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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 NATHEN BARTON,

11 Plaintiff,

12 v.

13 JOE DELFGAUW, *et al.*,

14 Defendants.

CASE NO. 3:21-cv-05610-JRC

ORDER GRANTING  
DEFENDANTS' MOTION

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16 This matter is before the Court on the parties' consent. Pending before the Court is  
17 plaintiff's motion for summary judgment (Dkt. 122) and defendants' "motion to continue or  
18 strike motion for summary judgment." Dkt. 139.

19 **BACKGROUND**

20 Plaintiff, proceeding *pro se*, brought this action based on alleged violations of the  
21 Telephone Consumer Protection Act and state law. *See* Dkt. 83. Defendants filed a counterclaim  
22 alleging that plaintiff consented to be contacted using a different name so that he may bring a  
23 federal lawsuit. *See* Dkt. 39 at 10–13. On March 14, 2022, plaintiff filed a motion for summary  
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1 judgment in which he appears to be challenging defendants’ ability to prove plaintiff consented  
2 to be contacted. Dkt. 122. On April 1, 2022, defendants filed a “motion to continue or strike  
3 motion for summary judgment,” which appears to be a motion for relief under Federal Rule of  
4 Civil Procedure 56(d), because of outstanding discovery responses. *See* Dkt. 139 at 2. Plaintiff  
5 opposes the motion and argues that he responded to defendants’ discovery requests on the same  
6 day defendants filed their motion. Dkt. 141 at 3–5. There are currently three discovery-related  
7 motions pending before the Court. *See* Dkts. 109, 136, 149. The deadline to complete discovery  
8 is set for June 22, 2022, and the dispositive motion deadline is set for July 22, 2022. Dkt. 124.

## 9 DISCUSSION

### 10 I. Legal Standard

11 Under Federal Rule of Civil Procedure 56(d), a nonmovant may avoid summary  
12 judgment “when they have not had sufficient time to develop affirmative evidence.” *United*  
13 *States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002). To do so, the party must  
14 set forth in an affidavit or declaration: (1) “specific facts it hopes to elicit from further  
15 discovery,” (2) that “the facts sought exist,” and (3) that “the sought-after facts are essential to  
16 oppose summary judgment.” *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*,  
17 525 F.3d 822, 827 (9th Cir. 2008). “Failure to comply with these requirements is a proper ground  
18 for denying discovery and proceeding to summary judgment.” *Id.* (internal quotation marks  
19 omitted). However, Rule 56(d) relief is generously granted where a summary judgment motion is  
20 filed “before a party has had any realistic opportunity to pursue discovery relating to its theory of  
21 the case.” *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of the Fort Peck Rsrv.*,  
22 323 F.3d 767, 773–74 (9th Cir. 2003). Unless the nonmovant has failed to diligently pursue

1 discovery, such relief “should be granted ‘almost as a matter of course.’” *Id.* (quoting *Wichita*  
2 *Falls Office Ass’n v. Banc One Corp.*, 978 F.2d 915, 919 n.4 (5th Cir. 1992)).

3 Here, defendants appear to be diligently pursuing discovery. Defendants’ attorney  
4 submitted a declaration indicating that summary judgment “is not yet ripe as there are  
5 outstanding discovery responses from both sides.” Dkt. 140 at 2. Indeed, it appears that the  
6 parties are in the middle of exchanging discovery and there are currently three discovery-related  
7 motions pending before the Court. *See* Dkts. 109, 136, 149. Further, the deadline for discovery in  
8 this action is set for June 22, 2022, which is based on the parties’ joint status report from  
9 November 4, 2021. *See* Dkts. 37 at 5, 124 at 2. These circumstances call for Rule 56(d) relief.

10 In his opposition, plaintiff claims he responded to defendants’ discovery requests on  
11 March 30, 2022. *See* Dkt. 141 at 3. It is unclear if defendants received these responses before  
12 they filed their motion. However, even if they did, plaintiff provided those responses two weeks  
13 after he filed his motion for summary judgment and two days before defendants’ opposition brief  
14 was due. It is also not evident whether defendants were satisfied with plaintiff’s responses or  
15 whether they intended to meet and confer.

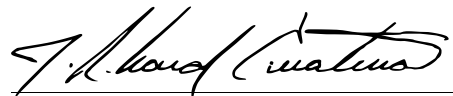
16 The Court notes that defendants’ motion does specify which facts they seek to oppose  
17 plaintiff’s motion for summary judgment. However, the Ninth Circuit has held that when a party  
18 is seeking discovery, they “cannot be expected to frame [their] motion with great specificity as to  
19 the kind of discovery likely to turn up useful information, as the ground for such specificity has  
20 not yet been laid.” *Burlington N.*, 323 F.3d at 774. At this point in the litigation, it is reasonable  
21 that defendants are seeking discovery regarding plaintiff’s consent to be contacted, which is at  
22 the core of plaintiff’s motion for summary judgment.

1 Finally, although the Court is liberally construing defendants' motion this time, going  
2 forward, defendants must cite proper authority for their motions. They did not do so here.

3 **CONCLUSION**

4 The Court grants defendants' motion, which is construed as a motion for Rule 56(d)  
5 relief. Dkt. 139. Accordingly, the Court will strike plaintiff's motion for summary judgment and  
6 the corresponding motions for judicial notice with leave to re-file after the close of discovery.  
7 Dkts. 109, 115, 117, 119, 121, 122. Defendants must also file any motions for summary  
8 judgment after the close of discovery.

9 Dated this 12th day of April, 2022.

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11 J. Richard Creatura  
12 Chief United States Magistrate Judge