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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

9 Leslie A. Merritt, Jr.,

10 Plaintiff,

11 v.

12 State of Arizona; Maricopa County; Bill
13 Montgomery, Maricopa County Attorney;
14 Heston Silbert; Christopher Kalkowski;
15 Frank Milstead; Ken Hunter; Kelley Heape;
16 Jennifer Pinnow; and Anthony Falcone,

17 Defendants.

No. CV-17-04540-PHX-DGC

ORDER

18 This action arises out of Plaintiff's arrest, incarceration, and attempted prosecution
19 for the much-publicized I-10 freeway shootings. Plaintiff asserts multiple claims for
20 relief, including false arrest, false imprisonment, malicious prosecution, negligence,
21 intentional infliction of emotional distress, and aiding and abetting. Doc. 8. Defendants
22 have filed motions for summary judgment. Docs. 63, 65. Plaintiff has filed motions for
23 additional time to conduct discovery pursuant to Federal Rule of Civil Procedure 56(d).
24 Docs. 82, 83. The Court will grant Plaintiff's motions.¹

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26 ¹ Plaintiff failed to comply with the requirement set forth in the Case Management
27 Order that he place a joint conference call to the Court to discuss whether additional
28 discovery is warranted. Doc. 45 ¶ 12. Because Plaintiff addressed the relevant issues in
his written motions, however, the Court finds a conference call unnecessary. In the
future, counsel should follow the Court's orders more carefully.

1 Rule 56(d) grants the Court discretion to deny a motion for summary judgment in
2 order to allow more time for discovery where the opposing party “shows by affidavit or
3 declaration that, for specified reasons, it cannot present facts essential to justify its
4 opposition[.]” When making a Rule 56(d) determination, the Court should consider
5 “whether the parties have diligently conducted discovery prior to the Rule 56(d) motion,
6 whether they complied with the procedural requirements of the Rule, and whether
7 further discovery would aid the party opposing summary judgment or merely delay the
8 proceedings.” *Roosevelt Irrigation Dist. v. Salt River Project*, No. 2:10-CV-290-DAE
9 (BGM), 2016 WL 3613278, at *2 (D. Ariz. Feb. 2, 2016).

10 In this case, there is no dispute that Plaintiff has diligently conducted discovery
11 prior to filing the Rule 56(d) motion. *See* Doc. 88 at 3. Plaintiff has obtained nearly
12 500,000 pages of discovery from Defendants and has taken more than a dozen
13 depositions.

14 Plaintiff also has complied with the procedural requirements of Rule 56(d) by
15 submitting declarations of counsel specifically stating the need for further fact discovery
16 to adequately respond to the summary judgment motions. Docs. 82-1, 83-1. With
17 respect to the State Defendants’ motion, Plaintiff seeks to conduct discovery regarding
18 the DPS crime lab, DPS law enforcement personnel, and the Maricopa County Attorney’s
19 Office personnel. Doc. 82-1 ¶ 3. For the motion filed by the County Defendants,
20 Plaintiff intends to depose Mr. Montgomery, Deputy County Attorneys, and other County
21 employees with relevant knowledge. Doc. 83-1 ¶ 3. The depositions of former
22 defendants Edward Leiter and Vanessa Lossico are noticed for June 26, 2018, and the
23 deposition of County Attorney Keith Manning is noticed for the following day. Doc. 94
24 at 4. Counsel describes with sufficient particularity the facts he expects to learn from the
25 anticipated discovery, and avows that those facts are essential to oppose summary
26 judgment. Docs. 82-1 ¶¶ 4-12, 83-1 ¶¶ 4-8. Counsel further states that additional time is
27 needed to prepare declarations from expert witnesses regarding firearms examinations,
28 crime lab operations, and prosecutorial and police procedures. *Id.* ¶¶ 13, 9.

1 The State Defendants’ motion seeks summary judgment for seven individuals on
2 all ten claims asserted in the complaint. Doc. 63. The statement of facts includes more
3 than 60 separate paragraphs and exhibits spanning some 700-plus pages. Doc. 64. The
4 County Defendants have joined the State Defendants’ motion, and separately seek
5 summary judgment on similar grounds. Docs. 65, 71. The parties disagree on the scope
6 of facts required to address the probable cause and immunity inquiries.

7 The Court cannot conclude that the additional discovery sought by Plaintiff will
8 shed no light on those issues or other issues raised by the summary judgment motions.
9 *See Jones v. Blanas*, 393 F.3d 918, 930 (9th Cir. 2004) (noting that “summary judgment
10 in the face of requests for additional discovery is appropriate only where such discovery
11 would be ‘fruitless’ with respect to the proof of a viable claim”); *Nyland v. Rooke, LLC*,
12 No. 2:15-cv-01670 JWS, 2016 WL 649072, at *2 (D. Ariz. Feb. 18, 2016) (“While it is
13 proper for a court to deny a Rule 56(d) application ‘where it is clear that the evidence
14 sought is almost certainly nonexistent or is the object of pure speculation,’ here the court
15 cannot conclude that such facts are clearly nonexistent[.]” (quoting *Terrell v. Brewer*, 935
16 F.2d 1015, 1018 (9th Cir. 1991)). The Court will grant Plaintiff’s Rule 56(d) motions
17 and deny the summary judgment motions without prejudice to their refileing
18 after discovery has been completed.

19 Defendants’ various arguments do not require a different result. The County
20 Defendants ask the Court to construe Plaintiff’s Rule 56(d) motion as a response to
21 Defendants’ summary judgment motion because it includes arguments as to why
22 summary judgment should be denied. Doc. 88 at 1-2. Defendants cite no legal authority
23 in support of this request. The mere fact that Plaintiff addressed certain summary
24 judgment issues in his motion is no basis for converting it into a response brief.

25 Defendants contend that the Rule 56(d) motion should be denied because Plaintiff
26 lacks the evidence necessary to preclude summary judgment. *Id.* at 3. They assert that
27 “Rule 56 requires what Plaintiff cannot show – genuine issues of material fact,” and yet
28 in the same breath assert that “Plaintiff does not need more time so that he can ‘present

1 all the facts essential to justify his opposition.” *Id.* The very purpose of Rule 56(d) is to
2 allow a party sufficient time to take discovery so that he may present facts essential to his
3 opposition. Fed. R. Civ. P. 56(d)(2); *see Choquette v. Warner*, No. 3:15-CV-05838-
4 BHS-JRC, 2017 WL 773670, at *3 (W.D. Wash. Feb. 27, 2017) (granting Rule 56(d)
5 request without limiting the scope of discovery to ensure that the court was “provided
6 with a complete and accurate record prior to ruling on a motion for summary judgment”).

7 Defendants further contend that Plaintiff has had ample time to conduct discovery
8 and did not object to the filing of an early summary judgment motion at the case
9 management conference. Docs. 88 at 7-8, 90 at 8-9. But Defendants cite no authority
10 suggesting that the lack of an objection constitutes a waiver of the right to seek
11 Rule 56(d) relief once a summary judgment motion is filed. Moreover, the Case
12 Management Order sets a September 7, 2018 discovery deadline, a date proposed by
13 Defendants. Docs. 32 at 16, 45 at 2. The filing of an early summary judgment motion
14 did not change this deadline or require Plaintiff to complete discovery in time to file a
15 response.

16 Defendants claim that their right to immunity will be compromised if Plaintiff is
17 permitted to conduct further discovery. Doc. 88 at 2-3. But the purpose of the immunity
18 doctrine is to ensure that “‘insubstantial claims’ against government officials be resolved
19 prior to discovery and on summary judgment if possible.” *Anderson v. Creighton*, 483
20 U.S. 635, 640 n. 2 (1987); *see Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (same).
21 Where, as in this case, “there is a dispute as to both the reasonableness of the official’s
22 actions and the factual characterization of those actions, discovery as to the issue of
23 qualified immunity [is] necessary.” *Choquette*, 2017 WL 773670, at *2 (citing *Anderson*,
24 483 U.S. at 646 n.6); *see Ngerntongdee v. Vaughn*, No. C08-1070RSM, 2008 WL
25 5000244, at *3 (W.D. Wash. Nov. 21, 2008) (noting that qualified immunity principles
26 “do not suggest that courts should make hasty determinations based on an incomplete
27 record”); *Hart v. Gaione*, No. CV-02-013311-RMT-MANX, 2003 WL 22846344, at *1
28 (C.D. Cal. Nov. 17, 2003) (noting that the qualified immunity defense must be balanced

1 against a plaintiff's right to discovery).

2 The State Defendants assert that the Rule 56(d) request is merely an attempt to
3 postpone a ruling on their "straightforward" summary judgment motion. Doc. 90 at 2.
4 As noted above, however, Defendants seek summary judgment on all ten claims, for a
5 host of different reasons. Doc. 63 at 2-4. The motion is not limited solely to the issue of
6 probable cause. *See id.* Moreover, the probable cause inquiry involves a consideration of
7 the totality of the circumstances and "necessarily turns upon the particular facts of the
8 individual case." *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009).
9 Plaintiff should be permitted to conduct further discovery into the investigation and facts
10 known to Defendants before his arrest. *See Spencer v. Peters*, No. C11-5424 BHS, 2012
11 WL 4514417, at *16-19 (W.D. Wash. Oct. 2, 2012) (granting Rule 56(d) request on the
12 issue of probable cause where the plaintiff challenged the facts known to officials at the
13 time of his arrest).

14 Plaintiff requests an additional six months to conduct the discovery he needs to
15 respond to the summary judgment motions. Docs. 82 at 2, 83 at 2. As noted above, the
16 Case Management Order set a September 7, 2018 deadline for the completion of fact
17 discovery. Doc. 45 ¶ 4. The order made clear that the Court intends to enforce the
18 deadlines and the parties should plan their litigation activities accordingly. *Id.* ¶ 9. The
19 Court will not extend the fact discovery period beyond the September 7 deadline. The
20 remaining four months provides ample time for Plaintiff to conduct the discovery needed
21 to oppose summary judgment.

22 **IT IS ORDERED:**

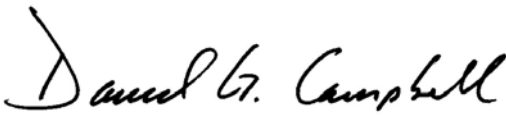
23 1. Plaintiff's motions for additional time pursuant to Rule 56(d) (Docs. 82, 83)
24 are **granted**.

25 2. Defendants' motions for summary judgment (Docs. 63, 65) are **denied**
26 without prejudice to their refile after the close of discovery.

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3. The schedule set forth in the Case Management Order (Doc. 45) is affirmed.

Dated this 17th day of May, 2018.



David G. Campbell
United States District Judge