

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

CELIA VALDEZ, et al.,

Plaintiffs,

v.

**MARY HERRERA, in her official capacity
as New Mexico Secretary of State, et al.,**

No. 1:09-cv-668 JCH/DJS

Defendants.

**DEFENDANT HSD'S RESPONSE IN OPPOSITION TO PLAINTIFFS MOTION
FOR A CONTINUANCE REGARDING DEFENDANT HYDE'S
SUMMARY JUDGMENT MOTION**

COMES NOW GARY K. KING, Attorney General of New Mexico, by Elaine P. Lujan and Adrian Terry, Assistant Attorneys General, on behalf of Defendants Pamela S. Hyde, Fred Sandoval, and Carolyn Ingram of the New Mexico Human Services Department (collectively "HSD") in the above-entitled action and submits this Response in Opposition to Plaintiffs' Motion for a Continuance Regarding Defendant Hyde's Summary Judgment Motion.

I. Procedural Background

Nearly a year ago, on January 9, 2009 Plaintiffs initiated this lawsuit by filing suit against the state agency defendants for alleged violations of the National Voter Registration Act ("NVRA"). [Doc. No. 1] After the Fed. R. Civ. P. 16 scheduling conference, conducted on September 16, 2009 [Doc. 22], the Court entered a scheduling order requiring discovery to be completed by April 1, 2010. [Doc. 23] This deadline was later extended, after a Joint Stipulated

Motion to Extend the Discovery Deadlines [Doc. 38], to June 1, 2010. Plaintiffs have thus had nearly eight months to conduct discovery.

Indeed, an extensive amount of discovery has been conducted thus far in the litigation. Specifically, Plaintiffs have served and HSD has responded to Plaintiff's First Set of Interrogatories and responded to Plaintiffs First Request for Production of Documents and have provided voluminous supplemental discovery documents. Plaintiffs have also taken an extensive 30(b)(6) deposition of Ted Roth, Deputy Director of ISD, three depositions of ISD county office managers, and three depositions of ISD regional operational managers. While Plaintiffs have filed a Motion to Compel Discovery against the Secretary of State [Doc. 60], they have not filed such a motion against HSD.

After such an extensive amount of discovery was conducted, it became increasingly apparent that there was no genuine issue of material fact, and Defendant HSD filed its motion for Summary Judgment. [Doc. 57] This fact is bolstered by the limited discovery propounded by Defendants HSD and TRD and the lack of any discovery requests to Plaintiffs from Defendant Herrera; notwithstanding the fact that none of the Defendants have requested or noticed depositions in this action. Plaintiffs now seek to extend the discovery deadline and not respond to the summary judgment motion until two weeks after the close of discovery as extended pursuant to their request.

II. Rule 56(f) Standard

Rule 56(f) allows a party opposing a motion for summary judgment to request additional time to complete discovery in order to gather information that is essential to opposing the summary judgment motion. *Committee for First Amendment v. Campbell*, 962 F.2d 1517, 1521-22 (10th

Cir. 1992). However, Rule 56(f) does not operate automatically. *Price v. Western Resources, Inc.*, 232 F.3d 779, 783 (10th Cir. 2000). It can only be applied if certain requirements are met. *Id.* As a prerequisite to obtaining relief under Rule 56(f), Plaintiffs must submit an affidavit identifying the probable facts not available and why those facts cannot be presented without further discovery. *Committee for First Amendment*, 962 F.2d at 1522. The Plaintiffs must also specifically demonstrate how such further discovery will assist them in overcoming HSD's prima facie showing of entitlement to judgment. *Id.* (“the nonmovant . . . must explain how additional time will enable [the nonmovant] to rebut movant's allegations of no genuine issue of fact.”); *Ben Ezra, Winstein & Co. v. Am. Online Inc.*, 206 F.3d 980, 987 (10th Cir. 2000) (“[T]he party [opposing summary judgment] must demonstrate precisely how additional discovery will lead to a genuine issue of material fact.”).

III. Plaintiffs Have Failed to Specify How Additional Discovery Will Assist In Overcoming HSD's Summary Judgment Motion

Plaintiffs have failed to meet prerequisites in order to obtain relief under Rule 56(f) and thus their motion for a continuance should be denied. Plaintiffs' general argument is that they have been diligent in seeking to complete discovery but because of alleged discovery failures on the part of HSD, discovery remains incomplete. [Doc. 67 at 4] This argument is defective for two reasons. First, “a party may not claim the right to an extension of time under Rule 56(f), by claiming that the opposing party has not cooperated with discovery requests.” *Reyes v. Wilson Mem. Hosp.*, 102 F. Supp. 2d 798, 826 (S.D. Ohio 1998). The appropriate forum for such an argument is a motion to compel. *Id.* Despite Plaintiffs arguments regarding HSD's discovery failures, it has not filed a motion to compel or sought any other from the Court compelling HSD to turn over documents. “A motion under Rule 56(f) is not the equivalent of a motion to

compel.” *Id.* While HSD is in full compliance with its discovery obligations, it will fully address this issue when and if the argument is raised legitimately, in an appropriate motion.

Second, while Plaintiffs have outlined what specific discovery they contend is incomplete and needed before responding to HSD’s summary judgment motion, they have failed to demonstrate how such discovery will enable them to overcome HSD’s motion for summary judgment. Instead of stating with any amount of specificity how the additional information is necessary to create a genuine issue of material fact, Plaintiffs make a vague and generalized argument that “[t]he uncompleted discovery specifically relates to Plaintiffs’ case in chief regarding HSD’s failure to comply with the NVRA, and thus relates specifically to Plaintiffs’ opposition to Defendant Hyde’s summary judgment motion.” [Doc. 67 at 4-5]

The generalized and vague nature of Plaintiffs argument is further evidenced in their affidavit in support of their motion. In their affidavit, Plaintiffs detail the factual contentions needed to support their claims. For example, the affidavit identifies that Plaintiffs need to submit evidence that “[v]oter registration historically has been a non-priority for HSD.” [Doc 67-1 at 2, ¶ 10] The affidavit further identifies that such facts are essential to their legal contentions including their contention that “Defendant Hyde and HSD are liable for a systematic violation of Section 7 of the NVRA extending back over many years.” [Doc. 67-1 at 3, ¶ 11] While this level of generalization is insufficient to obtain Rule 56(f) relief, it also raises questions about the sincerity of Plaintiffs motion for a continuance. Such vague references suggest “no more than a fishing expedition in progress.” *See Committee for First Amendment*, 962 F.2d at 1523 (holding that Plaintiff’s explanation that additional discovery would establish “a long history of censorship” was insufficient in showing how additional discovery would rebut Defendant’s

factual allegations or establish other disputed material facts and suggested “a fishing expedition in progress”).

In addition, Plaintiffs fail to demonstrate how the extensive amount of information already gathered through discovery at this point is insufficient to allow Plaintiffs to respond to the summary judgment motion. *See Ben Ezra, Winstein & Co.* 206 F.3d at 987 (holding that “[t]he district court properly concluded Plaintiff failed to demonstrate the previous depositions or written discovery were insufficient to allow Plaintiff to respond to Defendant’s summary judgment motion”). After nearly eight months of ongoing discovery, Plaintiffs have completed seven depositions and received responses to interrogatories and requests for production. If Plaintiffs allegation of a longstanding systematic violation of the NVRA is true, Plaintiffs certainly have had ample time in which to allege specific acts of NVRA violations. *See Committee for First Amendment*, 962 F.2d at 1523.

Finally, the Plaintiffs’ claims must support their right of action provided under the NVRA. *See* 42 USC § 1973gg-9(b)(2). The NVRA provides a private right of action for declaratory or injunctive relief with respect to alleged violations of the NVRA. *Id.* Plaintiffs have not filed a motion for injunctive relief and given the protracted course of this litigation, HSD now requests the declaratory relief prescribed by the NVRA through its motion for summary judgment. Plaintiffs cannot seek to prevent HSD from requesting the Court to provide the only remedy authorized by statute simply because of Plaintiffs’ unsupported allegations that inconsequential discovery matters are outstanding. Accordingly, Plaintiffs’ motion should be denied.

IV. Conclusion

For the foregoing reasons, Defendant HSD respectfully request this Court deny Plaintiffs Motion for a Continuance Regarding Defendant Hyde's Summary Judgment Motion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all parties of record via the CM/ECF case management system for the United States District Court for the District of New Mexico this 26th day of May, 2010.

/s/
Elaine P. Lujan