaged in serious and extensive settlement negotiations over the past two weeks. As a result of the settlement conference conducted by Judge Svet on Wednesday, January 26, 2011, and further settlement discussions conducted by telephone on Friday, January 28, the parties reached an agreement in principle as to the terms of a consent order. In particular, on Friday, January 28, counsel for Plaintiff and for HSD discussed each paragraph of a prior written proposal made by Plaintiff, and reached agreement on the substance of the terms to be included in a consent order. As required by Judge Svet, the parties then contacted his chambers that same afternoon to inform him of this agreement in principle. It was counsel's understanding that Judge Svet sought a response by Friday, January 28, in order to apprise the Court as to whether a February 14 trial was needed. Plaintiff's counsel worked that Friday and over the weekend to incorporate the agreed terms into a written draft, which was forwarded to Defendants' counsel on Monday, January 31, for counsel to review and discuss with their clients.

Also, on Monday afternoon, counsel for Plaintiff (Mark Posner) and Defendant HSD (Elaine Lujan) jointly telephoned chambers and spoke to Ms. Williams. Counsel represented that they hoped to settle the case this week and indeed hoped to be able to forward a proposed consent order prior to the scheduled pre-trial conference; with regard to the latter point, however, counsel also recall indicating that it was not certain that the agreement would be forwarded by then (since Defendants were still reviewing Monday's written proposal). Counsel inquired whether, in light of the positive developments with regard to settlement, it would be possible to

conduct a telephonic status conference with the Court instead of, and at the time of, the scheduled pre-trial conference, but were informed that this could not be done. Counsel then inquired whether the pre-trial conference was being continued and counsel understood the response to be that the pre-trial conference would be continued. Counsel subsequently conveyed this information to their co-counsel (see Exhibit A).

Since Monday, Defendants' counsel have reviewed the proposed written agreement and have consulted with their clients; this process has been slowed by the closure of state government on Thursday afternoon and Friday, February 3 and 4. Defendants expect to be able to respond to Plaintiff no later than Tuesday, February 8 (unless further closures of state government occur), at which time the parties fully anticipate that any remaining issues will be resolved.

On Thursday, February 3, shortly after receiving the Court's Order to Show Cause, counsel for Plaintiff (Mark Posner) telephoned Ms. Williams to inquire about the Order. Counsel apologized for the miscommunication that had occurred and explained that it was the parties' understanding that the pre-trial conference had been continued. Ms. Williams explained that it was her understanding from the call that while Counsel were proceeding toward settlement and were requesting a status conference, ultimately the pre-trial conference remained on the Court's calendar.

In sum, counsel for both Plaintiff and Defendants believed in good faith that the pre-trial conference was being continued. In these circumstances, the parties respectfully submit that it would not be appropriate to order sanctions based on their failure to appear at the scheduled pre-trial conference.

Respectfully submitted this 4<sup>th</sup> day of February, 2011.

On behalf of Plaintiff Shawna Allers:

s/ Mark A. Posner

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