

CANTELME & BROWN, P.L.C.

A Professional Liability Company
3003 N. Central Avenue, Suite 600
Phoenix, Arizona 85012-2902
Tel (602) 200-0104 Fax (602) 200-0106
E-mail: djc@cb-attorneys.com / dbrown@cb-attorneys.com

David J. Cantelme, Bar No. 006313
D. Aaron Brown, Bar No. 022133

Attorneys for Plaintiffs Wesley W. Harris, LaMont E. Andrews, Cynthia L. Biggs, Lynne F. Breyer, Ted Carpenter, Beth K. Hallgren, James C. Hallgren, Lina Hatch, Terry L. Hill, Joyce M. Hill, and Sherese L. Steffens

SNELL & WILMER L.L.P.

One Arizona Center
400 E. Van Buren Street
Phoenix, Arizona 85004-2202
Telephone: (602) 382-6000
E-Mail: mliburdi@swlaw.com
Michael T. Liburdi, Bar No. 021894)

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Wesley W. Harris, *et al.*,
Plaintiffs,

v.

Arizona Independent Redistricting
Commission, *et al.*,
Defendants.

Case No. CV 12-0894-PHX-ROS

**PLAINTIFFS' REPLY
MEMORANDUM SUPPORTING
THEIR RULE 56(d) MOTION**

Hearing Date: October 31, 2012
Time: 10:00 a.m.

1 **1. THE IRC’S MOTION TO DISMISS IS A MOTION FOR**
2 **SUMMARY JUDGMENT**

3 Plaintiffs’ Rule 56(d) motion hangs on whether Rule 12(d) converts the motion
4 to dismiss filed by the Independent Redistricting Commission (“IRC”) to a motion for
5 summary judgment under Rule 56. Rule 12(d) does convert the motion to dismiss for
6 failure to state a claim into a motion for summary judgment, because the IRC seeks to
7 have this Court accept the factual statements contained therein as true, and numerous
8 fact points for which the IRC asks judicial notice are disputed. *Lee v. City of Los*
9 *Angeles*, 250 F.3d 668, 689 (9th Cir. 2001); *Aurelius Capital Master, Inc. v. MBIA Ins.*
10 *Corp.*, 695 F. Supp. 2d 68, 75 (S.D.N.Y.) (denying motion to dismiss and rejecting
11 defendant’s request that the court take judicial notice of the truth of statements in public
12 records, holding “[b]ased solely on the approval letter [offered by defendants for
13 judicial notice], and without the benefit of discovery, the scope of the Superintendent’s
14 approval is insufficiently clear for the Court to hold that Plaintiff’s claims must fail as a
15 matter of law”).

16 The points of factual dispute framed by the IRC’s motion to dismiss include the
17 following, all of which are set forth in the declaration supporting Plaintiffs’ Rule 56(d)
18 motion:

- 19 a. The advice the IRC received from Bruce Adelson to underpopulate
20 Voting Rights districts, and the context and limitations, if any, that Mr. Adelson gave
21 with his advice.
- 22 b. The change orders that the IRC claims were given to the mapping
23 consultant, and the purposes behind such change orders.
- 24 c. Why the IRC’s under-population of the following purported Voting
25 Rights districts significantly worsened after the draft map was published.
- 26 d. The IRC having adopted no definition of communities of interest,
 whether a community of interest accounted for any population deviations from ideal,

1 and if so, how and where.

2 e. Whether the neutral criteria of compactness and contiguity justified any
3 of the population deviations from ideal, and if so, how and where.

4 f. Given the fact that this IRC appears to have produced only four
5 competitive districts, as opposed to six ten years ago, and given the fact that the number
6 of candidates contesting a seat in the Legislature appears to have declined, whether
7 competitiveness considerations accounted for any population deviations from ideal, and
8 if so, how and where.

9 These fact points bear on the central question of whether any reason, passing
10 muster under the Fourteenth Amendment, justified the IRC's dilution of Plaintiffs'
11 votes. The IRC claims this Court can answer this question by taking judicial notice of
12 the evidence set forth in its submissions to the Department of Justice for pre-clearance
13 purposes. Yet the Hofeller affidavits attached to Plaintiffs' response opposing the
14 IRC's motion to dismiss establish that the evidence of which the IRC wants judicial
15 notice is disputed. Under these circumstances, judicial notice cannot be taken, and the
16 matters outside the pleadings attached to the IRC's motion to dismiss convert the
17 motion to dismiss to one for summary judgment. *Lee*, 250 F.3d at 689.

18 **2. THESE FACTS ARE PROPER SUBJECTS OF DISCOVERY.**

19 The fact that some of this information may be available in public records does
20 not pre-empt Plaintiffs' discovery rights. Rule 26(b)(1) contains no public records
21 exception to the scope of discovery. A party's right to obtain documents through public
22 records laws coexists with a party's rights to conduct discovery. *See, e.g., Mid-Atlantic*
23 *Recycling Technologies, Inc. v. City of Vineland*, 222 F.R.D. 81, 86-87 (D.N.J. 2004)
24 (Rule 26 does not pre-empt a party's right to make a public records request.)

25 The Adelson advice is a prime example of why discovery is critical in this case.
26 Plaintiffs are not limited to discovery of the advice he gave in public session. By

1 relying on his advice as part of its defense, the IRC has waived the attorney-client
2 privilege attending his advice bearing on underpopulating of districts to comply with the
3 Voting Rights Act. *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349 (Fed.Cir.
4 2005) (“[F]airness dictates that a privilege holder cannot be allowed, after disclosing as
5 much as he pleases, to withhold the remainder.”) (internal quotation marks and citations
6 omitted.) What’s more, the IRC cannot avail itself of the executive-session shield of
7 Arizona’s open meeting laws, A.R.S. §§ 38-421 to 38-431.09, having successfully taken
8 the position that it is not subject to Arizona’s open meeting laws. *See* order of
9 December 12, 2012, entered in *State of Arizona v. Colleen Mathis*, No. CV2011-
10 016442, Arizona Superior Court, Maricopa County (“Therefore, the Court finds that the
11 Open Meeting Law, A.R.S. § 38-431 *et seq.*, does not apply to the IRC, which is
12 governed instead by the open meetings language of Article IV Pt. 2 § 1(12) (the Open
13 Meetings Clause).”)¹

14 **3. TIME SHOULD BE ALLOWED FOR DISCOVERY.**

15 Summary “judgment [should] be refused where the nonmoving party has not had
16 the opportunity to discover information that is essential to his opposition.” *Anderson v.*
17 *Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986). Here, discovery has not even begun
18 under Rule 26(d)(1), much less proceeded to the point where Plaintiffs have been
19 afforded a reasonable opportunity to build their case through the available discovery
20 devices and disclosure.

21 **4. CONCLUSION.**

22 For these reasons, the motion to dismiss should be treated as a motion for
23 summary judgment and should be deferred under Rule 56(d) until Plaintiffs have had a
24 reasonable period within which to conduct discovery to prepare their case.

25

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¹ Found at <http://www.courtminutes.maricopa.gov/docs/Civil/122011/m5016875.pdf>.

1 RESPECTFULLY SUBMITTED on October 5, 2012.

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3 **CANTELME & BROWN, P.L.C.**

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5 /s/ David J. Cantelme, SBN 006313
6 3003 N. Central Avenue, Suite 600
7 Phoenix, AZ 85012
8 Tel (602) 200-0104
9 Fax (602) 200-0106
10 E-mail: djc@cb-attorneys.com

11 *Attorneys for Plaintiffs Wesley W. Harris, LaMont E. Andrews, Cynthia L. Biggs, Lynne F. Breyer, Ted Carpenter, Beth K. Hallgren, James C. Hallgren, Lina Hatch, Terry L. Hill, Joyce M. Hill, and Sherese L. Steffens*

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13 **SNELL & WILMER L.L.P.**

14 /s/ Michael T. Liburdi, SBN 021894
15 One Arizona Center
16 400 E. Van Buren Street
17 Phoenix, Arizona 85004-2202
18 Telephone: (602) 382-6000
19 Fax: (602) 382-6070
20 E-Mail: mliburdi@swlaw.com

21 *Attorneys for Plaintiffs*

22 **CERTIFICATE OF SERVICE**

23 I hereby certify that on October 5, 2012, I electronically transmitted the
24 foregoing document to the Clerk's Office using the CM/ECF System for filing and
25 transmittal of a notice of electronic filing to the EM/ECF registrants appearing in this
26 case.

/s/ Samuel Saks