Exhibit D

U.S. Department of Justice
Civil Division, Federal Programs Branch

By First-Class Mail
P.O. Box 883
Washington, D.C. 20044

By Special Delivery
20 Massachusetts Ave., NW
Washington, D.C. 20001

Ryan B. Parker
Trial Attorney

Tel: (202) 514-4336
Fax: (202) 616-8470
Email: ryan.parker@usdoj.gov

March 5, 2010

By Electronic Mail and First-Class Mail

Patrick Hunnius
White & Case, LLP
633 West Fifth Street, Suite 1900
Los Angeles, CA 90071-2007

Re: *Log Cabin Republicans v. U.S. et al.*: Plaintiff's Proposed Ex Parte Applications

Patrick,

I write to express the Government's opposition to Plaintiff's proposal to file ex parte applications seeking orders compelling discovery. Plaintiff's proposed ex parte applications contradict Plaintiff's counsel's representations to Defense counsel and the Court, violate Judge Phillips's Standing Order, and lack legal support. At bottom, they appear to be attempts to circumvent the March 15 discovery deadline. If Plaintiff nonetheless decides to file its proposed applications, the Government respectfully that this letter, and the accompanying attachments, be submitted to the Court with Plaintiff's filing.

I. Plaintiff Failed to Provide a Timely Joint Stipulation Regarding the 30(b)(6) Depostion

The process for resolving any dispute with respect to the 30(b)(6) deposition had been worked out by the parties. As part of that process, on Wednesday, March 3, 2010, Plaintiff's counsel emailed Defense counsel its portion of a "JOINT STIPULATION IN SUPPORT OF: (1) PLAINTIFF'S MOTION TO COMPEL DEPOSITION OF DEFENDANTS UNITED STATES OF AMERICA AND ROBERT M. GATES PURSUANT TO F.R.C.P. 30(b)(6); AND (2) DEFENDANTS' MOTION FOR A PROTECTIVE ORDER." See Attachment 1 - Plaintiff's Email Sending Joint Stipulation; Attachment 2 - Plaintiff's Portion of the Joint Stipulation. In the introduction to Plaintiff's Portion of the Joint Stipulation ("Plaintiff's Joint Stipulation"), Plaintiff set forth the background for the cross motions indicating that a process for resolving the issues already was in place:

> "On December 21, 2009, Plaintiff served on Defendants a 30(b)(6) Notice of Deposition ("Notice") to be taken on January 25, 2010 at the offices of Plaintiff's counsel in Washington, D.C. On January 29, 2010, Defendants

> objected to the Notice, via a letter to Plaintiff's counsel. The parties met-and-conferred telephonically regarding the Notice on February 9, 2010 but were unable to resolve their differences. At the conclusion of the conference, both parties maintained their respective contentions that they have grounds for a motion regarding the Notice (for Plaintiff, a motion to compel; for Defendants, a motion for a protective order) and agreed to brief these cross-motions through one Local Rule 37 'joint stipulation.'"

Attachment 2, pg. 1-2. There was indeed a meet and confer, and the agreement to brief the issue through cross motions was set forth more fully in a letter Plaintiff's counsel sent to Defense counsel on February 11, two days after the meet and confer. See Attachment 3- Plaintiff's Counsel's February 11 Letter, pg 6. The schedule called for Plaintiff to send Defendants Plaintiff's portion of the required Joint Stipulation on February 22 and set an expedited briefing schedule based on the rapidly approaching March 15 discovery deadline. See Attachment 3, pg. 6. At the Status Conference, held on February 18, Plaintiff's counsel confirmed in open court that the 30(b)(6) issue would be briefed through motion practice: Plaintiff's Motion to Compel and Defendants' Motion for a Protective Order.

When Plaintiff's counsel failed to send Defendants Plaintiff's portion of the Joint Stipulation on February 22, as previously agreed. Defense counsel assumed that Plaintiff's counsel had decided to seek the requested information though other forms of discovery, as Plaintiff had asked for the same information in interrogatories, document requests, and requests for admission.

On the evening of March 3, much after the agreed upon date, Plaintiff's counsel emailed Defense counsel Plaintiff's Joint Stipulation. See Attachment 2. The belated stipulation proposed a new briefing schedule, asking Defendants to provide their portion of the Joint Stipulation by March 11. Plaintiff's stipulation contained Plaintiff's legal arguments and nowhere alleged, nor could it in good faith, that Defense counsel had failed to cooperate in the parties' agreement to brief the issue through cross motions. Rather, the stipulation indicated just the opposite: the parties had met-and-conferred and Plaintiff was belatedly initiating the process that had been agreed upon.

Just one day later, on March 4, Plaintiff's counsel sent Defense counsel an email explaining that Plaintiff intended to file an ex parte application seeking an order compelling the Government to designate a witness pursuant to the 30(b)(6) notice. See Attachment 4 - Plaintiff's counsel's Email of March 4. In the email, Plaintiff's Counsel explained why he felt ex parte relief was necessary:

> "Ex parte relief is necessary in light of: the rapidly approaching discovery cutoff; *the government's failure to respond to Plaintiff's prior reasonable proposal to brief and hear these issues prior to the discovery cutoff*; and the government's intransigent refusal to designate a witness on any topic specified in the Notice."

Attachment 4 (emphasis added).

Plaintiff's counsel's March 4 email changes course and attempts to shift the blame to Defendants for Plaintiff's failure to follow the parties' expedited briefing schedule. Plaintiff's counsel's new position appears to be motivated by the Court's order on March 4 declining to extend the March 15 discovery deadline. Plaintiff's proposed ex parte application is inconsistent with Plaintiff's counsel's representations to Defense counsel and the Court, and appears to be a bleated attempt to skirt the discovery deadline because Plaintiff is now out of time to proceed with a motion to compel.

II. Plaintiff Failed to Bring a Timely Motion To Compel Regarding the RFAs

In his February 11 letter to Defense counsel, Plaintiff's counsel also explained Plaintiff's position that certain of Defendants' responses to Plaintiff's Requests for Admission (the "RFAs") are deficient. See Attachment 4. Following the Status Conference on February 18, Defense counsel approached Plaintiff's counsel about consolidating the potential discovery motions, including the motion regarding the RFAs, and seeking an extension of the discovery deadline to allow the parties to address those motions. Plaintiff's counsel rejected Defense Counsel's proposal. But Plaintiff did not file a timely motion to compel regarding the RFAs or propose an expedited briefing schedule. Now, recognizing that the discovery cutoff will not be extended, Plaintiff's counsel has proposed seeking an ex parte application seeking an order deeming certain RFAs admitted. Plaintiff's counsel's attempt to justify its need for an ex parte application by alleging that Defendants refused to meet and confer is unfounded. Plaintiff's counsel's endeavor to shift the blame for its failure to file a timely motion is inappropriate. Ex parte applications are not meant to excuse parties who fail to bring timely motions.

III. Plaintiff's Ex Parte Application Violates Judge Phillips's Standing Order and Lacks Legal Support

Judge Phillips's Standing Order advises that "this Court allows ex parte applications solely for extraordinary relief." Docket Entry 68, pg 5. The order also directs counsel to become familiar with Mission Power Engineering Co. v. Continental Casualty, Co., 883 F.Supp. 488 (C.D. Cal. 1995). The Court in Mission Power provides an overview of the abuse of ex parte applications. It also reviews the stringent standard for showing that ex parte relief is necessary. "First, the evidence must show that the moving party's cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures." Id at 492. Second, it must be established that the moving party is without fault in creating the crisis that requires ex parte relief, or that the crisis occurred as a result of excusable neglect.

Plaintiff can not make either of these showings with regard to the 30(b)(6) witness or the RFAs. Plaintiff has received the information it seeks from Defendants' 30(b)(6) witness through other means of discovery and is unlikely to succeed on its motion to compel the deposition. Moreover, Plaintiff could have filed a timely motion to compel the deposition on February 22, as the parties had agreed, but failed to do so. With regard to the RFAs, Defendants' objections and responses are sufficient and the information Plaintiff seeks is not central to its case. Furthermore, Plaintiff had the opportunity to being a timely motion to compel and did not do so.

The Court in Mission Power ends its discussion of ex parte applications with a warning, "Ex parte applications are not intended to save the day for parties who have failed to present requests when they should have." *Id.* (quoting Judge Rymer in In re Intermagnetics America, Inc., 101 B.R. 191, 193 (C.D.Cal.1989)). Plaintiff has failed to present requests when it should have, and should not proceed in a manner contrary to the Court's warning.

For the foregoing reasons, the Government opposes any effort by Plaintiff to proceed with ex parte applications. If Plaintiff's counsel nonetheless intends to proceed with its proposed applications, Defense counsel requests that Plaintiff include the Government's opposition to the applications and attach this letter and its accompanying exhibits.

Respectfully,

Ryan B. Parker