The Honorable James L. Robart
U.S. District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

NORTHWEST IMMIGRANT RIGHTS PROJECT, ET AL., Plaintiffs, v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL., Defendants.	Case No. 2:15-cv-00813 PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY SUMMARY JUDGMENT NOTED ON CALENDAR: August 14, 2015

The Court should deny Defendants' untimely and unsupported motion to stay consideration and briefing of Plaintiffs' pending motion for summary judgment. Defendants' motion should be construed as an untimely and unsupported Rule 56(d) motion and denied. Defendants fail to plead, much less to document, that their late-filed opposition is excusable neglect under Fed. R. Civ. P. 6(b). *See Hartman v. United Bank Card, Inc.*, 291 F.R.D. 591, 595 (W.D. Wash. 2013). Nor do Defendants attempt to meet the Fed. R. Civ. P. 56(d) standard of showing by "affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." *See Stern v. SeQual Technologies, Inc.*, 840 F. Supp. 2d 1260, 1275

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(W.D. Wash.) *aff'd*, 493 F. App'x 99 (Fed. Cir. 2012). With no explanation for their late filing, and no declaration or affidavit identifying any specific facts they seek to discover, Defendants provide no basis for staying or delaying summary judgment proceedings. Indeed, Defendants' inexcusable delay only causes putative class members more harm: jobs lost, income lost, and cascading hardship to individuals, families, and businesses. *See, e.g.*, Exh. D at 1-2 (Dolgaya Decl. ¶¶ 2, 4); Exh. E at 1-2 (Moran Decl. ¶¶ 2, 4); Exh. F at 2-3 (Svendsen Decl., ¶¶ 5, 7-8).

Despite Defendants' failure to respond in a timely manner to Plaintiffs' motion for summary judgment, Plaintiffs do not oppose granting Defendants fourteen days from the date of this Court's order to file a *substantive* response to the pending summary judgment motion, explaining why the agency need not follow its own mandatory regulations for issuing employment authorization documents (EADs). Plaintiffs request that the Court grant fourteen days to file a reply brief.

BACKGROUND

On May 22, 2015, Plaintiffs filed this putative nationwide class action challenging Defendants' policies and practices of unlawfully delaying adjudication of EAD applications and failing to issue interim employment authorization, as required by Defendants' own regulations. 8 C.F.R. §§ 208.7(a)(1), 274a.13(a)(2), 274a.13(d); *see also* Compl. at 19-21. Plaintiffs contend that the legal question for summary judgment is basic: Does USCIS have to follow its own mandatory regulations?

Not only is the legal claim straightforward, but there is no genuine dispute of fact. First, Defendants do not adjudicate all EAD applications within the regulatory timetable, as Plaintiffs have documented. *See, e.g.*, Dkt. 5-8 at 2-4 (Oskouian Decl. ¶¶ 4-9); Dkt. 5-5 at 2-4 (McKenzie Decl. ¶¶ 5-6, 8-10, 14-15). Defendant USCIS has publicly admitted this problem.

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According to the USCIS Ombudsman's[1] most recent Annual Report, "Customers regularly turn to the Ombudsman for case assistance when their [EAD applications] remain pending outside of the 90-day regulatory processing period." Dkt. 24-1 at 49 (2015 Annual Report); *see also* Pls.' Mot. Summ. J. at 2, 5-13.

Second, there is no dispute that Defendants do not grant interim employment authorization when the regulatory timeframe has expired. Defendant USCIS candidly admits that it "no longer produces interim EADs" despite the regulatory requirement to do so. Dkt. 5-1 at 2 (Lawrence Decl. ¶ 8), Dkt. 24-2 at 9 (USCIS/AILA April 16, 2015 Meeting Q&A).

Defendant USCIS's delays in adjudicating EAD applications and its refusal to issue interim employment authorization cause hardship to affected individuals and businesses. As the USCIS Ombudsman reported:

> When processing of employment authorization applications is delayed, both individuals and their current or would-be employers suffer adverse consequences. Applicants experience financial hardship due to job interruption and employment termination; they may lose or have difficulty renewing driver's licenses; business operations stall due to loss of employee services; and families face suspension of essential income and health benefits.

Dkt. 24-1 at 48. As noted in Plaintiffs' motion for class certification, Plaintiff Osorio-Ballesteros lost her full-time job, which she needed to support herself and her three minor U.S. citizen children, when her EAD expired on April 21, 2015. Dkt. 5-12 at 3-4 (Hoffmann Decl. ¶¶ 15). One putative class member, a woman who has not received interim employment authorization even though her EAD renewal application has been pending for more than 120 days, is having difficulty supporting her thirteen-year old U.S. citizen daughter, for whom she

[1] The USCIS Ombudsman, a position within USCIS created by statute, provides individual case assistance and makes recommendations to improve the administration of immigration benefits by USCIS. *See* http://www.dhs.gov/topic/cis-ombudsman (accessed August 9, 2015).

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is the sole provider. Exh. D at 1-2 (Dolgaya Decl. ¶¶ 2, 4). Another individual fears becoming homeless because her EAD application has been pending for more than 100 days and she has not received interim employment authorization. Exh. E at 1-2 (Moran Decl. ¶¶ 2, 4). Another individual, who is an asylum applicant seeking an initial asylum EAD, is unable to accept work in the construction industry, for which he has training, and cannot apply for a Social Security number because he has not received interim employment authorization even though his EAD application has been pending more than 30 days. Exh. F at 2-3 (Svendsen Decl., ¶¶ 5, 7-8).

LEGAL AUTHORITY

Ninth Circuit case law, interpreting Federal Rules 6(b) and 56(d), explains the legal standards Defendants must meet in order to defer a summary judgment motion or extend the time to respond. For the reasons discussed below, Defendants have failed to satisfy these requirements.

I. Rule 6(b)

Under Rule 6(b), the Court may, for "good cause," extend a deadline imposed by one of the Federal Rules of Civil Procedure. The decision to extend a deadline is committed to the discretion of the Court. *See In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 974 (9th Cir. 2007). A motion for extension of time filed *before* a deadline has passed should "normally ... be granted in the absence of bad faith [on the part of the party seeking relief] or prejudice to the adverse party." *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1259 (9th Cir. 2010) (citation omitted). On the other hand, if such a motion is filed *after* the deadline has passed, the good cause standard becomes more stringent. In these cases, the Court may grant the motion only when the moving party missed the deadline due to "excusable neglect." Fed. R. Civ. P. 6(b)(1)(B).

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This Court weighs four factors to determine whether a litigant has established excusable neglect: (1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the moving party's conduct was in good faith. *Hartman*, 291 F.R.D. at 595, *citing Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir.2004) (en banc).

II. Rule 56(d)

The Federal Rules, as most recently amended in 2010, are clear that a summary judgment motion may be filed "at any time," including with the complaint. Fed. R. Civ. P. 56(b). If the nonmoving party believes the motion is premature, the remedy is Rule 56(d), formerly Rule 56(f). That rule allows the nonmoving party to request that the motion be deferred or denied on a showing "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d).

Prior to 2009, Rule 56 did not allow plaintiffs—only defendants—to file a summary judgment motion at any time. In 2009, Rule 56 was amended on the following basis:

> The timing provisions for summary judgment are outmoded. … The new rule allows a party to move for summary judgment *at any time*, even as early as the commencement of the action. If the motion seems premature both subdivision (c)(1) and Rule 6(b) allow the court to extend the time to respond.

Fed. R. Civ. P. 56 Advisory Committee Notes 2009 Amendments (emphasis added). When a non-movant needs to discover affirmative evidence necessary to oppose a motion for summary judgment, Rule 56(d) permits the court to defer or deny the motion. Fed. R. Civ. P. 56(d); *see also Garrett v. San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987). The non-movant requesting a continuance, denial, or other order under Rule 56(d) must demonstrate that: "(1) it has set forth in affidavit or declaration form the specific facts it hopes to elicit from further discovery; (2) the

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facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment." *Stern*, 840 F. Supp. 2d at 1275, *citing Family Home & Fin. Ctr., Inc. v. Fed Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). "The burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, and that it would prevent summary judgment." *Chance v. Pac–Tel Teletrac Inc.*, 242 F.3d 1151, 1161 n.6 (9th Cir. 2001); *see also Tatum v. City & Cnty. of S.F.*, 441 F.3d 1090, 1099-1100 (9th Cir. 2006). "Failure to comply with these requirements 'is a proper ground for denying discovery and proceeding to summary judgment.'" *Family Home*, 525 F.3d at 827 (citation omitted).

ARGUMENT

I. Plaintiffs are not Responsible for Defendants' Failure to Meet the Deadline for Filing Their Opposition to Summary Judgment.

Defendants missed the deadline for filing their opposition to Plaintiffs' summary judgment motion. Plaintiffs' motion, filed on Thursday, July 2, was noted for Friday, July 24, and the deadline for Defendants to respond was Monday, July 20. *See* Dkt. No 24; LCR 7(d)(3). Defendants failed to file a response by the July 20 deadline. Instead, four days after the deadline, Defendants filed a motion to stay briefing on Plaintiffs' motion for summary judgment, or in the alternative to grant them 30 extra days to respond, after any order by the Court.

Without taking any responsibility for failing to timely respond to Plaintiffs' summary judgment motion or even offering an explanation, Defendants instead suggest—improperly—that their mistake is Plaintiffs' fault. *See* Defs.' Mot at 2. Defendants do not contend, nor could they, that service of the motion was not proper. Opposing counsel was served electronically. *See* Dkt. No. 24; LCR 5. Moreover, Plaintiffs' counsel sent a courtesy email at the time of filing, stating: "We wanted to give you a quick heads-up on the summary judgment motion that we're filing today in NWIRP v. USCIS. Under the local rules, we note it for July 24, but we're open to

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discussing the briefing schedule." Exh. A at 1-2 (Strawn. Decl. ¶¶ 1, 2); Exh. B at 1. The summary judgment motion received press. Law360 wrote an article, including a quote from Defendant USCIS: "When asked about the judgment bid, a representative for USCIS told Law 360 on Monday [July 6] that the agency 'can't speak to pending litigation.'" Exh. C at 1. Law360 posted the motion and exhibits for (paid) public download. *Id.* at 4-5. LexisNexis picked up the story as well. *Id.* at 6. This was not a stealth motion, as Defendants imply. Defs.' Mot. at 2.

Defendants also incorrectly suggest that Plaintiffs were unwilling to stipulate to granting Defendants an extension of time to respond to the summary judgment motion. Defs.' Mot at 2. On the same day that Plaintiffs filed their motion for summary judgment, Plaintiffs' counsel informed Defendants that they were "open to discussing the briefing schedule." Exh. A at 1-2 (Strawn. Decl. ¶¶ 1, 2); Exh. B at 1. During a subsequent phone conversation, Defendants stated that they wanted to stay briefing on summary judgment, and that they would file a motion to stay if Plaintiffs did not agree. *Id.* Plaintiffs do not consider "take it or leave it" to be an "attempt[] to come to an agreement with Plaintiffs on re-scheduling summary judgment briefing." Defs.' Mot. at 2. Indeed, Plaintiffs first learned of the current request for an additional 30 days to respond by reading Defendants' motion. Exh. A at 2 (Strawn Decl. ¶ 3). While Plaintiffs did agree to a fourteen day extension for Defendants to file their dispositive motion and response to class certification, Plaintiffs do not agree that Defendants need additional time to respond to the summary judgment motion because of the "complexity of the issues raised and need for multi-level supervisory review." Defs.' Mot. at 2 n.1.

II. Defendants' Motion for a Stay is Untimely and Unsupported.

As noted above, Defendants' response to the summary judgment motion was due on Monday, July 20. Dkt. No 24; LCR 7(d)(3). On July 24, four days after the deadline, Defendants filed an untimely motion to stay briefing.

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The Local Rules are clear that filing deadlines are requirements, not suggestions. "Each party opposing the motion *shall*, within the time prescribed in LCR 7(d), file ... a brief in opposition to the motion, together with any supporting material ..." LCR 7(b)(2) (emphasis added); *see also* LCR 7(j). "If a party fails to file papers in opposition to a motion, such failure may be considered by the court as an admission that the motion has merit." *Id.*

Defendants do not acknowledge or offer any explanation for their untimely filing, as the Federal Rules require. Fed. R. Civ. P. 6(b); *see Hartman*, 291 F.R.D. at 595. Not only was Defendants' motion untimely, but their request for delaying summary judgment was unsupported by evidence, affidavit, or declaration, as the Federal Rules also require. Fed. R. Civ. P. 56(d); *see Stern*, 840 F. Supp. 2d at 1275.

A. Defendants Fail to Plead and Do Not Meet the Requirements for a Rule 6(b) Extension.

Because Defendants' motion was untimely, Rule 6(b) requires Defendants to show excusable neglect. The Court looks at four factors: "(1) the danger of prejudice to the non-moving party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the moving party's conduct was in good faith." *Hartman*, 291 F.R.D. at 595.

As this Court did in *Hartman*, Plaintiffs start with the third factor. Defendants fail to acknowledge, much less explain, their failure to timely respond. In this respect, their position compares unfavorably with the plaintiffs in *Hartman*, who admitted missing the deadline and offered an (unconvincing) explanation. *Id*. at 595. Like *Hartman*, Defendants in this case do not meet the third factor of the test because the timing of the filing was within their exclusive control. Turning to the first factor, Plaintiffs are prejudiced by Defendants' delay. A summary judgment motion that would have been ripe for consideration on July 24 may be set for

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consideration six weeks farther out, if not later. As Plaintiffs have documented, putative class members are harmed by each day of delay: they lose jobs, income, and employment opportunities and often suffer other hardships as well. *See, e.g.*, Dkt. 24-1 at 48 (USCIS Ombudsman report); Exh. D at 1-2 (Dolgaya Decl. ¶¶ 2, 4); Exh. E at 1-2 (Moran Decl. ¶¶ 2, 4); Exh. F at 2-3 (Svendsen Decl., ¶¶ 5, 7-8); Dkt. 5-12 at 3-4 (Hoffmann Decl. ¶ 15); Dkt. 5-13 at 3 (Brown Decl. ¶ 8).

Regarding the second factor, the length of Defendants' delay is short — four days. If Defendants had simply filed their summary judgment opposition four days late, the harm to Plaintiffs would have been minimal. However, Defendants did not file a substantive response, but instead sought more time and caused further delay.

As to the final step, Plaintiffs are not alleging bad faith, but Defendants' suggestion that their failure to respond in a timely manner was somehow Plaintiffs' fault is baseless.

For these reasons, Defendants have not met their burden under Rule 6(b). Indeed, Defendants do not even cite the rule or attempt to plead facts necessary to support an extension. Should the Court accept Defendants' late filing notwithstanding these deficiencies, Plaintiffs request that the Court order prompt briefing on summary judgment to prevent further harm to putative class members.

B. Defendants Fail to Plead and Do Not Meet the Rule 56(d) Standard for Deferring Summary Judgment.

Rule 56 identifies a single ground for opposing parties to delay a properly filed motion for summary judgment: a timely Rule 56(d) motion specifically stating, in a sworn declaration or affidavit, what discovery is sought and how the information would preclude summary judgment. Defendants complied with none of these requirements. They did not submit a declaration or affidavit, identify any specific issues on which they were seeking discovery, or explain how such

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information would preclude summary judgment. Based on these omissions alone, the Court should deny Defendants' motion. *See Stern*, 840 F. Supp. 2d at 1275.

The mere fact that a summary judgment motion is filed early in litigation does not by itself excuse a party from complying with Rule 56(d). Rule 56(b) explicitly allows a summary judgment motion "at any time until 30 days after the close of all discovery" including at the filing of the complaint. Fed. R. Civ. P. 56(b) (effective as of Dec. 1, 2010); *see also id.* Committee Notes on Rules—2010 Amendment, subsection (b). Here, Plaintiffs filed their motion for summary judgment more than a month after service of the complaint, and weeks after the Court had set a briefing schedule for Defendants' planned dispositive motion and response to Plaintiffs' class certification motion. Although a party facing a motion for summary judgment filed with a complaint will, in many cases, be able to meet the Rule 56(d) test, *see id.*, a party cannot simply ignore the rule's requirements. Moreover, when the Rule 56(d) test is applied in this case, Plaintiffs' summary judgment motion is not premature.

Plaintiffs explained in detail in their summary judgment motion why there is no genuine dispute of material fact in this case. Pls.' Mot. Summ. J. at 2, 5-13. Tellingly, Defendants do not dispute the facts alleged by Plaintiffs. Plaintiffs filed their summary judgment motion relatively early not as a tactical matter, but because this case turns on a straightforward question of law: do Defendants have to follow their own mandatory regulations and timely adjudicate applications for EADs or issue interim employment authorization?[2] In this case, Defendants' own statements

[2] Given Plaintiffs' belief that the only dispute in this case is a legal one, they took to heart Judge Jones' recent suggestion to avoid a "more-motions-are-better approach." *Khoury v. Asher*, 3 F. Supp. 3d 877, 882 (W.D. Wash. 2014). Because no facts appear to be in dispute, Plaintiffs opted not to file a motion for a preliminary injunction and then, at a later date, a motion for summary judgment.

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demonstrate that there are no factual issues in dispute. *See* Dkt. 24-1 at 48-49; Dkt. 24-2 at 9 (USCIS/AILA April 16, 2015 Meeting Q&A).

III. The Court Should Deny Defendants' Motion and Direct Them to File a Substantive Response.

Defendants argue that summary judgment is premature since they have not (yet) filed their responsive pleading and the parties have not agreed on a plan for "any discovery that needs to be conducted." Defs.' Mot. at 1, 3. Rule 56(d) is the only Rule that would permit such delay. Accordingly, Defendants' motion should be construed as an untimely, substantively deficient and unsupported Rule 56(d) motion to defer summary judgment. *Rubenstein v. United States*, 227 F.2d 638, 642 (10th Cir. 1955) ("There is no controlling magic in the title, name, or description which a party litigant gives to his pleading. The substance rather than the name or denomination given to a pleading is the yardstick for determining its character and sufficiency."); *Mohammed v. Gonzales*, 400 F.3d 785, 792-93 (9th Cir. 2005) (improperly titled motion should be construed based on its underlying purpose).

When litigants in the Western District have made similar requests, the Court has construed the motions as Rule 56(d) [then 56(f)] motions and denied them. *Strauss v. Hamilton*, No. C05-5772FDB, 2006 WL 1328896, at *1 (W.D. Wash. May 11, 2006) (motion to stay or deny summary judgment and open discovery treated as 56(f) motion and denied); *Wise v. Wash. State Dep't of Corr.*, No. C05-5810 FDB/KLS, 2007 WL 1101499, at *1 (W.D. Wash. Apr. 6, 2007) (motion to stay summary judgment until all discovery may be completed treated as 56(f) motion and denied); *Hernandez v. Nelson*, No. C08-5242 FDB/KLS, 2009 WL 37155, at *1 (W.D. Wash. Jan. 5, 2009) (motion for summary judgment to be delayed because party did not have any opportunity for discovery treated as 56(f) motion and denied).

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While Plaintiffs request that this Court deny Defendants' motion, they are not opposed to giving Defendants an opportunity to present any argument supporting their failure to follow their own regulations requiring adjudication of EAD applications within particular time periods or the issuance of interim employment authorization. Given that Defendants have obtained several more weeks to craft their response by virtue of filing their motion to stay, Plaintiffs request that summary judgment briefing proceed promptly. Plaintiffs do not oppose granting Defendants fourteen days from the date of the Court's order to file a *substantive* response to the summary judgment motion, and request that the Court grant Plaintiffs an additional fourteen days to file a reply brief. This schedule would permit the Court to consider Plaintiffs' dispositive motion with the dispositive motion that Defendants are scheduled to file today.

Respectfully submitted this 10th day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on August 10th, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically filed Notices of Electronic Filing.

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