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November 10, 2008

08-CV-048

John K. Rabiej
Administrative Office of the
United States Courts
Washington, DC 20554

Re: Summary of Comments on Proposed Rule 56

Dear Mr. Rabiej:

As requested in your November 3, 2008, email, this letter is a brief summary of the comments I intend to offer on November 17. Although subject to revision, the suggestions we offer on the proposed rule include the following:

1. To discourage unnecessarily lengthy lists of proposed undisputed facts which are not essential to the motion but which impose a burden on the non-moving party, the proposed rule should define “material facts” as those “that might affect the outcome of the suit under the governing law” as explained in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (U.S. 1986) with the following change:

[insert this language at end of proposed 56(c)(2)(A)] A fact is “material” if a dispute over that fact would affect the outcome of the suit as to that count, claim or issue. If the non-moving party demonstrates that there is a dispute as to any fact claimed to be material by the moving party under this section, the court must deny the motion for summary judgment as to each count or claim for which the moving party referred to that statement of material fact. Facts that are not material should not be listed in this separate section, but may be included in the brief to the extent that such facts are helpful to a full understanding by the court.

2. Provide a right of sur-reply for the non-moving party so that the party with the burden of proof at trial is fully heard, rather than giving the moving party the first and last word and a disproportionate ability to frame the issues.

3. Provide that courts should hold oral argument before granting summary judgment, and must do so before granting summary judgment on the basis of a “*Celotex*—no evidence” motion. This recognizes the fact that it is difficult for any court with a large and busy docket to understand the record as well as the litigants who have lived with the case for years, and to fully understand all the facts and inferences in a complex fact situation based solely on a paper record.

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4. Revise the rule to deal expressly with the role of inferences, specifically, that a moving party must support its motion by undisputed facts without inferences, while the non-moving party may rely on both undisputed and disputed factual assertions as well as inferences drawn from such evidence.

5. Revise the rule to discourage unfounded or improperly supported motions for summary judgment that burden opposing parties and the courts.

6. There is an irreconcilable tension between proposed Rule 56(c)(3) permitting acceptance of fact for purposes of the motion only and 56(g) permitting the court to identify material facts not in dispute likely causing non-moving parties to dispute every disputable fact, whether or not material, for fear of having it decided adversely as part of the motion.

Please contact me if there are any questions.

Sincerely,

Stephen Z. Chertkof