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' MOTION FOR STAY OR, IN THE ALTERNATIVE, RULE 56(f) MOTION AND BRIEF IN SUPPORT

Pursuant to Federal Rules of Civil Procedure, including Rule 56(f), Defendants Dallas County, Texas and Bruce Sherbet, in his capacity as Election Administrator for Dallas County, Texas (collectively, "Defendants"), move for a stay of this action pending resolution of their pending motion to dismiss and a continuance or denial of Plaintiffs' motion for summary judgment, as follows:

I.

INTRODUCTION

Defendants' pending Rule 12(b) motion to dismiss challenges Plaintiffs' standing to bring and assert the mootness of Plaintiffs' section 5 claim. That motion and legal challenges preclude any decision on the merits of Plaintiffs' section 5 claim. Despite the pendency of these threshold issues, Plaintiffs have prematurely moved for summary judgment. Thus, the Court

should stay further proceedings in this case until the Court resolves Defendants' motion to dismiss.

Even assuming Plaintiffs can overcome the legal infirmities in their claim, Plaintiffs' motion for summary judgment is still premature because (1) Plaintiffs filed this lawsuit less than three months ago; (2) Defendants have not answered Plaintiffs' amended original complaint; (3) this Court has not entered a Rule 16 Scheduling Order; (4) the parties have not engaged in—and cannot yet serve – discovery; and (5) Defendants have not had the opportunity to discover information vital to Defendants' opposition to Plaintiffs' motion for summary judgment. Accordingly, the Court should deny or continue Plaintiffs' motion for summary judgment.

II.

PROCEDURAL BACKGROUND

On December 1, 2008, Plaintiffs filed their original complaint against Defendants, Toni Pippins-Poole, and James Foster. *See* Plaintiffs' Original Complaint (doc. 1). On December 19, 2008, Plaintiffs obtained leave to file their First Amended Original Complaint. *See* Plaintiffs' First Amended Original Complaint (doc. 16). The amended complaint dismissed Foster and Pippins-Poole from this action and alleged claims pursuant to section 5 and section 2 of the Voting Rights Act ("VRA") with respect to how certain straight-party ticket votes are counted on direct record electronic voting machines called the iVotronic. *See id.*

On January 20, 2009, Defendants filed their motion to dismiss Plaintiffs' first amended original complaint on the grounds that Plaintiffs lacked standing to bring their section 2 and section 5 claims and failed to state a claim upon which relief can be granted. *See* Defendants' Motion to Dismiss (doc. 24). On February 9, 2009, Plaintiffs filed (1) their brief in support of their response to Defendants' motion to dismiss Plaintiffs' first amended original complaint and

Plaintiffs' brief in support of their motion for summary judgment on the section 5 claim and (2) Plaintiffs' motion for summary judgment on the section 5 claim. *See* Plaintiffs' Motion (doc. 27). Defendants now file this motion for stay and Rule 56(f) motion.

III.

STANDARDS FOR MOTIONS

A. Standard for Motion to Stay.

It is well settled that a district court has broad discretion to stay proceedings pending before it and to control its docket for the purpose of "economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997). The power to stay "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254-55 (citations omitted). To meet this burden, the moving party should show that its motion is supported by genuine necessity. *See id.* at 255.

B. Standard for a Rule 56(f) Motion.

Rule 56(f) discovery motions are "broadly favored and should be liberally granted" because the rule is designed to "safeguard non-moving parties from summary judgment motions that they cannot adequately oppose." *Hinojosa v. Johnson*, 277 Fed. Appx. 370, 375 (5th Cir. 2008) (quoting *Culwell v. City of Fort Worth*, 468 F.3d 868, 871 (5th Cir. 2006)). "The purpose of Rule 56(f) is to provide non-movants with a much needed tool to keep open the doors of discovery in order to adequately combat a summary judgment motion." *Wichita Falls Office Assocs. v. Banc One Corp.*, 978 F.2d 915, 919 (5th Cir. 1992). Indeed, "where a party seeks discovery 'germane to the pending summary judgment motion it is inequitable to pull out the rug

from under [it] by denying such discovery.'" *Hinojosa*, 277 Fed. Appx. at 375-76 (quoting *Wichita Falls Office Assocs.*, 978 F.2d at 920) (alteration in original).

Rule 56(f) provides:

> If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order.

To invoke Rule 56(f), the nonmovant must establish three general requirements: (1) "request[] extended discovery prior to the court's ruling on summary judgment;" (2) "put the trial court on notice that further discovery pertaining to the summary judgment motion is being sought;" and (3) "demonstrat[e] to the trial court specifically how the requested discovery pertains to the pending motion." *Hinojosa*, 277 Fed. Appx. at 375 (quoting *Wichita Falls*, 978 F.2d at 919) (alteration in original). A 56(f) motion "should be granted almost as a matter of course' unless 'the non-moving party has not diligently pursued discovery of the evidence.'" *Wichita Falls*, 978 F.2d at 919 n.4 (quoting *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir.1991)); *see also Culwell*, 468 F.3d at 871 (explaining that Rule 56(f) motions "are broadly favored and should be liberally granted").

IV.

ARGUMENTS AND AUTHORITIES

A. This Court Should First Rule on Defendants' Rule 12(b)(1) Motion Before Entertaining Plaintiffs' Motion for Summary Judgment.

As explained in Defendants' motion to dismiss, Plaintiffs lack standing. *See* Defendants' Motion to Dismiss Plaintiffs' First Amended Original Complaint and Brief in Support. (doc.

24).[1] A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction must be considered before any other challenge because the court must first find jurisdiction before determining the validity of the claim. *See Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994). Therefore, this Court should not consider Plaintiffs' motion for summary judgment until after it rules on Defendants' Rule 12(b)(1) motion to dismiss.

B. This Court Should Stay These Proceedings Pending the Outcome of Defendants' Motion to Dismiss.

A stay of the proceedings is appropriate here. The Court has discretionary authority to issue a stay pending the outcome of Defendants' motion to dismiss. *See* FED. R. CIV. P. 26(c); *Petrus*, 833 F.2d at 583 ("A trial court has broad discretion and inherent power to stay until preliminary questions that may dispose of the case are determined."); *see also Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 876 (5th Cir. 2000) ("We review a district court's discovery decisions for abuse of discretion and will affirm such decisions unless they are arbitrary or clearly unreasonable.").

Defendants' motion to dismiss raises a legal question of this Court's jurisdiction over the subject matter of the dispute. That motion to dismiss has been fully briefed by the parties and submitted for determination. Assuming the Court grants Defendants' motion to dismiss, then it will not be necessary for both parties and the Court to devote any time and effort to litigating the section 2 and section 5 claims.

C. Plaintiffs' Motion for Summary Judgment is Premature.

Courts have found numerous reasons to hold that a summary judgment is premature, including no answer on file for defendant, no basic discovery has been initiated, the litigation is

[1] Pursuant to Federal Rule of Civil Procedure 10(c), Defendants incorporate their Motion to Dismiss herein.

in its infancy, and the nonmovant has not had the opportunity to develop its case. *See Phongsavane v. Potter*, No. 05CA0219-XR, 2005 WL 1514091, at *5 (W.D. Tex. June 24, 2005) (a grant of summary judgment is premature when basic discovery has not been completed, the case was filed three months before summary judgment was filed, there is no scheduling order directing a timetable for discovery, and the defendant has not filed an answer); *Blakely v. UNUM Life Ins. Co. of Am.*, No. 97-CV-1769G, 1998 WL 177970, at *1 (N.D. Tex. April 9, 1998) (holding that a motion for summary judgment is deemed to be premature when the nonmovant has not had the opportunity to develop his case); *United States v. Forfeiture Prop., All Appurtenances and Improvements, Located at 1604 Oceola Wichita Falls*, 803 F. Supp. 1194, 1199 (N.D. Tex. 1992) (motion for summary judgment is premature when no answer has been filed in the case); *Mont Belview Square Ltd. v. City of Mont Belview*, 27 F. Supp. 2d 935, 944-45 (S.D. Tex. 1998) ("Summary judgment should not . . . ordinarily be granted before discovery has been completed."); *see also Littlejohn*, 483 F.2d at 1145-46 (vacating summary judgment that was granted without allowing party to take discovery); *Valadez v. United Indep. Sch. Dist.*, No. L-08-22, 2008 WL 4200092, at *2 (S.D. Tex. Sept. 10, 2008) (holding that when discovery is still open, it is premature to grant summary judgment).

It is undisputed that all of these reasons are present in this case. Plaintiffs filed their motion for summary judgment seventy days after filing this lawsuit and only fifty-two days after filing their amended complaint. Defendants filed a motion to dismiss the amended original complaint and have not filed an answer yet. The parties have not engaged in any discovery, held a Rule 26 conference, or even exchanged initial disclosures. Of course, the Court has not entered a scheduling order yet. In sum, Defendants have not had the opportunity to develop their case; accordingly, Plaintiffs' motion for summary judgment on their own claim is premature.

D. If the Court Denies the Motion to Dismiss, the Court Should Continue the Proceedings on Plaintiffs' Motion for Summary Judgment to Provide Defendants an Opportunity to Conduct Discovery and Develop Their Case to Oppose Plaintiffs' Motion for Summary Judgment.

Because Defendants believe Plaintiffs failed to meet their burden of establishing that Defendants failed to obtain the requisite section 5 preclearance, Defendants request that they be afforded the opportunity to conduct meaningful discovery that will enable them to present facts material to their opposition to Plaintiffs' motion for summary judgment, and that will assist the Court in determining that Plaintiffs' motion for summary judgment should be denied. *See Culwell*, 468 F.3d at 871 ("Rule 56(f) allows for discovery to safeguard nonmoving parties from summary judgment motions that they cannot adequately oppose.")

Plaintiffs' motion for summary judgment includes several statements of material fact for which Defendants require depositions and discovery to prepare an adequate response. For example, Plaintiffs' motion for summary judgment asserts that: (1) "the manner in which the election system employed by the Defendant tallies votes does not comply with state law" (doc. 24, p. 3); (2) the Department of Justice did not receive all the information necessary to preclear the iVotronic voting machine at issue in this litigation (doc. 24, p. 3); (3) Plaintiffs have standing to bring the section 5 claim (doc. 24, p. 15); (4) the iVotronic did not receive the requisite preclearance (doc. 24, p. 19); and (5) that Plaintiffs' section 5 claim is not barred by laches (doc. 24, p. 20).

The areas of discovery that are necessary to respond to Plaintiffs' motion for summary judgment and will likely result in the discovery of material fact issues that may preclude summary judgment on Plaintiffs' section 5 claim are:

a. What information Plaintiffs contend was not provided to the Department of Justice regarding preclearance of the iVotronic;

b. The Plaintiffs' allegations that the iVotronic requires additional preclearance;

c. Information from Plaintiffs regarding their allegations that the method of tallying votes has changed since October 2008 and requires further preclearance;

d. Whether iVotronic should offer voters a chance to cast an emphasis vote;

e. Whether Plaintiffs cast a straight-party ticket vote and then also deselected a candidate intending to case an emphasis vote on the iVotronic; and

f. Whether an "emphasis vote" cast on an iVotronic results in a no vote cast by that voter.

See Declaration of Jamil N. Alibhai ("Alibhai Decl.") ¶ 2, attached hereto as Exhibit "A."

If Defendants' Motion To Dismiss is denied, discovery related to whether Plaintiffs have standing or were dilatory in bringing their claims will create a material fact issue that will preclude summary judgment in their favor as a matter of law. Alibhai Decl. ¶ 3. Information on how, when, where or by which method Plaintiffs cast votes will determine whether they have standing to bring the section 5 claim. *Id.*

Defendants intend to obtain this information through interrogatories, request for production, and depositions of Plaintiffs. *Id.* ¶ 4. Defendants also intend to serve Freedom of Information Act requests and/or subpoenas to the Texas Secretary of State and the United States Department of Justice. *Id.* ¶ 5.

Defendants have not yet obtained this discovery for several reasons. This litigation is less than three months old. *See* Plaintiffs' Complaint (doc. 1.) Defendants have a pending Rule 12(b)(1) motion to dismiss. *See* Defendants' Motion to Dismiss (doc. 24). Defendants have not filed an answer to Plaintiffs' amended original complaint. Alibhai Decl. ¶ 6. The Court has not

entered a scheduling order setting forth discovery deadlines. *Id.* Thus, Defendants' failure to obtain this discovery is not the result of any dilatory tactics. *Id.*

Without the opportunity to discover this information, Defendants' ability to put on their case and oppose Plaintiffs' Motion for summary judgment is severely compromised. Accordingly, Defendants respectfully request that the Court deny Plaintiffs' motion for summary judgment or grant them a continuance to conduct discovery necessary to oppose Plaintiffs' motion for summary judgment.

V.

CONCLUSION AND REQUEST FOR RELIEF

Pursuant to the Court's inherent power to manage its docket, Plaintiffs respectfully request that the Court stay proceedings in this case until the Court's decision on Defendants' Rule 12(b) motion to dismiss. Pursuant to Rule 56(f), Defendants respectfully request that the Court deny or continue Plaintiffs' motion for summary judgment on their section 5 claim to allow Defendants to conduct discovery to prepare an adequate response to Plaintiffs' motion for summary judgment.

Respectfully submitted,

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BRUCE SHERBET, IN HIS CAPACITY
AS ELECTION ADMINISTRATOR
FOR DALLAS COUNTY, TEXAS

CERTIFICATE OF CONFERENCE

On February 27, 2009, I conferred with Chad Dunn, counsel for Plaintiffs, concerning the relief requested in this motion. Mr. Dunn is opposed to the foregoing motion.

/s/ Jamil N. Alibhai
Jamil N. Alibhai

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 2nd day of March, 2009.

/s/ Jamil N. Alibhai
Jamil N. Alibhai

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

DECLARATION OF JAMIL N. ALIBHAI

I, Jamil N. Alibhai, declare as follows:

1. I am an attorney licensed to practice law in the State of Texas and am admitted before this Court. I am a partner with the law firm Munck Carter, LLP, counsel for Defendants Dallas County, Texas and Bruce Sherbet, in his capacity as Election Administrator for Dallas County, Texas (collectively "Defendants"). I submit this Declaration in support of Defendants' Motion for Stay or, in the Alternative, Rule 56(f) Motion and Brief in Support. Unless otherwise indicated, I make this Declaration based on personal knowledge.

2. In the event the Court does not grant Defendants' pending motion to dismiss, Defendants will require depositions and discovery to respond to Plaintiffs' motion for summary judgment. The areas of discovery that are necessary to respond to Plaintiffs' motion for summary judgment and will likely result in the discovery of material fact issues that may preclude summary judgment on Plaintiffs' section 5 claim are:

a. What information Plaintiffs contend was not provided to the Department of Justice regarding preclearance of the iVotronic;

b. The Plaintiffs' allegations that the iVotronic requires additional preclearance;

c. Information from Plaintiffs regarding their allegations that the method of tallying votes has changed since October 2008 and requires further preclearance;

d. Whether iVotronic should offer voters a chance to cast an emphasis vote;

e. Whether Plaintiffs cast a straight-party ticket vote and then also deselected a candidate intending to case an emphasis vote on the iVotronic; and

f. Whether an "emphasis vote" cast on an iVotronic results in a no vote cast by that voter.

3. In addition to the discovery required regarding the factual issues underlying Plaintiffs' section 5 claim, depending on the Court's ruling on Defendants' Motion to Dismiss, discovery may be required regarding:

a. whether Plaintiffs were dilatory in bringing their claims; and

b. how, when, where or upon what method Plaintiffs cast votes.

4. Defendants intend to obtain this information through interrogatories, request for production, and depositions of Plaintiffs.

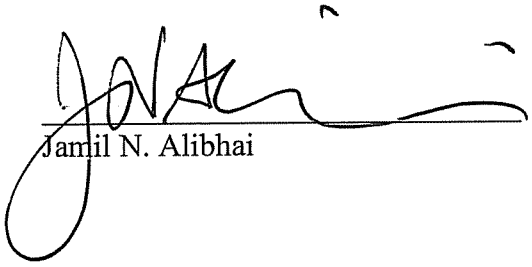
5. Defendants also intend to obtain information through Freedom of Information Act requests and/or subpoenas to the Texas Secretary of State and the United States Department of Justice.

6. Defendants have not yet obtained this discovery because: (1) this litigation is less than three months old; (2) Defendants have a pending Rule 12(b)(1) motion to dismiss; (3) Defendants have not filed an answer to Plaintiffs' amended complaint; and (4) the Court has not

entered a scheduling order setting forth discovery deadlines. Thus, Defendants' failure to obtain this discovery is not the result of any dilatory tactics.

I declare under penalty of perjury that the foregoing is true and correct.

This Declaration was executed in Dallas, Texas on March 2, 2009.



Jamil N. Alibhai