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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; **DONALD TRUMP**, in his official capacity as President of the United States; et al.,

Defendants.

Case No.: 6:15-cv-01517-TC

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO DEFER CONSIDERATION OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This Court should to exercise its discretion and authority to defer hearing Defendants' Motion for Summary Judgment (ECF No. 207) ("MSJ") until after the conclusion of discovery and in conjunction with trial. On June 28, 2018, Plaintiffs filed their Response in Opposition. (ECF No. 255), along with supporting declarations and exhibits, and a Motion *in Limine* Seeking Judicial Notice of Federal Government Documents (ECF No. 254). While these filings included many underlying federal government documents that Plaintiffs intend to use at trial, there remains much to do in order to complete discovery, such as authenticating government documents through the judicial notice process, contention interrogatories, examination of the documents at the government's NARA facility, expert depositions, and further requests for judicial notice of government documents. Development of a full factual record through discovery is essential for adequate resolution of the many issues of fact raised by the MSJ, especially when, as here, the case at issue is particularly complex.

Defendants agree that this Court "may defer consideration of a motion for summary judgment under Rule 56(d) where the party seeking continuance identifies specific facts that additional discovery will reveal and explains why those facts preclude summary judgment." *See* Defendants' Opposition to Plaintiffs' to Defer Consideration of Defendants' Motion for Summary Judgment, ECF No. 245 at 2. ("Defendants' Opp.") In their Motion to Defer Consideration (ECF No. 226), Plaintiffs present specific facts that warrant deferring consideration of the MSJ under the standards of both Rule 56(d) and this Court's inherent judicial discretion to defer consideration. *See, e.g.,* ECF No. 226 at 12-13 (identifying specific facts Plaintiffs seek to develop in the discovery process).

Finally, Defendants' arguments that there are no material facts in dispute nor a cause of action whatsoever are both legally and factually unavailing. On the issue of standing alone, by their MSJ, Defendants have placed numerous material factual matters at issue. Defendants' odd decision to totally ignore the information contained in Plaintiffs' 17 expert reports that they received months ago is not grounds to eliminate questions of fact that were raised in their Answer. This Court should grant Plaintiffs' Motion and defer consideration of Defendants' MSJ until after the conclusion of discovery and in conjunction with trial.

ARGUMENT

In moving to defer consideration of a motion for summary judgment, the movant need only argue that specific facts established through further discovery will create or add to disputed material facts. Fed. R. Civ. P. 56(d); see also *Friends of Maha'ulepu, Inc. v. Hawai'i Dairy Farms, LLC*, No. CV 15-00205 LEK-BMK, 2016 WL 6917282, at *2 (D. Haw. Feb. 29, 2016), citing *Tatum v. City & Cnty. of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006). That is what Plaintiffs have done here.

I. Rule 56(d) and Inherent Judicial Discretion are Distinct Legal Standards and Both Weigh in Favor of Deferral

This Court has both the inherent judicial discretion to defer consideration of a motion for summary judgment until a more complete factual record has been established *and* discretion to defer consideration under Rule 56(d). *See* Transcript of Status Conference, ECF No. 190 at 11:18-22 (Mar. 26, 2018); Transcript of Status Conference, ECF No. 191 at 19:8-21 (Apr. 12, 2018). In their Opposition, Defendants cite no authority constraining judicial discretion in case management under the Federal Rules of Civil Procedure. "[C]ase management ultimately falls within the purview of judicial discretion," and to assert otherwise is to ignore the concept of judicial authority. *Varney v. Air & Liquid Sys. Corp.*, No. 3:18-CV-05105-RJB, 2018 WL

2387832, at *2 (W.D. Wash. May 25, 2018). Further, even assuming Defendants' assertion that Rule 56(d) is the only basis for deferral, Plaintiffs met all requirements for deferral.

II. Judicial Discretion Weighs in Favor of Deferral

"If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d).[1] Under this standard, the deferral of consideration is warranted when a party identifies specific reasons "it cannot present facts essential to justify its opposition." *Id.*; *Friends of Maha'ulepu, Inc*, 2016 WL 6917282. at *2, citing *Tatum*, 441 F.3d at 1100. As demonstrated in the Motion and supporting declaration, Plaintiffs are unable to gather and present all facts essential to make their case.[2]

Granting this Motion to Defer Consideration is particularly appropriate because Defendants have consistently refused to respond to virtually all of Plaintiffs' discovery requests to date, taking the stance that discovery is "improper" and seeking to preclude any and all substantive discovery, even after Defendants' Motion for a Protective Order and Discovery Stay (ECF No. 196) was denied by Magistrate Judge Coffin. (ECF No. 212.)[3] Just today, this Court concluded Magistrate Judge Coffin's denial of Defendants' Motion for a Protective Order and Discovery Stay is not clearly erroneous or contrary to law and affirmed that Order (ECF No. 300) and, accordingly, affirmed Magistrate Judge Coffin's Order. As a result, Defendants now

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[1] Note that Rule 56(d) was Rule 56(f) until 2010 when amendments were made to the Rule.
[2] *See* Plaintiffs' Motion to Defer Consideration of Defendants' Motion for Summary Judgment (ECF No. 226, pages 8, 12-13, 16-19), *see also* Declaration of Julia A. Olson in Support of Plaintiffs' Motion to Defer Consideration of Defendants' Motion for Summary Judgment (ECF No. 227, ¶¶ 17-19).
[3] *See, e.g.* May 8 and June 5 Joint Status Reports, ECF No. 194, at 10; ECF No. 218, at 2-3; *see also* ECF Nos. 195, 215, 216, 217.

should finally begin to respond to Plaintiffs' outstanding discovery requests and cease seeking protective orders at every turn so the parties can get prepared for trial to begin on October 29, 2018.

Motions under Rule 56(d) provide the opportunity "for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence." *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir.2002). When a summary judgment motion is filed in the middle of discovery, before a party has had any realistic opportunity to complete discovery relating to its theory of the case, the Ninth Circuit has held that district courts should grant any Rule 56(d) motion fairly freely. *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773–74 (9th Cir. 2003), citing *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir.2001) ("Although Rule 56([d])[4] facially gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence supporting its opposition, the Supreme Court has restated the rule as requiring, rather than merely permitting, discovery 'where the non-moving party has not had the opportunity to discover information that is essential to its opposition.'") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).[5]

The Ninth Circuit has additionally stated that "[a Rule 56(d) motion] for purposes of conducting discovery should be granted almost as a matter of course unless the non-moving

[4] *See supra* note 1.

[5] *See also Burlington N. Santa Fe R. Co.*, 323 F.3d at 774; *Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1414 (D.C.Cir.1995) (describing "the usual generous approach toward granting Rule 56([d]) motions"); *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 919 n. 4 (5th Cir.1992) (Rule 56([d])-based "continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence" (internal quotation marks and citation omitted)); *Sames v. Gable*, 732 F.2d 49, 52 (3d Cir.1984) (same)."

party has not diligently pursued discovery of evidence." *Burlington N. Santa Fe R.R. Co.*, 323 F.3d at 773–74. Here, Defendants do not and cannot argue that Plaintiffs have not diligently pursued discovery. Plaintiffs have served multiple discovery requests on Defendants and no substantive responses have been provided. There can be no argument that Plaintiffs have not "diligently pursued discovery of evidence." *Id.*[6]

III. Defendants Have Mischaracterized Plaintiffs' Claims

Defendants incorrectly state that Plaintiffs' claims are purely legal in nature, that Plaintiffs cannot establish standing or a statutory right of action, and that any remedies for their blatant disregard for the rights and health of the American people would exceed the scope of judicial power. *See* Defendants' Opposition, ECF No. 245 at 4-7. As evidenced by Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment, ECF No. 255, Defendants' characterization of Plaintiffs' claims is patently erroneous.[7] Plaintiffs have presented the factual evidence (available to them at the time) in order to oppose Defendants' motion for summary judgment. But, Plaintiffs should be afforded an opportunity to develop fully the facts ultimately necessary to prove their case.

IV. This Court Should Use its Discretion to Defer Consideration of Summary Judgment Because of the Importance and Complexity of Plaintiffs' Claims

The Supreme Court has held that decisions on summary judgment should be withheld "in cases involving complex legal issues where the record lacks clarity . . . 'until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts.'" *Anderson v. Hodel*, 899 F.2d 766, 770 (9th Cir. 1990), quoting

[6] *See also* Plaintiffs' Motion to Defer (ECF No. 226, pages 3-5); Olson Declaration, ¶¶ 11, 16, 25

[7] Plaintiffs will not here restate their arguments on these issues. They are fully briefed in Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment, ECF No. 255.

Kennedy v. Silas Mason Co., 334 U.S. 249, 257 (1948). Here, this Court should choose to defer consideration of summary judgment in this complex case until full factual elucidation has occurred through discovery. *Eby v. Reb Realty, Inc.*, 495 F.2d 646, 649 (9th Cir. 1974).

Where there is "an extremely important question" at issue, "[n]o conclusion in such a case should prudently be rested on an indefinite factual foundation." *Kennedy*, 334 U.S. at 256. The instant proceeding certainly raises "an issue of great importance to the political branches." *Juliana*, 217 F.Supp.3d at 1236 (D. Or. 2016), *motion to certify appeal denied*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. June 8, 2017), quoting *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992). This Court has stated: "Plaintiffs are asserting that their constitutional rights are being violated by government action and inaction . . . and that does permit discovery[.]" Transcript of Status Conference, ECF No. 209-2, at 16:5-10 (May 10, 2018). Further, the Ninth Circuit held: "[generally,] where a party has had no previous opportunity to develop evidence and the evidence is crucial to material issues in the case, discovery should be allowed before the trial court rules on a motion for summary judgment." *Program Eng'g, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1193 (9th Cir. 1980), citing *British Airways Board v. Boeing Co.*, 585 F.2d 946, 954 (9th Cir. 1978); *accord George C. Frey Ready-Mixed Concrete v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 555 (2d Cir. 1977).

While Plaintiffs have obtained significant evidence through informal discovery in the form of publicly available government documents, there remain many questions of fact that must be answered with, at minimum, litigation-typical discovery, to which Defendants have yet to respond substantively. At this stage, it is unclear what facts the Defendants actually dispute. The only position the Defendants have taken on the facts has been in their answer (ECF No. 98), which contains denials of many of the key elements of Plaintiffs' claims. *See, e.g.*, ECF No. 98

¶¶ 17, 27, 28, 31 (denying allegations that climate change is caused by Defendants); 8 (denying that the climate system is in a "zone of danger"). Notably, Defendants have declined to stipulate to any facts when requested to do so by the Plaintiffs, ECF No. 256 at ¶ 3, but now say there are no questions of fact. Their position is nonsensical. In the instant case, there has been no "realistic opportunity for discovery," as there have been no substantive discovery responses by Defendants. *Burlington N. Santa Fe R. Co.*, 323 F.3d at 773.

As stated by the Ninth Circuit, "courts must not rush to dispose summarily of cases—especially novel, complex, or otherwise difficult cases of public importance—unless it is clear that more complete factual development could not possibly alter the outcome and that the credibility of the witnesses' statements or testimony is not at issue." *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 684–85 (9th Cir. 1990). Because of the complex, novel, and critically important nature of Plaintiffs' claims, and the widespread, systemic nature of Defendants' violations of Plaintiffs' fundamental constitutional rights, consideration of Defendants' MSJ should be deferred until the factual record is completed through discovery.[8]

[8] *See also Zweig v. Hearst Corp.*, 521 F.2d 1129, 1136 (9th Cir. 1975), *disapproved of on other grounds by Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990) ("Courts must, of course, proceed with caution in determining litigation by summary judgment; this is especially true where grave, important and novel questions of law are involved."); *New York Stock Exch., Inc. v. Sloan*, 394 F.Supp. 1303, 1306 (S.D.N.Y. 1975) (". . . summary judgment should be used sparingly in complex lawsuits which, like the present one, raise novel questions of law." (citing *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962); *Kennedy*, 334 U.S. at 256-257 (1948); *Eccles v. People's Bank of Lakewood Village*, 333 U.S. 426, 434 (1948)); *Miller v. Gen. Outdoor Advert. Co.*, 337 F.2d 944, 948 (2d Cir. 1964) (". . . there are instances where summary judgment is too blunt a weapon with which to win the day, particularly where so many complicated issues of fact must be resolved in order to deal adequately with difficult questions of law which remain in the case.")

V. A Deferral Would Not Prejudice Defendants

Contrary to Defendants' arguments that they would be "irreparably prejudiced" with a deferral of the decision on summary judgment (Defendants' Opposition, ECF No. 245 at 3), Plaintiffs would instead be irreparably prejudiced should summary judgment be decided prior to completion of discovery. Defendants have presented no basis for preventing the Plaintiffs from being able to conduct discovery to support their case. Based on the present state of the record, while this Court "might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide." *Kennedy*, 334 U.S. at 257. Furthermore, the Defendants have had ample opportunity to raise their "legal issues" in both their Rule 12(b) motion to dismiss (which was denied in November 2016) and Rule 12(c) motions to dismiss (which will be heard by the Court on July 18, 2018).

In denying Defendants' Petition for Writ of Mandamus, the Ninth Circuit stated that "the government [is not exempt] from the normal rules of appellate procedure." *In re United States*, 884 F.3d 830, 836 (9th Cir. 2018).[9] Disregarding the entirety of this ruling, Defendants allege that Plaintiffs have ignored supposed "instructions" from the Ninth Circuit to purportedly narrow their claims and their intended "scope of the trial". ECF No. 245 at 2-3, 5-7. On the contrary, the Ninth Circuit merely made explicit that Defendants are held to the same standards and

[9] "To the extent that the defendants are arguing that executive branch officials and agencies in general should not be burdened by this lawsuit, Congress has not exempted the government from the normal rules of appellate procedure, which anticipate that sometimes defendants will incur burdens of litigating cases that lack merit but still must wait for the normal appeals process to contest rulings against them. The United States is a defendant in close to one-fifth of the civil cases filed in federal court. The government cannot satisfy the burden requirement for mandamus simply because it, or its officials or agencies, is a defendant." *In re United States*, 884 F.3d at 836.

procedures as all defendants and stated that, should the government be subjected to truly improper discovery, as opposed to those within "the normal rules of appellate procedure," they would "still have the usual remedies before the district court for nonmeritorious litigation, *for example*, seeking summary judgment on the claims."[10] *In re United States,* 884 F.3d at 836 (emphasis added). Plaintiffs agree that the facts and issues in the case could potentially be narrowed, which is why they served Requests for Admissions. But Defendants have refused to respond, thereby eliminating Plaintiffs' ability to ascertain the facts that Defendants legitimately dispute in this case. As such, Plaintiffs must go forward with full discovery on all aspects of their claims.

Furthermore, in contrast to Defendants' claims that a simple delay in the consideration of their MSJ would cause them to be irreparably prejudiced, the Ninth Circuit stated that Defendants were totally unable to establish any harm or prejudice resulting from this action "other than the mere cost and delay that are the regrettable, yet normal, features of our imperfect legal system." *Id.* at 835-36, citing *DeGeorge v. U.S. Dist. Ct.*, 219 F.3d 930, 935 (9th Cir. 2000) (alteration in original) (quoting *Calderon v. U.S. Dist. Ct.*, 163 F.3d 530, 535 (9th Cir. 1998) (en banc)). Additionally, Plaintiffs do not ask the Court to totally forgo the possible consideration of Defendants' MSJ, only a postponement so that discovery may be completed. "[A]llowing [time] to have a reasonable opportunity to take discovery will not be particularly time-consuming or

[10] The Ninth Circuit also stated that ". . . if relief is not forthcoming, any legal error can be remedied on appeal," explicitly stating that, as the government is considered a typical defendant, so too their remedies are those of a typical defendant. *Id.* at 836.

burdensome for either party." *First Interstate Bank v. VHG Aviation, LLC*, 291 F.Supp.3d 1176, 1185 (D. Or. 2018).

Premature consideration of summary judgment is more likely to prejudice Plaintiffs than Defendants. Defendants are in possession of significantly more factual evidence than Plaintiffs, simply by virtue of being the source of the majority of said evidence. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts about Summary Judgment*, 100 Yale L.J. 73, 110 (1990) (stating "that the defendant generally has more relevant factual information than the plaintiff . . .").[11] "Summary judgment under *Celotex* provides a unidirectional rule allowing defendants to force plaintiffs to reveal trial strategies while not forcing reciprocal disclosure by defendants. Given the value of this information, strategic misuse of summary judgment must be considered a real possibility." *Id.* at 111, referencing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Without the deferral of consideration of Defendants' MSJ, Plaintiffs will be substantially prejudiced due to the complete lack of substantive discovery responses from Defendants.

VI. Premature Consideration of Defendants' MSJ Would Rest Waste Judicial Resources

At this point in the proceedings, any argument and decision on summary judgment would be based solely on what has already been uncovered through informal discovery, constituting a monumental waste of judicial time and resources. Additional formal discovery remains to be

[11] *See also* Samuel Issacharoff & George Loewenstein, *Second Thoughts about Summary Judgment*, 100 Yale L.J. 73, 110, n. 143 (1990) ("[t]he presumption of information relevant to the assessment of liability being in the hands of defendants is central to the liberal procedural rules reflected in notice pleading and broad discovery." (Citing *Conley v. Gibson*, 355 U.S. 41 (1957) (setting forth requirement that pleading only put defendant on notice of nature of claim); *see also* Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 818-19 & n.59 (1981) (liberal discovery a stimulus to expansion of substantive remedies); Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 441-42 (1986) (liberal pleading tied into pro-plaintiff substantive law changes))).

completed, especially now that Defendants' Motion for Protective Order has finally been denied. Rather than respond to discovery, Defendants have chosen to divert their time and resources with repeated filings of extraneous motions in their apparent procedural strategy to delay all discovery. Without substantive discovery establishing a full factual and legal record, there will be an incomplete evidentiary basis for this Court's consideration of the important claims raised in this case.

The judicial time and effort expended on summary judgment tends to equal or exceed the same for trial and decision, particularly where the case is novel and complex in nature. *See Petition of Bloomfield S. S. Co.*, 298 F.Supp. 1239, 1242 (S.D.N.Y. 1969), *aff'd sub nom. Petition of Bloomfield S.S. Co.*, 422 F.2d 728 (2d Cir. 1970) ("The judicial time and effort necessary [for] thorough analysis of the facts as a prerequisite to summary judgment would equal or exceed the time and effort necessary for trial and decision. Summary judgment, with ever-lurking issues of fact, is always a treacherous shortcut and, in cases like these, too fragile a foundation for so heavy a load.") Where, as here, substantive discovery has not been completed, "an appellate court may, in the interests of sound judicial administration, vacate a summary judgment without reaching the merits of the issue presented if the record has not been sufficiently developed to allow for a fully informed decision." *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1278 (9th Cir. 1993) (summary judgment vacated and remanded). Should this Court prematurely consider Defendants' MSJ, this effort to thoroughly examine the present record will be in vain, as the appellate court would in all probability remand the case back to the District Court for further factual development.[12] Therefore, in the interests of conserving judicial time

[12] *See Tovar*, 3 F.3d at 1279 ("the salient question in each case [concerning government action] is whether there is a sufficient factual record to allow the appellate court to decide the case before it. As Judge Schwarzer has aptly observed in his landmark article on summary judgment,

and resources, consideration of such motion should be deferred until the completion of discovery.[13]

CONCLUSION

The Ninth Circuit previously held that,

> [T]he denial of a Rule 56([d])[14] application is generally disfavored where the party opposing summary judgment makes (a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists. Summary denial is especially inappropriate where [as in the instant case] the material sought is also the subject of outstanding discovery requests.

VISA Int'l Serv. Ass'n v. Bankcard Holders of Am., 784 F.2d 1472, 1475 (9th Cir.1986)

Plaintiffs made such a timely motion for deferral, identifying specific reasons Plaintiffs cannot present facts essential to justify their opposition. Defendants have repeatedly refused to engage in formal discovery, instead filing protective order motions to avoid production of factual information that remains solely in their possession. Now that this Court has affirmed denial of Defendants' Motion for a Protective Order and Discovery Stay (ECF No. 196), Defendants may now choose to finally begin to respond to Plaintiffs' outstanding discovery requests and allow development of the record necessary for resolving the claims in this case. As stated, Plaintiffs do

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'[T]he appellate court, if it concludes that a critical issue of ultimate fact has not been sufficiently developed and considered, should remand for that purpose.'").

[13] *See also Cohesive Techs. v. Waters Corp.*, 130 F.Supp.2d 157, 161 (D. Mass. 2001) ("If at all uncertain about how a potentially decisive issue of first impression may be resolved in higher courts, a trial court may instead, as stated above, deny the motion for summary judgment and press the case forward to determine whether a final disposition on the merits may be reached on less debatable legal grounds, or on findings that under settled law would be decisive of the outcome regardless of how the legal issue of first impression might later be resolved in higher courts. This way of proceeding commits more of that trial judge's time to the case but often results in far greater savings of time and resources for the parties and the court system." (citing Keeton, Judging in the American Legal System § 17.2.1 (Lexis Law Publishing, 1999))).

[14] *See supra* note 1.

not seek to completely avoid the consideration of Defendants' MSJ; this Motion seeks simply to defer consideration thereof until discovery has been completed.

For the reasons stated above, Plaintiffs respectfully request the Court defer hearing on Defendants' MSJ until after conclusion of discovery and in conjunction with trial.

DATED this 29th day of June, 2018.

s/ Andrea K. Rodgers

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