

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TEXAS DEMOCRATIC PARTY; §
BOYD L. RICHIE, in his capacity as §
Chairman of the Texas Democratic Party; §
FRANK JOSEPH; and BRETT §
ROSENTHAL, §

Plaintiffs, §

vs. §

Cause No. 3:08-CV-02117-P

DALLAS COUNTY, TEXAS; §
BRUCE SHERBET, in his capacity as §
Election Administrator for Dallas County, §
Texas, §

Defendants. §

**DEFENDANTS’ REPLY IN SUPPORT OF DEFENDANTS’ MOTION
FOR STAY OR, IN THE ALTERNATIVE, RULE 56(f) MOTION**

Defendants Dallas County, Texas and Bruce Sherbet, in his capacity as Election Administrator for Dallas County, Texas (collectively, “Defendants”), file this reply in support of Defendants’ motion for a stay [doc. 35] pending this Court’s ruling on Defendants’ motion to dismiss [doc. 24], and would show the Court as follows:

I. INTRODUCTION

Defendants’ Motion for Stay or in the Alternative, Rule 56(f) Motion (“Defendants’ motion”) should be granted. First, as this Court is well aware, the question of whether each plaintiff has standing is a threshold issue. Defendants’ motion to dismiss challenges the standing of Plaintiffs Texas Democratic Party, Boyd L. Richie, Frank Joseph, and Brett Rosenthal (collectively, “Plaintiffs”). Because Plaintiffs must each establish Article III jurisdiction before

the merits of their claims can be considered, a stay or continuance of Plaintiffs' motion for summary judgment is appropriate while defendants' motion to dismiss is pending. Second, even if Plaintiffs overcome their burden to show standing, Plaintiffs' motion for summary judgment should be denied as premature. Plaintiffs filed this lawsuit less than three months ago; Defendants have not answered; a scheduling order has not been entered, and the parties cannot serve or conduct discovery in its absence. Third, Defendants have satisfied the requirements for a Rule 56(f) continuance. Defendants' motion shows how additional discovery will create a genuine dispute as to material facts, and demonstrates that Defendants have not been dilatory. Accordingly, the Court should stay or deny Plaintiffs' motion for summary judgment. Alternatively, this Court should continue Plaintiffs' motion for summary judgment until such time as meaningful discovery has been conducted.

II. ARGUMENT

A. The merits of Plaintiffs' section 5 claim cannot be considered while Article III jurisdiction is at issue.

Article III jurisdiction is a threshold prerequisite for any federal claim. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (citation omitted); *United States v. Texas Tech Univ.*, 171 F.3d 279, 287 (5th Cir. 1999). "To rule on a merits question before, or in addition to, answering the omnipresent jurisdictional question would contravene the well-established principle that the federal courts may not issue advisory opinions." *Texas Tech*, 171 F.3d at 287 (citation omitted).

Defendants' motion to dismiss, which is currently under this Court's consideration, challenges Plaintiffs' standing to bring a section 5 claim and asserts the mootness of Plaintiffs' section 5 claim. Defendants' Motion To Dismiss [doc. 24] at 6-10; Defendants' Reply in Support of Defendants' Motion To Dismiss [doc. 33] at 2-6. Plaintiffs' motion for summary judgment on their section 5 claim cannot be considered until this Court determines whether Plaintiffs have established Article III jurisdiction. *See Steel Co.*, 523 U.S. at 94; *Texas Tech*, 171 F.3d at 287. Accordingly, it is appropriate for this Court to stay the case or continue Plaintiffs' motion for summary judgment pending resolution of Defendants' motion to dismiss.

B. Plaintiffs' motion for summary judgment should be denied as premature.

Where, as here, a party prematurely moves for summary judgment within a few months of filing suit, before a defendant's answer is due, where no scheduling order is in place, and no discovery has been exchanged, the motion should be denied. *See Valadez v. United Indep. Sch. Dist.*, No. L-08-22, 2008 WL 4200092, at *2 (S.D. Tex. Sept. 10, 2008) (finding that when discovery is still open, it is premature to grant summary judgment); *Phongsavane v. Potter*, No. 05CA0219-XR, 2005 WL 1514091, at *5 (W.D. Tex. June 24, 2005) (denying summary judgment motion filed three months into litigation as premature, explaining there was no scheduling order directing a timetable for discovery and the defendant had not filed an answer); *Blakeley v. UNUM Life Ins. Co. of Am.*, No. 3:97-CV-1769G, 1998 WL 177970, at *1 (N.D. Tex. April 9, 1998) ("a party may not be 'railroaded' by a motion for summary judgment prematurely filed") (citation omitted); *United States v. Forfeiture Prop., All Appurtenances and Improvements, Located at 1604 Oceola Wichita Falls, Tex.*, 803 F. Supp. 1194, 1199-1200 (N.D. Tex. 1992) (denying motion for summary judgment as premature when no answer had been filed); *Mont Belvieu Square Ltd. v. City of Mont Belvieu*, 27 F. Supp. 2d 935, 944-45 (S.D. Tex.

1998) (“Summary judgment should not . . . ordinarily be granted before discovery has been completed.”).

C. Defendants’ motion for stay or continuance satisfies Rule 56(f).

“Rule 56(f) allows for discovery to safeguard nonmoving parties from summary judgment motions that they cannot adequately oppose.” *Culwell v. City of Ft. Worth*, 468 F.3d 868, 871 (5th Cir. 2006). To prevail on a Rule 56(f) motion, the party opposing summary judgment “must show how the additional discovery . . . will create a genuine dispute as to a material fact” *International Shortstop, Inc. v. Rally’s, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991) (citation omitted). Defendants’ Rule 56(f) motion makes such a showing.¹

Plaintiffs have not alleged sufficient facts to support their standing to assert any claim in Plaintiffs’ amended original complaint, nor have they proffered any affidavits or other evidence in response to Defendants’ 12(b)(1) motion. There is currently no evidence in the record that would support Plaintiffs’ standing. Thus, Defendants’ motion to dismiss should be granted. In the event the Court denies Defendants’ motion to dismiss, however, Defendants submit that discovery regarding Plaintiffs’ standing will likely create material fact issues that preclude summary judgment as a matter of law. Information regarding how, when, where, and by what method Plaintiffs cast votes is only in the possession of Plaintiffs. Alibhai Decl. [doc. 35-2] ¶ 3. *Id.*² Information known only to Plaintiffs is likewise necessary to determine whether Plaintiffs

¹ Plaintiffs’ inapposite cases do not hold otherwise. In *United States v. Bloom*, the party opposing summary judgment *never filed a Rule 56(f) motion*. 112 F.3d 200, 205 n.17 (5th Cir. 1997). The antitrust plaintiff seeking Rule 56(f) relief in *Paul Kadair, Inc. v. Sony Corp. of America*, failed to make any discovery attempts over the course of one year, and the 56(f) motion—despite two court-directed revisions—remained nothing but an “impermissible fishing expedition.” 694 F.2d 1017, 1031-33 (5th Cir. 1983).

² See, e.g., *Segue v. State of La.*, No. 07-5221, 2007 WL 2900207, at *1, 3-4 (E.D. La. Oct. 3, 2007) (concluding plaintiff lacked standing because she lacked an actual, particularized injury fairly traceable to

section 5 claims are barred by laches. *Id.*³ Without the opportunity to discover this information, Defendants' ability to oppose Plaintiffs' motion for summary judgment is severely compromised.

Furthermore, Defendants have not engaged in dilatory tactics. Plaintiffs filed suit on December 1, 2008, and filed an amended complaint on December 19, 2008. *See* Plaintiffs' Complaint [doc. 1]; Plaintiffs' First Amended Original Complaint [doc. 16]. Defendants filed their pending Rule 12(b)(1) motion to dismiss on January 20, 2009, [doc. 24] and thus, have not filed an answer to Plaintiffs' amended original complaint. Alibhai Decl. [doc. 35-2] ¶ 6. The Court has not entered a scheduling order setting forth discovery deadlines. *Id.*

For all the foregoing reasons, Defendants have satisfied the requirements for Rule 56(f) relief. *See Culwell*, 468 F.3d at 873-74; *International Shortstop*, 939 F.2d at 1267-68. Accordingly, Defendants' Rule 56(f) motion should be granted. *Wichita Falls Office Assocs. v. Banc One Corp.*, 978 F.2d 915, 920 (5th Cir. 1992) (“[W]hen a party is seeking discovery that is germane to the pending summary judgment motion it is inequitable to pull out the rug from under them by denying such discovery.”).

D. Plaintiffs' “primary reason” to deny Defendants' motion to stay or continue Plaintiffs' motion for summary judgment on their section 5 claim lacks merit.

Plaintiffs contend that the “primary reason” to deny Defendants' motion to stay or continue Plaintiffs' section 5 claims is that “the nature of the claims requires that they be heard or decided promptly.” Plaintiffs' Response [doc. 40] at 3. Contrary to Plaintiffs' position, however, there is no “mandate for speedy disposition” of section 5 claims in the cases Plaintiffs cited. The plaintiffs in *Rios v. Bexar Metro. Water Dist.* sought to obtain a preliminary injunction to delay

the procedure alleged to be a section 5 violation); *Bone Shirt v. Hazeltine*, 444 F. Supp. 2d 992, 996 (D.S.D. 2005) (same).

³ *See e.g., Lopez v. Hale County, Tex.*, 797 F. Supp. 547, 549-50 (N.D. Tex. 1992), *aff'd*, 506 U.S. 1042 (1993) (denying section 5 relief due to plaintiff's delay).

elections. *Bexar*, No. SA-96-CA-335, 2006 WL 2711819, at *1-2 (W.D. Tex. Sept. 21, 2006). In *Bexar*, the “burden of delays in litigation” was the financial and logistical burden of holding delayed elections, not—as Plaintiffs assert—the burden of a hastening a section 5 judgment. *Bexar*, 2006 WL 2711819, at *1. Similarly, the plaintiffs in *Perkins v. Matthews* sought to enjoin implementation of certain changes, to have certain results set aside, and new elections ordered. 400 U.S. 379, 395-96 (1971). The *Perkins* Court considered the relative “burden of delays in litigation” in the context of the plaintiffs’ request for a new election, not in the context of hurrying a decision on the merits of a section 5 claim. *Id.* Finally, the court in *Elrod v. Burns* considered whether the loss of First Amendment rights satisfied the irreparable harm prong of a motion to preliminarily enjoin patronage dismissals—an issue which has no bearing on the merits of Plaintiffs’ section 5 claims. 427 U.S. 347, 373 (1976); Plaintiffs’ Response [doc. 40] at 3. Accordingly, none of Plaintiffs’ cases supports the Plaintiffs’ contention that a “mandate for speedy disposition” justifies refusing Defendants’ motion for stay or continuance, especially after Plaintiffs’ delay in bringing this action.

III. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, Defendants respectfully request that the Court stay proceedings in this case until the Court rules on Defendants’ motion to dismiss. Alternatively, Defendants respectfully ask the Court to deny or continue Plaintiffs’ motion for summary judgment to allow time for discovery as needed to prepare an adequate response.

Respectfully submitted,

/s/ E. Leon Carter

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon on counsel of record via the Court's ECF Noticing System on this 7th day of April, 2009.

/s/ E. Leon Carter

E. Leon Carter