

1 GAUTAM DUTTA, ESQ. (State Bar No. 199326)
39270 Paseo Padre Parkway # 206
2 Fremont, CA 94538
Telephone: 415.236.2048
3 Email: dutta@businessandelectionlaw.com
Fax: 213.405.2416

4 Attorney for Plaintiffs

5 MICHAEL CHAMNESS, DANIEL FREDERICK,
6 and RICH WILSON

7
8 IN THE UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 MICHAEL CHAMNESS, DANIEL
FREDERICK, and RICH WILSON,

12 *Plaintiffs,*

13 vs.

14 DEBRA BOWEN, in only her
15 official capacity as California
Secretary of State; DEAN LOGAN,
16 in only his official capacity as
Registrar-Recorder / County Clerk
17 of the County of Los Angeles; and
DOES 1-10;

18 *Defendants.*

CASE NO. CV-11-1479 ODW (FFMx)

**PLAINTIFF’S OPPOSITION TO EX
PARTE APPLICATION TO DEFER
CONSIDERATION OF PLAINTIFFS’
MOTION FOR SUMMARY
JUDGMENT; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF GAUTAM
DUTTA**

HEARING DATE: N/A
HEARING TIME: N/A
JUDGE: Hon. Otis D. Wright II
COURTROOM: 11

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. Introduction**

3 *Ex parte applications throw the system out of whack. They impose an*
4 *unnecessary administrative burden on the court and an unnecessary adversarial*
5 *burden on opposing counsel who are required to make a hurried response under*
6 *pressure, usually for no good reason.*

7 -- *Mission Power Engineering Co. v. Continental Casualty Co.*¹

8 *Ex parte applications are solely for extraordinary relief and should be used*
9 *with discretion. Sanctions may be imposed for misuse of ex parte applications.*

10 -- The Court's Standing Order²

11 This unauthorized, untimely, and unwarranted Application must be denied
12 for two main reasons. First and foremost, there are no grounds whatsoever for
13 granting extraordinary, ex parte relief. Defendant Bowen first learned that
14 Plaintiffs would file their Motion for Summary Judgment *over five weeks ago*.
15 Why did she not bring her discovery-related concerns sooner? And why did she
16 reject Plaintiffs' repeated offers to extend the deadline for her opposition brief.
17 Second, Defendant Bowen's underlying motion must be denied outright. Not only
18 does her motion lack legal merit, but it fails to provide any Points and Authorities
19 – a deliberate violation of Local Rule 7-19. The Court must deny her naked
20 attempt to delay – and thereby prejudice – Plaintiffs' right to a "just, speedy, and
21 inexpensive determination" of their weighty constitutional claims.³

22 **II. Background**

23 A. Defendant Bowen Was Given Early Notice of Plaintiffs' Motion for
24 Summary Judgment

25 On April 4, 2011, Plaintiffs' counsel notified all counsel via email that
26 Plaintiffs would file a Motion for Summary Judgment.⁴ Pursuant to Local Rule 7-3,

27 ¹ *Mission Power Engineering Co. v. Continental Casualty Co.*, 883 F.Supp.488, 491 (C.D.
28 Cal. 1995) (emphases added) (quoting *In re Intermagnetics America, Inc.*, 101 B.R. 191, 193
(C.D. Cal. 1989)).

² The Court's Mar. 7, 2011 Standing Order Regarding Newly Assigned Cases ¶10
(emphasis added).

³ See FRCP §1.

⁴ Declaration of Gautam Dutta ("Dutta Decl.") ¶3.

1 a conference of counsel was held on April 6, 2011 to discuss Plaintiffs’ Motion for
2 Summary Judgment.⁵ During that conference, counsel for Defendant Bowen stated
3 that he would file a motion to defer consideration of Plaintiffs’ Motion for
4 Summary Judgment under FRCP 56(d).⁶ The next day, Defendant Bowen’s
5 counsel told Plaintiffs’ counsel that he would seek to depose Plaintiff Michael
6 Chamness with regard to his party affiliation with the Coffee Party.⁷

7 The period for discovery in this case began on April 25, 2011, immediately
8 after all counsel conferred in order to prepare their Joint Scheduling Conference
9 Report, which was filed with the Court on May 2, 2011.⁸ Paragraph I(C) of that
10 Report stated: “The parties believe that all issues in this case *can and should be*
11 *decided by summary judgment*. Plaintiffs intend to file a motion for summary
12 judgment. Towards that end, Plaintiffs convened a conference of counsel on April
13 6, 2011, pursuant to Local Rule 7-3.”⁹

14 Neither Secretary Bowen nor Intervenors filed any motions between April 6
15 and May 11, 2011, and they did not propound any discovery during that time.¹⁰ On
16 May 6, 2011, 5:07 pm, Plaintiffs filed the Memorandum of Points and Authorities
17 to their Notice of Motion and Motion for Summary Judgment.¹¹ All opposition
18 papers to Plaintiffs’ Motion for Summary Judgment are due on May 16, 2011.¹²

19 B. Items Requested by Defendant Bowen

20 According to her counsel’s declaration (he did not file any Points and
21 Authorities), Defendant Bowen seeks three purportedly “extraordinary” items of
22 relief. First, she claims that she needs an extension of time to oppose Plaintiffs’
23 Motion for Summary Judgment (the “Motion”). Yet in so doing, Defendant Bowen

24 _____
25 ⁵ Dutta Decl. ¶3.

26 ⁶ Dutta Decl. ¶4.

27 ⁷ Dutta Decl. ¶¶5,6.

28 ⁸ Dutta Decl. ¶7.

⁹ Dutta Decl. ¶7 (emphases added).

¹⁰ Dutta Decl. ¶8.

¹¹ Dutta Decl. ¶9.

¹² Dutta Decl. ¶10.

1 does not explain why she rejected Plaintiffs' repeated offers to extend the filing
2 deadline for her brief. Two days ago, she had accepted Plaintiffs' offer to extend
3 the deadline for her papers by one day, to May 17, 2011 – but then inexplicably
4 changed her mind.¹³ Plaintiffs' then offered to extend her deadline by *one full*
5 *week*. Once again, Secretary Bowen again rejected Plaintiffs' generous offer.¹⁴

6 Second, Defendant Bowen seeks to *indefinitely block* Plaintiffs' Motion from
7 being heard, in order to allow her to file a cross-motion for summary judgment at
8 an unspecified time. However, the Court does not await a cross-motion to resolve
9 this case. Even if it denies a party's motion for summary judgment, a court has the
10 power to enter judgment as to the entire litigation under FRCP 56(f).

11 Finally, Defendant Bowen seeks to stay Plaintiffs' Motion, for she claims
12 that she must first conduct discovery regarding (1) the "basis" for Plaintiff
13 Chamness' right to the ballot label of "Independent" and (2) Plaintiff Chamness'
14 affiliation with the Coffee Party. As we will show, neither issue provides any basis
15 for staying Plaintiffs' Motion.

16 C. Underlying Legal Issue

17 This Application pertains to one of Plaintiff Chamness' as-applied claims:
18 namely, whether Plaintiff Chamness had a fundamental right to use the ballot label
19 of "Independent" in two recent special elections. Under SB 6, a candidate's *voter*
20 *registration* determines what ballot label he or she may use. For instance, if a
21 candidate is registered to vote with the party affiliation of a major party (e.g.,
22 Republican Party), he or she may use that party's ballot label.

23 However, a different set of rules applies for minor-party candidates, who are
24 deemed under California law to be "Independent".¹⁵ Specifically, if a candidate is
25 registered to vote with the party affiliation of a minor party (e.g., Coffee Party), SB
26

27 ¹³ Dutta Decl. ¶¶13, 14.

28 ¹⁴ Dutta Decl. ¶¶16, 17.

¹⁵ *Libertarian Party v. Eu*, 620 P.2d 612, 28 Cal.3d 535, 540 (Cal. 1980).

1 6 bans him or her from using the ballot label of “Independent”.¹⁶ Here, Plaintiff
2 Michael Chamness is registered to vote with the party affiliation of the Coffee
3 Party.¹⁷ Thus, SB 6 banned him from using the party label of “Independent”.

4 **III. Defendant Bowen Violated Local Rule 7-19**

5 At the outset, Defendant Bowen’s ex parte Application must be summarily
6 denied, because she violated Local Rule 7-19. Under that rule, every ex parte
7 applicant must, at a bare minimum, provide a Memorandum of Points and
8 Authorities, as well as the contact information of opposing counsel. Defendant
9 Bowen did neither. (Astoundingly, her entire ex parte “Application” consists of
10 *two sentences*.) Needless to say, Defendant Bowen has failed to proffer any legal
11 authority to justify her claims. Because she violated two core requirements for ex
12 parte applications, Rule 7-19 mandates that her Application be summarily denied.

13 **IV. Defendant Bowen Is Ineligible for Ex Parte Relief**

14 Defendant Bowen is barred from receiving ex parte relief for two reasons:
15 (1) her failure to take timely action “created” her “crisis”, and (2) she is not
16 threatened with “irreparable prejudice”.¹⁸

17 **A. Defendant Bowen Is at Fault for “Creating” Her “Crisis”**

18 First, Defendant Bowen is barred from receiving any ex parte relief, for she
19 is fully at “fault” for “creating” the crisis from which she seeks relief.¹⁹ Even
20 thought she was given notice that Plaintiffs would file their Motion *over five weeks*
21 *ago*, she failed to propound any discovery and failed to file any motion regarding

22 _____
23 ¹⁶ SB 6-amended Elections Code §325 mandates that all voters “of independent status” be
24 listed as having “No Party Preference”. Further, if a candidate’s voter registration card states that
25 he or she has “No Party Preference”, his or her declaration of candidacy must also state that he or
26 she has “No Party Preference.” SB 6-amended Elections Code §8002.5(a). Finally, if a
candidate’s declaration of candidacy states that he or she has “No Party Preference”, then “No
Party Preference” must be printed beside his or her name on the ballot. SB 6-amended Elections
Code §13105(a).

26 ¹⁷ Dutta Decl. ¶2 & Exh. 1.

27 ¹⁸ *Mission Power, supra*, 883 F.Supp. at 492-93.

28 ¹⁹ *Id.* at 493; *see also Mackey v. Pioneer Nat’l Bank*, 867 F.2d 520, 524 (9th Cir. 1989); *Brae
Transp. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986); *Frederick S. Wyle P.C. v.
Texaco*, 764 F.2d 604, 612 (9th Cir. 1985).

1 her discovery-related concerns *until 24 hours ago* – and has given no explanation or
2 excuse for her conduct. What is more, Defendant Bowen rejected two offers by
3 Plaintiffs to extend the filing deadline for her opposition brief. Inexplicably, she
4 rejected Plaintiffs’ generous offer to grant her a *one-week extension*. Finally,
5 Defendant Bowen inexplicably waited until yesterday evening – five days after
6 Plaintiffs had filed their Motion – to file her Application. In this light, Defendant
7 Bowen refused to “diligently pursue” discovery,²⁰ and flatly refused Plaintiffs’
8 repeated offers to extend her deadlines. Because she is thus fully at fault for
9 “creating” her “crisis”, the Court must deny her ex parte Application.

10 B. Defendant Bowen Is Not Threatened with Irreparable Prejudice

11 Furthermore, Defendant Bowen is barred from receiving ex parte relief, for
12 she will not suffer “irreparable” prejudice if her Application is denied. Defendant
13 Bowen has had sufficient time to study Plaintiffs’ Motion. She was served with
14 Plaintiffs’ Points and Authorities at 5:07 pm on Friday, May 6, 2011; her
15 opposition papers are due on May 16, 2011. Nevertheless, Plaintiffs would not
16 object if the Court granted her a three-day extension, provided that Plaintiffs also
17 receive the same extension to file their reply brief.

18 Moreover, Defendant Bowen would not suffer – and does not allege that she
19 would suffer – any “irreparable” prejudice if Plaintiffs’ Motion is not consolidated
20 with any cross-motions for summary judgment. Indeed, Defendant Bowen
21 successfully opposed Plaintiff Chamness’ earlier Motion for Preliminary
22 Injunction, and will likely raise similar arguments against Plaintiffs’ pending
23 Motion. In this light, she will have a full and fair opportunity to oppose Plaintiffs’
24 Motion.

25 Finally, as the next section will show, her underlying motion (i.e., to
26 indefinitely block Plaintiffs’ Motion from being heard) has no legal merit. If an ex

27 _____
28 ²⁰ *Mackey, supra*, 867 F.2d at 524; *see also Brae, supra*, 790 F.2d at 1443; *Frederick S. Wyle P.C., supra*, 764 F.2d at 612.

1 parte litigant’s motion is meritless, “failure to hear it cannot be prejudicial.”²¹

2 Because Defendant Bowen has not alleged that she is threatened with “irreparable
3 prejudice”, she must show that her underlying motion has a “high likelihood of
4 success on the merits.”²² As the next section shows, she has failed to make such a
5 showing.

6 **V. Defendant Bowen’s Underlying Motion Has No Legal Merit**

7 Finally, Defendant Bowen’s underlying motion to block the hearing on
8 Plaintiffs’ Motion has no merit. As a general rule, a party may seek – and a court
9 may rule on – a motion for summary judgment, even if the discovery period has not
10 yet ended.²³ If a party has “properly submitted” a motion for summary judgment,
11 the “burden shifts to the opposing party to set forth specific facts showing that there
12 is a genuine issue for trial.”²⁴ Toward that end, the opposing party “may not rely on
13 denials in the pleadings but must produce specific evidence ... to show that the
14 dispute exists.”²⁵

15 Although her counsel’s declaration is not clear, Defendant Bowen apparently
16 seeks to stay the hearing on Plaintiffs’ Motion by invoking FRCP 56(d). That rule,
17 which originally codified as FRCP 56(f), imposes stringent requirements on how to
18 stay hearings on summary judgment. Specifically, an opposing party must show
19 that (1) it diligently pursued discovery, and (2) it needs additional time to discover
20 “central” facts.²⁶

21 Defendant’s Bowen’s Application must first be rejected, because she failed
22 to diligently pursue discovery.²⁷ First, even though the discovery period began
23 nearly *three weeks ago*, she has failed to propound any discovery whatsoever.

24 ²¹ *Mission Power, supra*, 883 F.Supp. at 492 (emphasis added).

25 ²² *Id.* at 492.

26 ²³ *Mackey, supra*, 867 F.2d at 524; *see also Brae, supra*, 790 F.2d at 1443; *Frederick S. Wyle P.C., supra*, 764 F.2d at 612.

27 ²⁴ *Albarran v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008).

28 ²⁵ *Id.* at 707 (emphasis added).

²⁶ *Mackey, supra*, 867 F.2d at 523 (emphasis added).

²⁷ *Mackey, supra*, 867 F.2d at 524; *see also Brae, supra*, 790 F.2d at 1443; *Frederick S. Wyle P.C., supra*, 764 F.2d at 612.

1 During that period, she also had ample opportunity to file a regularly noticed
2 motion with the Court. Accordingly, Ninth Circuit precedent absolutely bars her
3 from staying Plaintiffs' Motion.²⁸

4 Equally important, none of the "facts" that Defendant Bowen seeks are
5 "central" to Plaintiffs' Motion. Specifically, Defendant Bowen seeks to conduct
6 discovery regarding (1) the "basis" for Plaintiff Chamness' right to the ballot label
7 of "Independent" and (2) Plaintiff Chamness' affiliation with the Coffee Party.
8 However, neither of those two items constitutes facts that are "central" to Plaintiffs'
9 Motion.

10 As mentioned earlier, Defendant Bowen's Application touches on only one
11 question of law raised by Plaintiffs' Motion: whether Plaintiff Chamness had a
12 fundamental right to use the ballot label of "Independent" during two special
13 elections. Under SB 6, a candidate's *voter registration* determines what ballot label
14 he or she may use.²⁹ Here, it is undisputed that (1) Plaintiff Chamness is registered
15 with the party affiliation of the Coffee Party (his voter registration form has been
16 attached as Exhibit 1), and (2) Plaintiff Chamness was banned from using the ballot
17 label of "Independent" during two special elections.

18 Thus, the Court now has all facts required to adjudicate Plaintiff Chamness'
19 legal question: whether he had a fundamental right to the ballot label of
20 "Independent". Moreover, Defendant Bowen had successfully convinced the Court
21 that Plaintiff Chamness had no such right during Plaintiff Chamness' Motion for
22 Preliminary Injunction. In this light, any discovery regarding Plaintiff Chamness'
23 right to a party label will not affect how the Court will rule on Plaintiffs' Motion.
24 Accordingly, the facts that Defendant Bowen seeks to (belatedly) discover are not
25 "central" to resolving the relevant part of Plaintiffs' Motion. Consequently,

26
27 ²⁸ *Mackey, supra*, 867 F.2d at 524; *see also Brae, supra*, 790 F.2d at 1443; *Frederick S.*
Wyle P.C., supra, 764 F.2d at 612.

28 ²⁹ *See* discussion at *supra* notes 15 and 16.

1 Defendant Bowen’s Application must be denied, because it fails on the merits.

2 **VI. Conclusion**

3 *Lawyers must understand that filing an ex parte motion ... is the forensic*
4 *equivalent of standing in a crowded theater and shouting, “Fire!” There had*
better be a fire.

5 -- *Mission Power Engineering Co. v. Continental Casualty Co.*³⁰

6 This unauthorized, untimely, and utterly unwarranted Application should
7 never have been filed. Simply put, there is no “fire” for the Court to put out.
8 Defendant Bowen’s Application not only violates the Local Rules, but lacks any
9 legal merit whatsoever. Accordingly, the Court should deny her Application and
10 notice it for a regularly scheduled hearing.³¹

11
12
13 DATED: May 12, 2011

14
15 Respectfully submitted,

16
17 By: /s/ _____

18 GAUTAM DUTTA, ESQ.

19
20 Attorney for Plaintiffs

21 MICHAEL CHAMNESS, DANIEL
22 FREDERICK, and RICH WILSON
23
24
25
26

27 ³⁰ *Mission Power, supra*, 883 F.Supp. at 492 (emphases added).

28 ³¹ *Id.* at 493.