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14
15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE EASTERN DISTRICT OF CALIFORNIA

18 **PROTECTMARRIAGE.COM, et al.,**

19 Plaintiff,

20 v.

21
22 **DEBRA BOWEN, SECRETARY OF
STATE FOR THE STATE OF
23 CALIFORNIA, et al.,**

24 Defendants.

2:09-cv-00058-MCE-DAD

**STATE DEFENDANTS' NOTICE OF
MOTION AND MOTION UNDER
RULE 56(f); POINTS AND
AUTHORITIES**

Date: July 16, 2009

Time: 2:00 p.m.

Courtroom: 7, 14th Floor

The Honorable Morrison C. England, Jr.

Trial Date: March 14, 2011

Action Filed: January 7, 2009

25
26 Please take notice that on July 16, 2009, at 2:00 p.m. PST, in Courtroom 7, Defendants
27 Debra Bowen, in her official capacity as the Secretary of State for the State of California,
28 Edmund G. Brown Jr., in his official capacity as Attorney General of the State of California, and

1 the individual members of the California Fair Political Practices Commission in their official
2 capacities (“State Defendants”) will and hereby do move to deny Plaintiffs’ Motion for Summary
3 Judgment or, in the alternative, continue the hearing date of Plaintiffs’ Motion, pursuant to rule
4 56(f) of the Federal Rules of Civil Procedure. This motion is brought pursuant to rule 56(f) and
5 Local Rule 78-230, and is supported by the declaration of Lawrence T. Woodlock, counsel of
6 record in this matter, filed concurrently herewith and incorporated by this reference.

7 This motion is made on the grounds that, as set forth in detail in the Woodlock Declaration,
8 given the hearing date of August 13, 2009, as noticed by Plaintiffs, the State Defendants have not
9 had sufficient time to conduct discovery or otherwise obtain and present facts essential to justify
10 their opposition to Plaintiffs’ motion.

11 Therefore, the State Defendants respectfully request that the Court deny Plaintiff’s Motion
12 for Summary Judgment in its entirety or, in the alternative, continue the hearing date on said
13 motion to a date no earlier than **December 18, 2009**. Such a continuance would likely provide
14 sufficient time for the State Defendants to complete discovery and otherwise obtain facts essential
15 to justify their opposition to Plaintiffs’ motion.

16 Dated: June 10, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DOUGLAS J. WOODS
Supervising Deputy Attorney General

/s/ Zackery P. Morazzini
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/s/ Lawrence T. Woodlock
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1 **POINTS AND AUTHORITIES**

2 The State Defendants have not had a sufficient opportunity to conduct discovery or
3 otherwise obtain and present facts essential to justify their opposition to Plaintiffs’ Motion for
4 Summary Judgment. Through this motion, the State Defendants respectfully request that the
5 Court either deny Plaintiffs’ Motion for Summary Judgment without prejudice to their re-filing at
6 a later date or, in the alternative, continue the hearing on the motion to a date no earlier than
7 December 18, 2009.

8 **STANDARD OF REVIEW ON RULE 56(f) MOTIONS**

9 “Federal Rule of Civil Procedure 56(f) provides a device for litigants to avoid summary
10 judgment when they have not had sufficient time to develop affirmative evidence.” *United States*
11 *v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002). “A district court should continue
12 a summary judgment upon a good faith showing by affidavit that the continuance is needed to
13 obtain facts essential to preclude summary judgment.” *Weinberg v. Whatcom County*, 241 F.3d
14 746, 750 (9th Cir. 2001) (citing *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998)). “In
15 order to obtain relief under Rule 56(f), the movant ‘must show: (1) it has set forth in affidavit
16 form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3)
17 the sought-after facts are essential to oppose summary judgment.’” *Family Home and Finance*
18 *Center, Inc. v. Federal Home Loan Mortgage Corp.*, 525 F.3d 822, 827 (9th Cir. 2008) (citing
19 *Cal. on behalf of Cal. Dep’t of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779 (9th Cir.
20 1998)). The movant must show by affidavit that the discovery will produce facts that are
21 “essential to oppose summary judgment.” *Tatum v. San Francisco*, 441 F.3d 1090, 1100-01 (9th
22 Cir. 2006).

23 Rule 56(f) confers on the court wide discretion to allow additional discovery to be
24 completed before summary judgment, or to “make such order as is just” to “protect parties from a
25 premature grant of summary judgment.” *Weinberg*, 241 F.3d at 750. Although rule 56(b) allows
26 a party to move for summary judgment “at any time,” it is well established that “‘continuance of a
27 motion for summary judgment for purposes of discovery should be granted almost as a matter of
28 course.’” *Burlington Northern Santa Fe R.R. Co. v. Assiniboine and Sioux Tribes of the Fort*

1 *Peck Reservation*, 323 F.3d 767, 773-774 (9th Cir. 2003) (quoting *Wichita Falls Office Assoc. v.*
2 *Banc One Corp.*, 978 F.2d 915, 919 n.4 (5th Cir. 1992)).

3 **ARGUMENT**

4 Plaintiffs seek summary judgment in this matter on the grounds that the pre- and post-
5 election disclosure requirements set forth in California’s Political Reform Act (Cal. Gov’t Code,
6 §§ 81000 et seq.) are unconstitutional on their face and as applied to Plaintiffs. In support of their
7 motion, Plaintiffs make a host of arguments regarding an alleged chilling effect of the disclosure
8 requirements on their ability to engage in political speech, including their ability to make and
9 receive monetary contributions in support of ballot measures, and make expenditures in support
10 of ballot measures. *See* Pltf.s’ Mot. Sum. J., pp. 13-16. Plaintiffs also argue, among other things,
11 that the State lacks a sufficiently compelling interest in maintaining such disclosure requirements,
12 that the requirements are not narrowly tailored to serve any State interest, and that such
13 requirements are not the least restrictive means of supporting the State’s interest. *Id.*, at pp. 32-
14 47.

15 As set forth in detail in the Woodlock Declaration, it will be necessary for the State
16 Defendants to obtain and review each of the ballot-committee Plaintiffs’ semi-annual campaign
17 statements in order to support their factual representations and arguments in opposition to
18 Plaintiffs’ Motion. Woodlock Decl., ¶¶ 3-5. Such statements must disclose, among other things,
19 the total amount of contributions received (including contributions of \$100 or more), as well as
20 the total amount of expenditures made, by each ballot-committee Plaintiff for the period between
21 January 1, 2009 – June 30, 2009. *See* Cal. Gov’t Code §§ 84200, 84211. Because these
22 campaign reports will cover a crucial period during which Plaintiffs allege reprisals have
23 continued, the State Defendants believe that such information will be essential to their ability to
24 demonstrate the impact, if any, the alleged reprisals have had on Plaintiffs’ ability to raise funds
25 and get out their message – an issue central to the State Defendants’ opposition. Woodlock Decl.,
26 ¶¶ 3-5 . However, Plaintiffs’ campaign statements are not required to be filed until **July 31,**
27 **2009.** *See* Cal. Gov’t Code, § 84200. Absent a denial or continuance of Plaintiffs’ motion, the
28

1 State Defendants will not have sufficient time to obtain, review, and analyze these reports; reports
2 that Plaintiff themselves allege may exceed 2,800 pages. *See* Pltf.’s Mot. Sum. J., p. 8, n. 6.

3 The State Defendants believe it will take their experts no less than four months after the
4 campaign reports are filed to analyze and compile the information contained in the reports in a
5 manner sufficient to enable them to compare the contributions and expenditures from this period
6 with those covering prior periods. Woodlock Decl., ¶ 5. Such information will be crucial to the
7 State Defendants’ arguments in opposition to Plaintiffs’ motion.

8 The State Defendants will also need to consult experts in order to address Plaintiffs’
9 contentions regarding the impact of modern technology on the ability of ballot committees to
10 successfully engage in fundraising. *See* Pltf.’s Mot. Sum. J., pp. 6-12. The question as to
11 whether ballot measure contributions have been increasing throughout the Internet era, rather than
12 decreasing as Plaintiffs’ claims would suggest, is essential to the State Defendants’ arguments in
13 opposition to Plaintiffs’ motion.

14 Finally, the State Defendants will need to consult experts regarding the State’s interest in
15 public disclosure of ballot-committee contributor identity, including relatively small donors, and
16 the injury to the State’s electoral process if disclosure is withheld whenever a ballot measure
17 election generates controversy. *See* Pltf.’s Mot. Sum. J., pp. 32-47; Woodlock Decl., ¶ 6. Experts
18 will also need to be consulted regarding “normal” levels of heated debate, discourse, petty
19 vandalism, and boycotts during ballot measure elections, and whether such activity results in any
20 measurable chilled speech. Pltf.’s Mot. Sum. J., pp.13-16, nn. 17-19; Woodlock Decl., ¶ 6.

21 The State Defendants believe it will take no less than four months after receipt of Plaintiffs’
22 campaign statements to obtain and procure the services of multiple experts to provide the reports
23 necessary to support their arguments in opposition to Plaintiffs’ motion. Woodlock Decl., ¶¶ 5-6.

24 This rule 56(f) motion should come as no surprise to Plaintiffs. After the Court issued its
25 written order denying Plaintiffs’ Motion for Preliminary Injunction, the parties met and conferred
26 for purposes of filing their Joint Status Report. On March 6, 2009, Plaintiffs, on behalf of all
27 parties to this action, filed the Joint Status Report with this Court. *See* Docket No. 95. Plaintiffs
28 themselves agreed to a discovery period running for no less than six months, ending no sooner

1 than October 1, 2009. *See* Docket 95, ¶ (f)(2). Through the Pretrial Scheduling Order, this Court
2 extended the discovery period to May 14, 2010. *See* Docket 96, ¶ IV. Plaintiffs also agreed that
3 all non-discovery (including dispositive) motions should be filed by no later than November 16,
4 2009. *See* Docket 95, ¶ (g). This Court extended such period to September 16, 2010. *See*
5 Docket 95, ¶ VI. Plaintiffs surely will not be prejudiced should the Court deny or continue
6 Plaintiffs' motion to a date no earlier than December 18, 2009.

7 CONCLUSION

8 Through this motion and the concurrently-filed Woodlock Declaration, the State
9 Defendants have demonstrated, with specificity, the facts it hopes to elicit through further
10 discovery, that the facts sought exist, and that the sought-after facts are essential to oppose
11 Plaintiffs' Motion for Summary Judgment. *Family Home and Finance Center, Inc.*, 525 F.3d at
12 827. Therefore, for all of the foregoing reasons, the State Defendants respectfully request that the
13 Court deny or, in the alternative, continue Plaintiffs' Motion for Summary Judgment for hearing
14 to a date no earlier than December 18, 2009.

15 Dated: June 10, 2009

16 Respectfully submitted,

17 EDMUND G. BROWN JR.
18 Attorney General of California
19 DOUGLAS J. WOODS
20 Supervising Deputy Attorney General

21 /s/ Zackery P. Morazzini
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