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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

12 JONATHAN BIRDT,
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14 Plaintiff,

15 v.

16
17 CHARLIE BECK, LEE BACA, THE LOS
18 ANGELES POLICE DEPARTMENT and
19 THE LOS ANGELES COUNTY SHERIFFS
20 DEPARTMENT, DOES 1 to 50, *inclusive*,
21
22 Defendants.

CASE NO. CV10-8377 JAK (JEMx)

DEFENDANTS BECK AND LOS ANGELES POLICE DEPARTMENT'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF ELIZABETH MITCHELL

[Objections to Plaintiff's Evidence filed concurrently herewith]

Date: May 16, 2011
Time: 9:00 a.m.
Crtrm: 750

23 Defendants Beck and the Los Angeles Police Department hereby submit their Reply
24 to Plaintiff's Opposition to Defendants' Motion for Summary Judgment or Partial Summary
25 Judgment.

26 ///

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28 ///

1 Plaintiff also seeks to rely on a recent appellate decision from California in
2 support of his argument he has a Second Amendment right to a CCW permit. Plaintiff
3 argues People v. Delacy, 192 Cal.App. 4th 1481 overrules pre-McDonald decisions
4 Defendants cited in support of the Motion for Summary Judgment including People v.
5 Villa, 178 Cal.App.4th 443 (2009), People v. Flores, 169 Cal.App. 4th 568 and People v.
6 Yarbrough, 169 Cal.App. 4th 303 (2008). The McDonald decision followed the Heller
7 decision and held that the Due Process Clause of the Fourteenth Amendment
8 “incorporates the Second Amendment right recognized in Heller.” McDonald, *supra*, 130
9 S. Ct. at 3044. Accordingly, it is the Heller decision that cases must be measured against,
10 not the McDonald decision as Plaintiff represents. Heller was decided on June 26, 2008.
11 Villa was decided in 2009, Flores was decided on December 19, 2008, and the Yarbrough
12 decision issued on December 17, 2008. All these decisions are post-Heller and
13 specifically address the Heller’s clarification regarding a Second Amendment right to
14 handgun possession in the home. Plaintiff’s argument that Villa, Flores, and Yarbrough
15 provide no guidance is misleading and disingenuous.

16 Contrary to Plaintiff’s representation, the Delacy decision issued out of the First
17 Appellate District of the Court of Appeal cannot overrule the jurisdiction of co-equal
18 appellate courts, nor does it purport to. At issue was a defendant’s challenge to the
19 constitutionality of California Penal Code section 12021 (c)(1)’s prohibition against
20 misdemeanants’ right to possess firearms. Delacy, *supra*, 192 Cal. App. 4th at 1485. The
21 Court of Appeal held Penal Code section 12021 was constitutional in light of Heller’s
22 recognition that certain individuals may be disqualified from gun possession including
23 felons. Following the Flores decision, the Court concluded that misdemeanants may also
24 be prohibited from possession firearms. The Delacy decision does not even suggest
25 anyone without a criminal history is entitled to a CCW permit after the Heller and
26 McDonald decisions. In fact, it clarifies, “[a]s discussed above, *Heller* protects a right to
27 keep and bear arms for self-defense in the home for persons who are not otherwise
28 disqualified from possessing firearms.” *Id.* at 1493 (emphasis added). Again, Plaintiff

1 has no authority for his broad expansion of the rule from Heller. Accordingly,
2 Defendants' interpretation of the law is correct and Plaintiff's is not.

3 **2. Plaintiff Fails To Refute The City's Important Interest in Maintaining Low**
4 **Levels of Concealed Carry Permits As a Means of Protecting Public Safety**
5 **and Safety of Police Officers**

6 Assuming an intermediate level of scrutiny was required to justify its CCW
7 permitting regulations, the City of Los Angeles' permitting scheme was substantially
8 related to the important government interest in public safety and the safety of its officers.
9 Plaintiff does not disagree. "The state may have an interest in reducing gun violence and
10 accidents..." (Opposition, 7:22-23). Plaintiff takes issue with the fact the City of Los
11 Angeles does not further this interest in the way he believes the world should work.
12 Without any admissible evidence, all that is left is Plaintiff's argument that public safety
13 is better served by issuing lots of CCW permits so that individuals can act as crime
14 fighters by defending themselves. Plaintiff argues there "is no State interest in depriving
15 people of the means of self-defense." (Opposition, 8:1). Depriving citizens of the right
16 to self-defense was not the basis of the City's argument that its interests meet an
17 intermediate scrutiny level. In part, Defendants introduced evidence that 39% of 2010
18 LAPD homicide arrestees had no disqualifying prior convictions. Without the good cause
19 requirement currently in effect, those individuals would have been eligible for a CCW
20 permit. Plaintiff has no evidence to the contrary. As a factual matter, Plaintiff cannot
21 dispute that under his version of issuing CCW permits, those criminals would be entitled
22 to a concealed carry permit.

23 Plaintiff argues the City's restrictive permitting scheme is misguided because the
24 increase of CCW permits around the country has led to a decrease in crime. As an initial
25 matter, Plaintiff fails to provide any evidence in support of this theory. Nevertheless,
26 accepting as true this purported cause and effect between an increase in CCW permits and
27 a decrease in crime, it is irrelevant. The test to pass constitutional scrutiny is not whether
28 there is a more effective way to promote public safety. It is simply whether the permitting

1 scheme is substantially related to the important government interest of public safety and
2 police officer safety. The fact the City of Los Angeles chooses to effect this goal in a
3 manner different than what Plaintiff would like has no place in the constitutional analysis.
4 Under the intermediate scrutiny standard, the Los Angeles Police Department's policy
5 need not be perfect, only reasonably related to a "significant," "substantial," or
6 "important" governmental interest. United States v. Marzzarella, 614 F.3d 85, 98 (3d Cir.
7 2010). This Los Angeles Police Department's CCW policy does that.

8 Moreover, Plaintiff provides no law that the City of Los Angeles' interest in
9 keeping the number of guns off the streets is not an important governmental interest.
10 Without meeting this burden, the City of Los Angeles's permitting scheme satisfies an
11 intermediate level of scrutiny. Accordingly, assuming Plaintiff had a constitutional right
12 to a CCW permit, Plaintiff cannot establish a violation of his Second Amendment rights
13 based on the manner in which the LAPD administers CCW permits.

14 **3. Plaintiff Fails to Create a Triable Issue of Material Fact to Deny the City of**
15 **Los Angeles Summary Judgment on the Equal Protection Claim**

16 Plaintiff argues that law-abiding citizens are treated differently from crime
17 victims such that the refusal to issue law-abiding citizens a CCW permit is a violation of
18 the Equal Protection Clause. This argument fails for several reasons. First, in support of
19 this theory, Plaintiff cites to the deposition testimony of Larry Waldie. Mr. Waldie is the
20 Undersheriff for the County of Los Angeles. He does not represent the City of Los
21 Angeles or the Los Angeles Police Department. Plaintiff's reference to the deposition of
22 Rick Tompkins does not say only crime victims get CCW permits. Plaintiff cites Richard
23 Tompkins' deposition to argue that LAPD requires victimization of an individual before
24 the Department will issue that individual a CCW permit. In fact, this is untrue. The
25 deposition testimony of Tompkins cited by Plaintiff only confirms that LAPD requires
26 that the applicant "demonstrate that they are in immediate risk of great bodily harm."
27 (Opposition, 8:17-22). Therefore, from an evidentiary standpoint, Plaintiff cannot
28 establish that in the City of Los Angeles law-abiding citizens are treated differently from

1 crime victims. Defendants question whether law-abiding citizens who have not been
2 crime victims are similarly situated to victims of crime. Plaintiff provides no legal
3 authority that these two groups are the same and therefore entitled to equal protection
4 under the law.

5 Plaintiff does not provide evidence that he belongs to a suspect classification and,
6 as argued above, Plaintiff has no Second Amendment right to a CCW permit.
7 Accordingly, Defendants are not required to satisfy a strict scrutiny analysis for the denial
8 of a CCW permit. As stated in the moving papers, even if there is intentional
9 discrimination, Defendants need only establish a rational relation to a legitimate state
10 interest. Not only does Plaintiff lack evidence he was intentionally discriminated against
11 but as stated above there is a rational relationship between limiting the issuance of CCW
12 permits and the legitimate goal of public safety and protection of its police officers.
13 Based on the foregoing, Defendants are entitled to summary judgment on the Equal
14 Protection claim.

15 **4. Plaintiff Fails to Create a Disputed Factual Issue to Prevent this Court from**
16 **Deciding the Legal Issue**

17 While Plaintiff argues this is a legal issue to be decided by the Court, he spends
18 much time in the response to the Defendants' Separate Statement trying to create disputed
19 factual issues. (See Opposition, 1:24). Plaintiff's efforts fail. In attempting to establish
20 the existence of this factual dispute, the opposing party must tender evidence of specific
21 facts in the form of affidavits, and/or admissible discovery material, in support of its
22 contention that the dispute exists. Fed. R. Civ. P. 56(e). As the Supreme Court explained,
23 "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do
24 more than simply show that there is some metaphysical doubt as to the material facts
25 Where the record taken as a whole could not lead a rational trier of fact to find for the
26 nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v.
27 Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

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1 In resolving a summary judgment motion, the evidence of the opposing party is to
2 be believed, and all reasonable inferences that may be drawn from the facts placed before
3 the court must be drawn in favor of the opposing party. Anderson v. Liberty Lobby, Inc.,
4 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L.Ed. 2d 202 (1986). Nevertheless, inferences are
5 not drawn out of the air, and it is the opposing party's obligation to produce a factual
6 predicate from which the inference may be drawn. Richards v. Nielsen Freight Lines, 602
7 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898 (9th Cir. 1987).

8 Throughout Plaintiff's Response to Defendants' Separate Statement Plaintiff
9 claims to dispute evidence. However, there is a lack of evidence in support of the alleged
10 dispute. Some examples are as follows:

- 11 1. Plaintiff purports to refute Defendants' evidence that the Gun Unit evaluates each
12 application on the merits and equally without regard to race, ethnicity, gender, etc
13 as well the fact no special treatment is given to celebrities. However, Plaintiff's
14 response to Defendants' MF 10 demonstrates he has no evidence to refute this
15 fact.
- 16 2. Defendants' Material Fact 25 states, a "concealed handgun is the dominant
17 weapon of choice for gun criminals and a special danger to government efforts to
18 keep public spaces safe and secure. Plaintiff provides no admissible evidence to
19 dispute this point but merely lobs a weak objection to Professor Zimring's expert
20 testimony. This fails as a matter of law.
- 21 3. Plaintiff claims to dispute facts relating to the Equal Protection claim and asserts
22 that he is waiting for Defendants to produce evidence regarding good cause. See
23 Plaintiffs' Response to Defendants' Material Facts, ## 3-335.

24 Interestingly, Plaintiff withdrew his Request for a Continuance pursuant to FRCP
25 56 (f) that he needed more time to conduct discovery. The failure to timely produce
26 evidence in opposition to refute Defendants' evidence that Plaintiff cannot prove his
27 Equal Protection Claim entitles Defendants to summary judgment on that claim. See
28 California Micro Devices, Inc. v. Van Kampen Merritt, 1990 U.S. Dist. LEXIS 15216, *

1 29-30 (“Although the time has come for defendants to make that showing, they have
2 failed to produce any evidence that would rebut CMD's evidence that the indemnity
3 agreement was limited to claims by third parties. Accordingly, plaintiff's motion for
4 summary judgment on the counterclaim's fifth claim for relief is granted.”).

5 **5. Plaintiff Failed to Submit Any Opposition to Defendants' Arguments That**
6 **Plaintiff Could Not Prove a Violation of His Interstate Right to Travel, the**
7 **Permitting Scheme As-Applied to Him Violated the Constitution, or That He**
8 **Has a Due Process Right to a Concealed Carry Permit**

9 Defendants move for summary judgment in part because Plaintiff could not prove
10 his right to interstate travel was violated, the permitting scheme was applied to him in a
11 constitutional manner, and that he did not have a due process right in a concealed carry
12 permit. Plaintiff provided no substantive opposition to these arguments. Accordingly,
13 Defendants are entitled to summary judgment on these claims.

14 **6. Plaintiff Materially Misrepresents the Scope of Detective Richard Tompkins'**
15 **Expert Testimony**

16 Plaintiff seeks to use the deposition of Richard Tompkins to establish that LAPD
17 has a policy of issuing CCW permits to very few people, and only after such persons have
18 been victimized. Plaintiff cites Tompkins' deposition testimony discussing the number of
19 current CCW permit holders, including a “vague recollection” that there have been four
20 new permits granted in the last 10 years (Opposition, 4:7-10). This argument lacks
21 foundation because Richard Tompkins was produced as LAPD's F.R.Civ.P. 30(b)(6)
22 witness only for the designated area of the “definition, procedure and justification” for
23 LAPD's “good cause” policy under Cal. Pen. Code 12050. Plaintiff specifically agreed
24 not to take the deposition of LAPD's 30(b)(6) witness regarding CCW permit-holders. At
25 the deposition, Plaintiff attempted to ask Tompkins several questions about current
26 LAPD-issued CCW permit holders, which was outside the designated area of his
27 expertise, and about which Tompkins could only speculate. (See Declaration of Elizabeth
28 Mitchell and attachments thereto).

1 **7. Conclusion**

2 Based on the foregoing, Defendants request the Court to deny Plaintiff's Motion
3 for Summary Judgment and grant Summary Judgment in Defendants Beck and Los
4 Angeles Police Department's favor.

5
6 DATED: May 2, 2011

CARMEN A. TRUTANICH, City Attorney
GARY G. GEUSS, Chief Assistant City Attorney
CORY M. BRENTE, Supervising Asst. City Attorney
ELIZABETH MITCHELL, Deputy City Attorney

7
8
9 By 
10 **WENDY SHAPERO**, Deputy City Attorney

11 Attorneys for Defendants **CHARLIE BECK** and
12 **LOS ANGELES POLICE DEPARTMENT**

DECLARATION OF ELIZABETH MITCHELL

I, Elizabeth Mitchell, say and declare as follows:

1. I am a deputy city attorney and counsel of record for Defendants Charlie Beck and the Los Angeles Police Department. I am duly admitted to practice before this Court. I make this declaration of my own personal knowledge and could and would so testify if called.

2. Richard Tompkins was produced as the Los Angeles Police Department (“LAPD”) F.R.Civ.P. 30(b)(6) witness only for the designated area of the “definition, procedure and justification” for LAPD’s “good cause” policy under Cal. Pen. Code 12050. Attached hereto as Exhibit A is a true and correct copy of the email in which Plaintiff Birdt confirmed the designated areas of testimony for LAPD’s 30(b)(6) witness (relevant portions have been underlined).

3. Plaintiff specifically agreed not to take the deposition of LAPD’s 30(b)(6) witness regarding current CCW permit-holders in exchange for defense counsel producing a list detailing the names, information, and good cause statements thereof. Attached hereto as Exhibit B is a true and correct copy of the email in which Plaintiff Birdt agreed not to take the deposition of LAPD’s 30(b)(6) witness regarding current CCW permit-holders in exchange for LAPD producing a list thereof.

4. At the deposition, Plaintiff attempted to ask Tompkins several questions about current LAPD-issued CCW permit holders, which was outside the designated area of his expertise, and about which Tompkins could only speculate.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 28th day of April 2011, at Los Angeles, California.


Elizabeth Mitchell



Elizabeth Mitchell <elizabeth.mitchell@lacity.org>

Birdt v. Baca

21 messages

Jon Birdt <jonbirdt@yahoo.com>

Thu, Apr 14, 2011 at 9:43 AM

To: "Lehman, Jennifer" <jlehman@counsel.lacounty.gov>, Elizabeth.Mitchell@lacity.org

Jennifer- when will you be able to confirm Waldie (i.e. all documents produced already)?

Elizabeth- Please confirm that the Beck/Doan depo will now be the LAPD 30b6 witness on the definition, procedure and justification for good cause in the CCW process is set for 4/22 at 10:30 am, 200 north main, 6th floor.

Both defendants will produce an unredacted list of all current CCW holders consisting of full name, age, occupation & description of good cause sufficient to understand the specific circumstances establishing good cause, on or before 4/25.

Jon Birdt

Law Office of Jonathan W. Birdt

18252 Bermuda St.

Porter Ranch, CA 91326

Phone: 818-400-4485

Fax: 818-428-1384

www.jonbirdt.com

Lehman, Jennifer <jlehman@counsel.lacounty.gov>

Thu, Apr 14, 2011 at 10:09 AM

To: Jon Birdt <jonbirdt@yahoo.com>

Cc: Elizabeth Mitchell <elizabeth.mitchell@lacity.org>

On April 7, I sent you an email confirming Waldie for Tuesday, April 19, 2011 from 10-12 at LASD Headquarters in Monterey Park. You will have a list 30 days from your Notice, which according to my calendar is April 25, 2011. My list will contain: (1) Name, (2) Occupation, (3) Issue Date, (4) Good Cause Explanation.

I'm not sure what you mean by "procedure." The procedure is the same for everyone and is contained in the policies previously produced to you in our Initial Disclosures. And I'm not sure what you mean by "all documents produced already." Perhaps you are confusing me with some of your discussions with Elizabeth?

Jennifer Lehman
Principal Deputy County Counsel
Law Enforcement Services Division
Tel: (213) 974-1908
Fax: (213) 626-2105

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From: Jon Birdt [mailto:jonbirdt@yahoo.com]
Sent: Thursday, April 14, 2011 9:44 AM
To: Lehman, Jennifer; Elizabeth.Mitchell@lacity.org
Subject: Birdt v. Baca

[Quoted text hidden]

Jon Birdt <jonbirdt@yahoo.com>
To: "Lehman, Jennifer" <Jlehman@counsel.lacounty.gov>
Cc: Elizabeth Mitchell <elizabeth.mitchell@lacity.org>

Thu, Apr 14, 2011 at 10:27 AM

Jennifer,

We are in agreement. The only concern I had was that my entire CCW file had not been produced. I was going to continue the deposition and do a demand to produce absent verification that I did have everything related to my application which I have asked that you confirm. Assuming I have everything, then we are on the same page and I will see you Tuesday.

Jon Birdt

Law Office of Jonathan W. Birdt

18252 Bermuda St.

Porter Ranch, CA 91326

Phone: 818-400-4485

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www.jonbirdt.com

From: Lehman, Jennifer [mailto:Jlehman@counsel.lacounty.gov]
Sent: Thursday, April 14, 2011 10:10 AM
To: 'Jon Birdt'
Cc: Elizabeth Mitchell
Subject: RE: Birdt v. Baca

[Quoted text hidden]

Lehman, Jennifer <Jlehman@counsel.lacounty.gov>
To: Jon Birdt <jonbirdt@yahoo.com>
Cc: Elizabeth Mitchell <elizabeth.mitchell@lacity.org>

Thu, Apr 14, 2011 at 10:46 AM

You have everything. And just so we all continue to be on the same page, this is the list I am providing to LASD of people attending:

- 1) Jonathan Birdt
- 2) Sig Raulinitis
- 3) Christina Kim Campos
- 4) Elizabeth Mitchell

If the attendees have changed, please advise. I'm still not sure what room we will be in, but will let you know as soon as I know.

Jennifer Lehman
Principal Deputy County Counsel
Law Enforcement Services Division
Tel: (213) 974-1908
Fax: (213) 626-2105

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#1107

From: Jon Birdt [mailto:jonbirdt@yahoo.com]

Sent: Thursday, April 14, 2011 10:27 AM

To: Lehman, Jennifer

[Quoted text hidden]

[Quoted text hidden]

Elizabeth Mitchell <elizabeth.mitchell@lacity.org>

Thu, Apr 14, 2011 at 11:01 AM

To: Jon Birdt <jonbirdt@yahoo.com>

Jon,

Yes we will be producing Detective Richard Tompkins for the deposition on that date and time, although it was never clear that he would be the 30b6 witness on "definition, procedure, and justification for good cause". Your email of yesterday (4/13) simply said "30b6 on that subject" which was your CCW application specifically. If you want him to be a 30b6 witness on the above, you're going to have to give me more details on what you're looking for before I agree. Detective Tompkins is the OIC of the Gun Unit and will be our PMK as far how we define "good cause" under Penal Code Section 12050 and the procedure for obtaining a CCW Permit through LAPD (although I believe those details were already turned over in my initial disclosures). What specifically do you mean by "justification for good cause"? Do you mean as to your CCW permit application specifically, or the justification for our good cause police, or something else entirely?

As far as our CCW list, I will get you exactly what you asked for, which was specifically a unique identifier (which I indicated twice via email would be first name and first initial of last name, not full name, to which you agreed), year of birth, occupation, city of residence (which is all LA), original issue date, and state of good cause. I confirmed this with you in an email yesterday. And yes, you will get the list on or before 4/25.

Thanks,

Elizabeth

[Quoted text hidden]

Elizabeth Mitchell
Deputy City Attorney
Police Litigation Unit
Los Angeles City Attorney's Office
Phone: (213) 978-6958
Fax: (213) 978-8785

Jon Birdt <jonbirdt@yahoo.com>

Thu, Apr 14, 2011 at 11:21 AM

To: Elizabeth Mitchell <elizabeth.mitchell@lacity.org>

Cc: Jennifer Villa <jennifervilla@hotmail.com>

The deposition will be on my good cause and justification for your good cause policy, all aspects of the good cause policy as applied and compliance with the Assenza consent decree. As to the list, I think I am entitled to last names, and I think there was some disagreement about the scope of the good cause statement. I believe Jennifer's last email confirmed the scope of what I was seeking quite well.

Jon Birdt

Law Office of Jonathan W. Birdt

18252 Bermuda St.

Porter Ranch, CA 91326

Phone: 818-400-4485

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CCW Permit List

22 messages

Elizabeth Mitchell <elizabeth.mitchell@lacity.org>

Tue, Apr 5, 2011 at 1:35 PM

To: Jon Birdt <jonbirdt@yahoo.com>

Cc: "Lehman, Jennifer" <jlehman@counsel.lacounty.gov>

Jon,

I know we went back and forth about the depositions for a while, so just to clarify if we provide you with a list of current CCW permit holders which contains the following, you do not need to depose our PMK: unique identifier (which will likely be first name, first initial of last name, assuming they are all different), sex, year of birth, occupation, city of residence, original issue date, current expiration date, and statement of good cause. Is that still correct?

I will have the list you requested ready 30 days from the date of your request (which was March 25). I cannot give it to you before that date. Based on your earlier email, because you will not have the requisite information necessary to oppose our MSJ in time, you will be seeking a continuance under 56(f) for time for your experts to review this information unless we stipulate, correct? How much time do you need? Given that so much has gone back and forth about continuances and depositions already, I really would prefer to keep this civil and keep the court out of it as much as possible.

That being said, I do not want to file our MSJ separately than our opposition because it doesn't make any sense, they're intrinsically one and the same. Let me know how much time you think you need and I might stipulate to continue the hearing, assuming the Judge allows it. A month? Let me know and I'll see what I do.

Elizabeth

—
Elizabeth Mitchell
Deputy City Attorney
Police Litigation Unit
Los Angeles City Attorney's Office
Phone: (213) 978-6958
Fax: (213) 978-8785

Jon Birdt <jonbirdt@yahoo.com>

Tue, Apr 5, 2011 at 1:49 PM

To: Elizabeth Mitchell <elizabeth.mitchell@lacity.org>

Cc: "Lehman, Jennifer" <jlehman@counsel.lacounty.gov>

Elizabeth,

I have absolutely no ill will towards you. Please don't mistake my passion for hostility. I have always found you and Jennifer to be pleasant, professional and amusing. We all have a job to do.

With respect to the issues raised below:

1. I will never agree to a continuance of the hearing on my MSJ.
2. Your statements regarding the list are correct. You can provide the list concurrently with your MSJ as I only need two weeks to prepare my opposition from receipt of the list.
3. I will need 30 days from the completion of the deposition of Beck/Doan to submit my opposition, and once we have a ruling on the ex parte would be happy to do the deposition of whichever one it is going to be the next day.
4. I cannot guaranty that I won't seek a further rule 56(f) continuance after I see your motion, the list or complete the deposition, but it is not likely, and further, the issue may become moot with the hearing on May 16th.

Jon Birdt