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E-Filed 06/02/2010

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

AGNES SUEVER, et al.,

No. C 03-00156 RS

Plaintiff,

**ORDER RE REQUEST FOR
CONTINUANCE**

v.

KATHLEEN CONNELL, et al.,

Defendants.

On May 30, 2010, plaintiffs filed a “Motion to Suspend the Hearing on Defendants’ Motion for Summary Judgment or in the Alternative to Continue the Hearing on the Motions for Summary Judgment.” The notice of motion, filed as a separate document in contravention of Civil Local Rule 7-2(b), stated that the motion would be heard on January 30, 2008, in this Court’s former courtroom in San Jose. On June 2, 2010, plaintiffs re-filed all of their motion papers, this time omitting any mention of a hearing date, but apparently expecting the Court to take up the matter immediately.

Thereafter, plaintiffs re-filed substantially all of the same papers yet again, but this time labeled as a motion for an order shortening time, under Civil Local Rule 6-3. Although the motion

1 contains virtually none of the information generally required in a Rule 6-3 motion,¹ the Court will
2 address it on an expedited basis.

3 Plaintiffs correctly note that there is some precedent for seeking a continuance under Rule
4 56(f) in lieu of filing an opposition,² but the Court has previously expressly explained in this case its
5 view that such requests should be submitted in conjunction with such opposition on the merits as a
6 party may be able to offer even without a continuance. Indeed, the Court effectively denied pre-
7 opposition Rule 56 requests brought at different times in this action by both plaintiffs and by
8 defendants. See Order filed April 1, 2008, at 10:5-11:7 for details regarding prior Rule 56(f)
9 requests.

10 Additionally, plaintiffs assert that they need additional discovery to demonstrate that the
11 current version of California's Unclaimed Property Law is "unconstitutional as applied."³ A
12 plaintiff may not avoid summary judgment by relying on claims not pleaded in the complaint.
13 *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("Simply put,
14 summary judgment is not a procedural second chance to flesh out inadequate pleadings.") As prolix
15 and wide-ranging as the complaint in this action may be, it was last amended in 2003, and cannot
16 reasonably be construed as stating a claim that the "entirely new statutory procedure"⁴ promulgated
17 by the State in 2008 is unconstitutional as applied.⁵ The relevance of the discovery described in the
18 continuance request therefore appears doubtful, at best. Accordingly, the request for a continuance
19 is denied.

20
21 _____
22 ¹ See Rule 6-3(a)(1)-(6).

23 ² See *Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 534 (5th Cir. 1999).

24 ³ The Ninth Circuit rejected any facial challenge to the law but observed that it was not making a
25 "definitive adjudication of the constitutionality of the new law and administrative procedure."
Taylor v. Westly, 525 F.3d 1288, 1289-90 (9th Cir. 2008).

26 ⁴ *Taylor v. Westly*, 525 F.3d at 1289.

27 ⁵ Among other things, it is not even clear that any of the named plaintiffs would have standing to
28 challenge application of the current law, given that their claimed injuries occurred under the prior
law.

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IT IS SO ORDERED.

DATED: 06/02/2010



RICHARD SEEBORG
United States District Judge