

1

2

3

4

5

6

7

8

## UNITED STATES DISTRICT COURT

9

## EASTERN DISTRICT OF CALIFORNIA

10

11 THOMAS T. AOKI, M.D., et al.,

No. 2:11-cv-02797-TLN-CKD

12 Plaintiffs,

13 v.

**ORDER**

14 GREGORY FORD GILBERT, et al.,

15 Defendants.

16

17 This matter is before the Court on Plaintiffs' Objection to Defendants' Motion  
18 Filed in Lieu of Answer [Docs. 138-143] and Ex Parte Request for Order that Defendants File  
19 Answers to First Amended Complaint ("Ex Parte Application"). (ECF No. 146.) Defendants  
20 opposed the Ex Parte Application. (ECF Nos. 148-49) This Court denies Plaintiffs' Ex Parte  
21 Application, as detailed below, because Plaintiffs fail to demonstrate the need for ex parte relief,  
22 i.e., the need for an exception to the regular law and motion rules and procedures.

23

**BACKGROUND**

24 Through this action, Plaintiffs Thomas Aoki, M.D. and Aoki Diabetes Research  
25 Institute (collectively "Plaintiffs") allege a variety of claims arising from the development,  
26 patenting, and licensing of therapies intended for the treatment of diabetes. Plaintiffs filed their  
27 initial complaint in October 2011 and named over a dozen defendants. (ECF No. 1.) Since then  
28 the parties have been involved in extensive pre-answer motion practice, including motions and

1 orders regarding dismissal, disqualification, and arbitration. (*See, e.g.*, ECF Nos. 6-11, 16-17, 41,  
2 54-55, 67-68, 70-73, 91, 112-13, 118, 138-39, 143.)<sup>1</sup> Currently pending before this Court is  
3 Defendants’ Motion to Dismiss Under Rule 12(b) (6); in the alternative, Motion for Summary  
4 Judgment Under Rule 56 (“Motion to Dismiss”).<sup>2</sup> (ECF Nos. 138-43.) Through their Ex Parte  
5 Application, Plaintiffs (1) object to Defendants’ Motion to Dismiss under Rule 12(g) and Rule  
6 56(d); (2) request that the Court strike the Motion to Dismiss (or take it off calendar and re-notice  
7 as a motion under Rule 56); and (3) request that the Court order Defendants to file answers to the  
8 First Amended Complaint. Defendants oppose Plaintiffs’ Ex Parte Application, arguing that the  
9 Court expressly permitted the Motion to Dismiss at issue in its order denying the motions without  
10 prejudice.

### 11 LEGAL STANDARD

12 Eastern District of California Local Rule 230 requires that a moving party file and  
13 serve motion papers, and set a hearing date not less than 28 days after service and filing of the  
14 motion. An ex parte application is an exception to the notice procedure. *See White v. Cinemark*  
15 *USA Inc.*, No. Civ. S 04 397 GEB KJM, 2005 WL 3890635, at \*1 (E.D. Cal. Apr. 27, 2005).

16 This Court in *White* elaborated:

17 [N]oticed motions should be the rule and not the exception.  
18 Timetables for the submission of responding papers and for the  
19 setting of hearings are intended to provide a framework for the fair,  
20 orderly, and efficient resolution of disputes. Ex parte applications  
21 throw the system out of whack. They impose an unnecessary  
22 administrative burden on the court and an unnecessary adversarial  
23 burden on opposing counsel who are required to make a hurried  
24 response under pressure, usually for no good reason. They demand  
25 priority consideration, where such consideration is seldom  
26 deserved. In effect, they put the applicant “ahead of the pack,”  
27 without cause or justification. Ex parte applications are not intended  
28 to save the day for parties who have failed to present requests when  
they should have, and should not be used as a way to “cut in line”  
ahead of those litigants awaiting determination of their properly  
noticed and timely filed motions.

25 *Id.* (citing *In re Intermagnetics America, Inc.*, 101 B.R. 191, 193 (Bankr. C.D. Cal. 1989)); *see*

---

27 <sup>1</sup> Without adopting the adversarial title, the Court finds helpful Plaintiffs’ chart of motions filed with their Ex Parte  
Application. (ECF No. 146-1.)

28 <sup>2</sup> It also appears that Defendants Kunz’s and MedEdCo, LLC’s motion to dismiss under Rule 12(b)(2) (ECF Nos. 6,  
9, 72) is still pending. Plaintiffs’ request that the Court rule on that motion as soon as possible is well taken.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

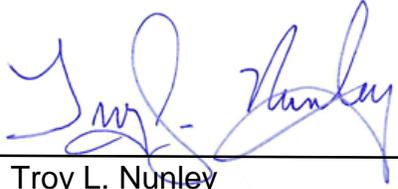
**CONCLUSION**

Plaintiffs' Ex Parte Application is DENIED. In denying Plaintiffs' Ex Parte Application, however, the Court expresses no opinion on the underlying merits of Plaintiffs' objections to Defendants' Motion to Dismiss. The Court only finds that Plaintiffs have not met the standard for justifying ex parte relief. Should Plaintiffs wish to challenge any aspects of Defendants' Motion to Dismiss, Plaintiffs may either file a duly noticed motion in compliance with the Local Rules or argue in opposition to Defendants' Motion to Dismiss.

Finally, the Court cautions the parties that abuse of the ex parte application procedure may result in this Court's imposition of sanctions on non-compliant parties.<sup>3</sup> See Fed. R. Civ. P. 11, 16; *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991); 28 U.S.C. § 1927. "It is rare that a lawyer's credibility is more on the line, more vulnerable, than when he or she has created this kind of interruption. Lawyers must understand that filing an ex parte motion, whether of the pure or hybrid type, is the forensic equivalent of standing in a crowded theater and shouting, 'Fire!' There had better be a fire." *Mission Power Engineering Co.*, 883 F. Supp. at 492.

**IT IS SO ORDERED.**

Dated: June 6, 2013



---

Troy L. Nunley  
United States District Judge

---

<sup>3</sup> From a quick review of the docket, it appears that this is Plaintiffs' fifth ex parte request. (See Ex Parte Request for Order Shortening Time, ECF No. 14; Ex Parte Request by Plaintiffs to Take Motion to Compel Arbitration and Stay Proceedings Pending Arbitration [Doc 54] Off-Calendar, ECF No. 56; Ex Parte Application by Plaintiffs to Amend Complaint, ECF No. 60; Ex Parte Application by Plaintiffs to Amend Complaint, ECF No. 96.) The Court expresses no opinion on the underlying merits of Plaintiffs' ex parte requests.