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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 David Steele Douglass,
10 Plaintiff,

11 v.

12 City of Mesa, et al.,
13 Defendants.
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No. CV-17-04686-PHX-SMB

ORDER

15 Pending before the Court is Plaintiff David Steele Douglass' Declaration Regarding
16 Deferment of Consideration of Defendants' Motion for Summary Judgment and Allowing
17 Time to Obtain Affidavits or Declarations or to Take Discovery. (Doc. 36, "Req.")
18 Defendants¹ oppose the request, (Doc. 39, "Opp."), and Plaintiff replied, (Doc. 41,
19 "Repl."). Plaintiff requests oral argument, but the Court elects to resolve the request
20 without it. LRCiv 7.2(f). Plaintiff appears to request the Court defer considering
21 Defendants' summary judgment motion under Rule 56(d)(2).² Having considered the
22 pleadings and relevant law, the Court denies Plaintiff's request as explained below.

23 **I. LEGAL STANDARD**

24 Federal Rule of Civil Procedure 56(d) provides that "[i]f a nonmovant shows by
25 affidavit or declaration that, for specified reasons, it cannot present facts essential to justify
26 its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to
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28 ¹ Defendants include the City of Mesa, Clyde Spillers, Steven Hether, Jose Rodriguez, Brett Metcalf, and Thomas McKnight.

² Plaintiff moves under Rule 56(d), but identifies no specific subsection.

1 obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate
2 order.” Fed. R. Civ. P. 56(d).³ Rule 56(d) creates “a device for litigants to avoid summary
3 judgment when they have not had sufficient time to develop affirmative evidence.” *United*
4 *States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002). “The burden is on
5 the party seeking additional discovery to proffer sufficient facts to show that the evidence
6 sought exists and that it would prevent summary judgment.” *Okabayashi v. Travelers*
7 *Home & Marine Ins. Co.*, No. CV-17-03612-PHX-DJH, 2019 WL 1059982, at *3 (D. Ariz.
8 Mar. 6, 2019) (citing *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 n.6 (9th Cir.
9 2001)).

10 To prevail under Rule 56(d), the moving party must show: “(1) that they have set
11 forth in affidavit form the specific facts that they hope to elicit from further discovery, (2)
12 that the facts sought exist, and (3) that these sought-after facts are ‘essential’ to resist the
13 summary judgment motion.” *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg.*
14 *Corp.*, 525 F.3d 822, 827 (9th Cir. 2008); see *California v. Campbell*, 138 F.3d 772, 779
15 (9th Cir. 1998) (noting same three elements). Thus, a party requesting relief under Rule
16 56(d) must “make clear what information is sought and how it would preclude summary
17 judgment.” *Nicholas v. Wallenstein*, 266 F.3d 1083, 1088-89 (9th Cir. 2001). “Failure to
18 comply with these requirements ‘is a proper ground for denying discovery and proceeding
19 to summary judgment.’” *Family Home & Fin. Ctr.*, 525 F.3d at 827 (quoting *Campbell*,
20 138 F.3d at 779).

21 II. DISCUSSION

22 Plaintiff requests the Court defer considering Defendants’ summary judgment
23 motion so that he may “obtain affidavits or declarations or take discovery.” (Req. at 1.) In
24 support, Plaintiff declares he cannot oppose Defendants’ summary judgment motion
25 exhibits because they “set[] forth facts that are not fully disclosed in the police reports or
26 other papers that [they] provided in discovery.” (*Id.*) More specifically, Plaintiff claims

27 ³ According to the Ninth Circuit in *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1169 n. 8 (9th
28 Cir. 2011), cases interpreting Rule 56(f) apply to Rule 56(d). See *Slama v. City of Madera*,
No. 1:08-cv-810 AWI GSA, 2012 WL 1067198, at *2 n.4 (E.D. Cal. Mar. 28, 2012)
(acknowledging Rule 56(f)’s “relocation” to Rule 56(d)).

1 “[t]he allegations in the [summary judgment exhibit] affidavits . . . will need to be
2 investigated through depositions or other discovery to respond adequately to the motion
3 for summary judgment.” (*Id.* at 2.) Plaintiff further claims he “[o]nly recently . . . had the
4 opportunity to complete review of these disclosures.” (*Id.* at 3.) He also claims his witness,
5 Lance White, “has become an uncooperative witness.” (*Id.* at 4.) For these main reasons,
6 Plaintiff requests the Court defer consideration on the summary judgment motion.

7 In response, Defendants argue Plaintiff’s request should be denied because he does
8 not satisfy Rule 56(d)’s substantive or procedural requirements. (Opp. at 2.) They argue
9 the substantive requirements are unsatisfied because Plaintiff fails to “identify any facts
10 that he expects to obtain with additional discovery, and that, even if obtained, would
11 preclude summary judgment.” (*Id.*) Defendants further argue the procedural requirements
12 are not satisfied because “[d]iscovery has closed, Plaintiff had adequate time to conduct
13 discovery, Plaintiff failed to take any depositions or to obtain any affidavits, and Plaintiff
14 provides no basis for modifying the existing Scheduling Order.” (*Id.*) The Court finds
15 Defendants’ arguments persuasive.

16 Plaintiff’s request falls short of meeting Rule 56(d)’s threshold requirements. *See*
17 *Family Home & Fin. Ctr.*, 525 F.3d at 827. Plaintiff identifies no specific facts that he
18 hopes to obtain through additional discovery, let alone how such facts would be essential
19 to oppose Defendants’ summary judgment motion. *Id.* Rather, he appears to simply be
20 requesting more time to investigate discovery already provided to him. (*See* Req. at 2 (“The
21 allegations . . . will need to be investigated.”)). This is inadequate for Rule 56(d) relief. *See*
22 *Mackey v. Pioneer Nat’l Bank*, 867 F.2d 520, 524 (9th Cir. 1989) (“A movant cannot
23 complain if [he] fails diligently to pursue discovery before summary judgment.”). Granting
24 Rule 56 relief under these circumstances, where Plaintiff identifies no specific information
25 that would be obtained or how such information could be used to oppose summary
26 judgment would cause unnecessary delay for both parties. *See Nicholas*, 266 F.3d at 1088-
27 89. In other words, and contrary to Rule 56(d)’s requirements, Plaintiff does not “make
28 clear what information is sought and how it would preclude summary judgment.” *Cf. id.*

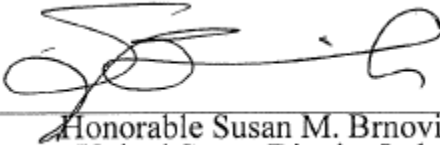
1 (quoting *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998)). As a consequence, the Court
2 finds Plaintiff's requested relief unwarranted. *Family Home & Fin. Ctr.*, 525 F.3d at 827.

3 Accordingly,

4 **IT IS ORDERED DENYING** Plaintiff's Request, (Doc. 36).

5 Dated this 28th day of January, 2020.

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Honorable Susan M. Brnovich
United States District Judge