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Subject

08-CV-075

Dear Committee Members

I noted that provisions amending Rule 56 were designated as primarily altering the time provisions regarding submitting and responding to the motions but, in fact, the nature of the amendments would result in a substantive change in summary judgment procedure

Under the present strictures of summary judgment Rule 56(c) has been consistently interpreted as requiring the non-moving party to have the "last word" in opposing a motion for summary judgment Thus, if a reply brief is allowed which contains either new factual materials or new legal arguments the consensus of circuit court law has been that it is error to consider the reply without allowing a surreply by the nonmovant This procedure is explained in some detail in **Beaird v. Seagate Tech, Inc** , 145 F 3d 1159, 1164-65 (10th Cir 1998) (cert denied) and it is the consensus approach of the federal circuits **See Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc** , 754 F 2d 404, 410 (1st Cir 1985), **Seay v. TVA**, 339 F 3d 454, 481 (6th Cir 2003), **Vais Arms, Inc. v. Vais**, 383 F 3d 287, 292 & n 10 (5th Cir 2004), inter alia

The **Beaird** decision is important because it illustrates the need for continuation of this rule In **Beaird** the defendant-movant filed a bare-bones summary judgment motion and waited until the reply to offer the bulk of its evidentiary materials and legal arguments The trial court denied a surreply which skewed the evidentiary record and motivated the Tenth Circuit to explain the necessity of allowing the nonmoving party to be afforded the opportunity to develop a complete record The Tenth Circuit has repeated this rule explaining that the necessity for a surreply extends both to new factual materials and to new legal arguments appearing in a reply **See Doeble v. Sprint/United Mgmt. Co** , 342 F 3d 1117, 1139 n 13 (10th Cir 2003) and **Green v. New Mexico**, 420 F 3d 1189, 1198 (10th Cir 2005)

By eliminating the language in Rule 56(c) which mandates the opportunity for a nonmoving part to respond to new evidentiary materials and/or new legal arguments, the protection against improvident grants of summary judgment is eliminated This correspondingly weakens the Seventh Amendment right to trial by jury in a way which cannot be justified Notably, nothing in the proposed rule change continues the protections previously incorporated in Rule 56(c)

At the least, part (c)(1)(C) must be amended to read "the movant may file a reply within 14 days after the response is served however such reply may not include either new evidentiary materials or new legal arguments If a reply includes either new materials or new legal arguments, the district court must either exclude such materials and arguments from consideration or must allow the nonmoving party the opportunity to respond "

Finally, the committee should alter (c)(2) to conform the language of the rule to controlling Supreme Court precedent As written the rule provides for judgment is "there is no genuine issue as to any material fact" It is very clear the summary judgment must be denied not merely when the facts are disputed but also when different inferences may be drawn from undisputed facts **Brosseau v. Haugen**, 543 U S 194, 195 (2004), **Groh v. Ramirez**, 540 U S 551, 563 (2004), **Bd. of Educ. v Earls**, 536 U S 849 (2002), **Anderson v. Liberty Lobby, Inc** , 477 U S 242 (1986) and **United States v. Diebold, Inc** , 369 U S 654, 655 (1962) (per curiam) Because a change in intent might be inferred from the revision, the language should be altered to read "there is no genuine issue as to any material fact or material factual inference"

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