

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

CELIA VALDEZ, *et al.*,

Plaintiffs,

v.

MARY HERRERA, *et al.*,

Defendants.

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

**PLAINTIFFS' MOTION FOR SANCTIONS**  
**AGAINST THE OFFICE OF THE SECRETARY OF STATE**

Plaintiffs noticed the Rule 30(b)(6) deposition of the office of Defendant Mary Herrera, the New Mexico Secretary of State (the "Secretary") on four (4) separate occasions and Plaintiffs' counsel traveled to New Mexico three (3) times, on noticed and agreed upon dates, in attempts to conduct that deposition. *See* Declaration of Allegra Chapman ("Chapman Decl."), attached hereto as Exhibit 1, at ¶ 1 and Declaration of Yolanda Sheffield ("Sheffield Decl."), attached hereto as Exhibit 2, at ¶ 1. The Secretary's self-designated "person most knowledgeable" concerning the deposition topics twice failed to appear for the Secretary's properly-noticed deposition – first, on February 23, 2010 and second, on May 6, 2010. Chapman Decl. at ¶¶ 6-7, 19, 22; Sheffield Decl. at ¶¶ 6-7, 19, 22. Although, on each occasion, the deposition was scheduled in consultation with the Secretary's counsel pursuant to the witness' availability, nevertheless, the February 23, 2010 deposition was canceled at the eleventh hour on the afternoon before the deposition – while Plaintiffs' counsel were en route to New Mexico. The May 6, 2010 deposition was not canceled at all – rather the witness simply failed to appear

at the agreed upon and noticed time, apparently without even providing notice to the Secretary's counsel.

Following the deponent's failure to appear on May 6, 2010, Plaintiffs noticed the Secretary's Rule 30(b)(6) deposition for the fourth time. Chapman Decl. at ¶ 28; Sheffield Decl. at ¶ 28. Based on the Secretary's pattern of failure to appear, Plaintiffs were forced to move to compel the deposition. *See* Motion to Establish a Revised Litigation Schedule and Compel Discovery [Docket No. 59]. The Court granted that Motion. Order [Docket No. 63] at 2-3 (granting Plaintiffs' Motion to Compel 30(b)(6) deposition of Secretary of State). Pursuant to Fed. R. Civ. P. 37, Plaintiffs are entitled to their reasonable fees and costs associated with the Secretary's repeated failure to produce a deponent, including Plaintiffs' fees and costs in preparing the Motion to Compel and this Motion for Sanctions.

#### **I. FACTUAL BACKGROUND**

Beginning in February 2010, Plaintiffs diligently sought the deposition of the person most knowledgeable in the Secretary's office concerning the Secretary's administration of the National Voter Registration Act of 1993 ("NVRA") in the State of New Mexico.<sup>1</sup> That deposition was a critical piece of discovery with respect to: (1) Plaintiffs' claims against the Secretary; (2) Plaintiffs' claims against the other Defendants as the Secretary has statutorily defined oversight of voter registration at the Defendant Human Services Department's ("HSD") public assistance offices and the Defendant Taxation and Revenue Department's ("TRD") motor vehicle offices; and (3) Defendants' defenses to those claims.

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<sup>1</sup> The Secretary of State finally produced a Rule 30(b)(6) deponent, and his deposition was taken, on May 26, 2010.

**First Notice of The Secretary's Deposition –The Black Widow Spider**

Plaintiffs first reached an agreement with the Secretary's counsel to take the Secretary's Rule 30(b)(6) deposition on February 23, 2010 at 9 a.m. in Albuquerque. Chapman Decl. at ¶ 2, Sheffield Decl. at ¶ 2. The Secretary did not serve any objections to the February 23, 2010 notice or to the subsequent three notices, for which the topics were identical and for which only the date was changed. *Id.* The Secretary self-designated Larry Dominguez as its person most knowledgeable concerning the Secretary's compliance with the NVRA. Chapman Decl. at ¶ 4, Sheffield Decl. at ¶ 4.

Plaintiffs' counsel with responsibility for taking the deposition, Ms. Yolanda Sheffield and Ms. Allegra Chapman are located in Washington, DC and New York, NY respectively. Accordingly, for this noticed deposition, Plaintiffs' counsel traveled to New Mexico on February 22, 2010. Chapman Decl. at ¶ 5, Sheffield Decl. at ¶ 5. On February 22, 2010, while Plaintiffs' counsel were en route to Albuquerque, the Secretary's counsel notified Plaintiffs' co-counsel that Mr. Dominguez had been bitten by a black widow spider and would not appear for the deposition. *Id.* The Secretary failed to produce a substitute designee, the deposition was not taken, and Plaintiffs' counsel returned home after conducting depositions of other Defendants. Chapman Decl. at ¶ 6-7, Sheffield Decl. at ¶ 6-7. Due to the belated notice of the deponent's spider bite and the Secretary's failure to produce a substitute designee, no other depositions could be scheduled for February 23 and unnecessary fees and costs were incurred, including an otherwise unnecessary February 22 hotel stay and at least a portion of Plaintiffs' counsels' time spent preparing for the Secretary's deposition, as that preparation had to be refreshed with each attempt to take the deposition. Chapman Decl. at ¶ 7-9, Sheffield Decl. at ¶ 7-9.

**Second/Third Notices of Deposition – The Motion for Protective Order and  
The Secretary’s Designee Calls In Sick**

As a result of the reported black widow spider attack and the Secretary’s failure to provide a substitute designee, Plaintiffs were forced reschedule the deposition for April 2, 2010. Chapman Decl. at ¶ 12, Sheffield Decl. at ¶ 12. When Defendant Hyde cancelled the HSD depositions that were to be taken during the same trip, filing an unsuccessful Motion for Protective Order, the Secretary’s deposition was consequently postponed. *See* Defendant HSD’s Motion for Protective Order to Limit Depositions and Request For Expedited Hearing [Docket No. 43]. After Defendant Hyde’s Motion for Protective Order was summarily denied as without merit on April 9, 2010, Plaintiffs reached an agreement with the Secretary’s counsel to reschedule the Secretary’s Rule 30(b)(6) deposition for May 6, 2010 at 1 p.m. Memorandum Opinion and Order [Docket No. 47] (denying HSD’s Motion for Protective Order); Chapman Decl. at ¶ 13-14, Sheffield Decl. at ¶ 13-14.

On April 30, 2010, the Friday before the May 6, 2010 deposition was scheduled to take place, the Secretary’s counsel contacted Plaintiffs’ counsel and requested that the deposition be moved from Albuquerque to Santa Fe to accommodate his schedule. Chapman Decl. at ¶ 15, Sheffield Decl. at ¶ 15. Though the change in location inconvenienced Plaintiffs’ counsel and necessitated additional driving time, Plaintiffs nevertheless agreed to accommodate the Secretary’s counsel’s request. *Id.*

Ms. Chapman flew to New Mexico for the second time to conduct depositions of other Defendants in Las Cruces and for the Secretary’s Rule 30(b)(6) deposition to occur immediately thereafter. Chapman Decl. at ¶¶ 16-17. Ms. Sheffield traveled to New Mexico primarily for the purpose of attending the Secretary’s deposition and did not participate in the Las Cruces depositions. Sheffield Decl. at ¶¶ 16-17. Immediately following the Las Cruces depositions,

Plaintiffs' counsel drove to Santa Fe (approximately 100 miles further than Albuquerque) for the sole purpose of conducting the Secretary's Rule 30(b)(6) deposition. Chapman Decl. at ¶18, Sheffield Decl. at ¶ 18.

Plaintiffs' counsel and the court reporter timely arrived for the scheduled deposition at 1 p.m. on May 6, 2010. The Secretary's counsel arrived several minutes late only to inform Plaintiffs' counsel for the first time that the Secretary's designated deponent, Mr. Dominguez, had called in sick to work without notifying the Secretary's counsel and thus would not appear for the scheduled deposition. Chapman Decl. at ¶ 19, Sheffield Decl. at ¶ 19. In light of their travel to Santa Fe for the explicit purpose of deposing the Secretary's Rule 30(b)(6) designee, Plaintiffs' counsel inquired about Mr. Dominguez's availability for deposition the following morning. Chapman Decl. at ¶ 20, Sheffield Decl. at ¶ 20. Throughout the afternoon of May 6, Plaintiffs' counsel remained in Santa Fe waiting to hear back from the Secretary's counsel regarding Mr. Dominguez's availability. Chapman Decl. at ¶ 20-23, Sheffield Decl. at ¶ 20-23. At approximately 6:00 p.m., the Secretary's counsel advised Plaintiffs' counsel that Mr. Dominguez could not be located. Chapman Decl. at ¶ 21, Sheffield Decl. at ¶ 21. Plaintiffs' counsel accordingly left Santa Fe and returned home the following day, which was the next available flight. Chapman Decl. at ¶ 22, Sheffield Decl. at ¶ 22. As a direct result of the Secretary's failure to produce a deponent on this second occasion, Plaintiffs incurred substantial unnecessary fees and costs, including travel time to, and an additional two nights' hotel stay in, Santa Fe. Chapman Decl. at ¶ 25-27, Sheffield Decl. at ¶ 25-27. Plaintiffs' counsel also incurred unnecessary fees refreshing their preparation for the deposition. The Secretary's counsel apparently empathized – telling Plaintiffs' counsel that “he would understand” if they filed a motion for sanctions. Chapman Decl. at ¶ 24, Sheffield Decl. at ¶ 24.

**Fourth Notice of Deposition – Secretary’s Designee Is “AWOL” and  
Order Compelling the Deposition**

On May 14, 2010, following several unreturned messages to the Secretary’s counsel attempting to reschedule the Secretary’s Rule 30(b)(6) deposition, Plaintiffs served their fourth Rule 30(b)(6) deposition notice setting the deposition for May 26. *See* Sheffield Decl. at ¶ 32 and Exhibit G thereto. Several days later, on May 18, 2010, in response to Plaintiffs’ counsel’s e-mails attempting to confirm the May 26 deposition, the Secretary’s counsel informed Plaintiffs’ counsel that the Secretary’s designee, Mr. Dominguez, was no longer employed by the Secretary’s office and that he reportedly “went AWOL on them last week.” *See* Sheffield Decl. at ¶ 33 and Exhibit H thereto. The Secretary’s counsel stated that a substitute designee had been identified and would be brought up to speed. *Id.*

Lacking any confidence that the Secretary would, in fact, produce a reliable and knowledgeable deponent to testify at this late juncture following two failed previous attempts and seeking to avoid additional unnecessary travel expenses and fees, Plaintiffs filed a Motion to Compel to ensure that the deposition would finally take place. *See* Motion to Establish a Revised Litigation Schedule and Compel Discovery [Docket No. 59]. The Court granted Plaintiffs’ Motion to Compel on May 19. *See* Order [Docket No. 63] (granting Motion to Compel deposition).

**II. ARGUMENT**

Rule 30(b)(6) delineates an “affirmative duty” to produce a representative who can answer questions that are both within the scope of the matters described in the notice and are known or reasonably available to the noticed entity. *See King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (“Rule 30(b)(6) obligates the responding corporation to provide a witness who can answer questions regarding the subject matter listed in the notice”). Fed. R.

Civ. P. 37(d) provides that when a party or a person designated to testify under Rule 30(b)(6) fails to appear the Court **must** award reasonable expenses, including attorney's fees. Rule 37 provides, in relevant part, that:

**the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure,** unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(d)(3) (emphasis added); *Bank of N.Y. v. Meridien BIAO Bank Tanz., Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997) (“the [c]ourt can impose sanctions where a party or person designated under Rule 30(b)(6) fails ‘to appear’”). *See also* Fed. R. Civ. P. 37(b)(2) (permitting the court to make such orders as are “just” and/or impose sanctions where the party or person designated under Rule 30(b)(6) “fails to obey an order to provide or permit discovery”).

Sanctions for failure to appear at a Rule 30(b)(6) deposition can range from an award attorney's fees and costs up to dismissal or default. *See Republic of the Phil. v. Marcos*, 888 F.2d 954 (2d Cir. 1989) (sanction of dismissal for failure of corporate plaintiff to present two witnesses for deposition was proper). In addition, fees and costs shall be awarded where a party's failure to respond to discovery requests, including properly noticed depositions, requires a motion to compel. *See DIRECTV, Inc. v. Penrod*, No. CIV-03-0054, 2005 WL 3663518, at \*2 (D.N.M. Oct. 24, 2005) (award of fees and costs warranted where party is forced to obtain discovery through a motion to compel); *Applied Capital, Inc. v. Gibson*, No. CIV-05-0098, 2007 WL 709054, at \*1-2 (D.N.M. Jan. 30, 2007) (awarding fees and costs where a party failed to appear for its deposition necessitating motion to compel).

There is no dispute that the Secretary had an obligation to produce a reliable and knowledgeable designee in response to the properly-issued Rule 30(b)(6) deposition notices. Indeed, the Court ordered the Secretary to produce such a designee for deposition. *See Order*

[Docket No. 63]. There also can be no dispute that the Secretary repeatedly failed to comply with its Rule 30(b)(6) obligations. If Mr. Dominguez, the Secretary's self-designated deponent, was sick or unable to appear, the Secretary had an obligation to produce a substitute designee in his place or to notify Plaintiffs in a timely fashion so as to avoid unnecessary fees and costs. The fact that Mr. Dominguez was unable to testify on at least three (3) occasions because he reportedly: 1) was bitten by a spider; 2) was sick; and 3) was absent without leave from the Secretary's office, suggests that Mr. Dominguez was not a reliable deponent and that the Secretary should have designated another deponent or, at minimum, a back-up deponent.<sup>2</sup> The fact that the Secretary was, when ordered by the Court, able to produce another deponent, on May 26, suggests that such a deponent was available all along, and should have been designated and appeared long ago.

Accordingly, Plaintiffs are entitled to an award of sanctions against the Secretary in the amount of attorneys' fees and costs Plaintiffs reasonably incurred, preparing for, traveling to, and attempting to attend the repeatedly-cancelled deposition. Plaintiffs are also entitled to recover their reasonable fees in bringing the Motion to Compel the deposition.<sup>3</sup> Indeed, the Secretary's own counsel stated that he would "understand" if Plaintiffs sought such sanctions. Chapman Decl. at ¶ 24, Sheffield Decl. at ¶ 24. Moreover, the fact that Plaintiffs' counsel are working on a pro bono basis and have not been compensated by Plaintiffs does not prevent an award of fees here. *See Martinez v. Roscoe*, 100 F.3d 121, 124 (10th Cir. 1996) (awarding attorneys' fees as

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<sup>2</sup> The fact that Mr. Dominguez was allegedly the Secretary's "person most knowledgeable" regarding the State's compliance with the NVRA is indicative of the State's significant failures to comply with that statute and the basis of Plaintiff's claims.

<sup>3</sup> Plaintiffs will not "double dip" in their request for reasonable fees and costs. To the extent Plaintiffs are awarded their reasonable fees and costs sought in this Motion, Plaintiffs will not seek those fees and costs again if they are ultimately successful on their claims and awarded fees either under the NVRA or pursuant to a settlement agreement.

sanction over objection that attorneys served pro bono and were not paid by a party); *Hornal v. Schweiker*, 551 F. Supp. 612, 616 (M.D. Tenn. 1982) (awarding attorneys' fees to pro bono legal services organization).

**Computation of Fees and Costs Incurred by Counsel**

Counsel for Plaintiffs, Ms. Chapman and Ms. Sheffield, traveled from New York, New York, and Washington, DC respectively, to New Mexico to take the Secretary's scheduled February 23 and May 6 depositions. Ms. Chapman and Ms. Sheffield spent substantial time traveling to, and preparing for, both depositions. Ms. Chapman and Ms. Sheffield also incurred unnecessary travel costs on each occasion – including unnecessary additional nights in hotels and additional days of car rental as detailed in their attached Declarations. Chapman Decl. at ¶¶ 7-10, 25-27, Sheffield Decl. at ¶¶ 7-10, 25-27.

Costs associated with travel, including non-duplicative air fare (such as Ms. Sheffield's May 6 trip, where Ms. Sheffield was not in New Mexico take other depositions), car rental, hotel, and meals for the February 23 and May 6 depositions are approximately \$1,987.09. Chapman Decl. at ¶¶ 8, 27, Sheffield Decl. at ¶¶ 8, 27. Ms. Chapman's hourly rate is \$550. Chapman Decl. at ¶ 10. Ms. Chapman spent a total of 12.4 hours, preparing for, traveling to, and attempting to attend these depositions and preparing the Motion to Compel for a total of \$6,820. Chapman Decl. at ¶¶ 10, 25-26, 31. Ms. Sheffield's hourly rate is \$490. Sheffield Decl. at ¶ 10. Ms. Sheffield spent a total of 31.5 hours, preparing for, traveling to, and attempting to attend these depositions and preparing the Motion to Compel for a total of \$15,435. Sheffield Decl. at ¶¶ 10, 25-26, 31. The Court thus "must" award Plaintiffs their fees and costs as a sanction

pursuant to Rule 37 and should award same in the amounts reasonably requested here. Plaintiffs also request their fees incurred in the preparation of this Motion for Sanctions.<sup>4</sup>

### III. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court sanction the Defendant Secretary of State in the amount of \$24,242.09 for unnecessary fees and costs Plaintiffs reasonably incurred in scheduling, preparing for, traveling to, and attending the February 23 and May 6 depositions as well as in preparing the Motion to Compel the deposition. In addition, Plaintiffs requests their fees and costs in preparing this Motion for Sanctions, in an amount to be submitted to the Court following completion of briefing.

RESPECTFULLY SUBMITTED this 15th day of July, 2010.

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<sup>4</sup> For ease of the Court, and to avoid provision of updated totals, Plaintiffs' counsel will provide a single Declaration concerning their fees incurred in bringing this Motion upon completion of briefing and preparation for any oral argument ordered.

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**CERTIFICATE OF SERVICE**

I certify that on the 15th day of July, 2010, I served the foregoing by electronic means, on:

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