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Subject Comments on Proposed Amendments to Rule 56 from seven Massachusetts lawyers

As Massachusetts lawyers, we practice in a judicial district that already has in place the "point-counterpoint" summary judgment system that the proposed rule would institutionalize on a national basis From our perspective as plaintiffs' civil rights lawyers, this system is an unmitigated disaster and we urge the Committee not to implement it nationwide. Instead, the Committee should move in a different direction it should take appropriate steps to limit the abuse of summary judgment motions in civil rights and other cases where the parties are disproportionate in resources

First, the sheer length of the lists of assertedly not-in-dispute material facts encouraged by this system tends to overwhelm plaintiffs and their lawyers In Massachusetts, moving-party defendants routinely file lists of scores of "facts." In a recent case, for example, the defendants' statement of material facts not in dispute, including its 104 paragraphs and 25 exhibits, exceeded six hundred pages! Addressing each of these "facts" and researching record cites adequate to demonstrate that all of them are unsupported, irrelevant or misleading creates an enormous burden on plaintiffs' firms, which are typically small and which typically do not charge on an hourly basis for these cases

Second, the methodology that the rule requires is profoundly biased against plaintiffs and their lawyers in civil rights cases. The proposed rule proffers the non-movant only one mode of responding to the movant's list of material facts that is, compiling a list of opposing facts. But that formulation misses the reality that there are many other reasons legitimately to dispute asserted facts in a movant's statement of material facts Disputes may properly be based on any of the following factors (and there may be others in a given case)

1. Other facts of record contradict the asserted fact This is the only method of dispute that the proposed rule would permit

2 The asserted fact may be factually accurate, but misleadingly stated or otherwise disingenuously utilized (Example "Employer ABC has a written rule that clearly prohibits (X) behavior " That is technically accurate, but it is also true that the employees are unaware of the rule, it has not been enforced, and ABC's ordinary practice ignores it Yet none of those facts – key to disputing the movant's assertion in a meaningful way – would be deemed to "dispute" the movant's allegation as required by the proposed rule)

3 The asserted fact may be factually accurate, but irrelevant to any legitimate summary judgment purpose (Example "Employee was terminated from his previous job for the same reason ") The proposed rule leaves no room for dealing with a fact asserted by the movant which is undisputed, but has no tendency to prove a fact in issue in the case Thus the non-movant is forced to marshall facts in opposition to the asserted fact, wasting vast amounts of time and resources of both bench and bar

4 The asserted fact may be factually accurate, but the inference the movant would have the court to draw from it is unwarranted (Example. "Employee admitted he engaged in (X) behavior prior to his termination " That is accurate, but so did many other employees, who were not terminated) The proposed rule does not easily permit a "dispute" on this ground

5 The asserted fact's accuracy turns on the credibility of witnesses whom the jury is entitled not to believe at trial, and thus is not a proper basis for granting summary judgment As such, it cannot be meaningfully disputed (Example "Manager Doe had no intent to discriminate when he terminated Employee ")

6 The asserted fact is based on inadmissible evidence Under the proposed rule, the non-movant must nevertheless consume valuable time and resources in responding fully to inadmissible evidence, since the non-movant cannot be certain that the court will agree that it is inadmissible, and the risk of not responding is enormous

7 The asserted fact may be factually accurate, but would have a different significance if considered in conjunction with other facts that are not listed (Example "Employee admitted that her supervisor never openly propositioned her " That is true, but not significant, or at least not as significant as it appears, because other employee-witnesses testified that the supervisor took numerous other actions that openly sexualized his dealings with the plaintiff and made evident his expectation of engaging in sex with her) The nuances of this kind of analysis are lost in the proposed rule, which treats individual facts in atomized fashion, stripping them of the context on which their significance turns.

Third, the proposed rule is profoundly one-sided in providing a reply opportunity for the movant as of right but no corresponding surreply opportunity for the non-movant In practice, movants' reply briefs virtually always raise central points that require a response, and it would be fundamentally unfair not to permit the non-movant to answer them. That is especially true in light of the growing practice on the part of some movants of saving major points for reply briefs to which non-movants are not permitted to respond

Fourth and most broadly, the Committee should move in the direction of limiting the one-sidedness (i e , favoring the moving party) of the current rule A considerable body of research has now been accumulated demonstrating that summary judgment and other procedural devices disproportionately limit the access to justice of plaintiffs in civil rights cases See, e g , Federal Judicial Center, Estimates of Summary Judgment Activity in Fiscal Year 2006 (April 12, 2007) http //www fjc gov/public/pdf nsf/lookup/sujufy06 pdf/$file/sujufy06 pdf (study of federal court cases found that employment discrimination plaintiffs lost 73-75% of summary judgment motions, vs a 60% rate for all cases, in 2006) The rule should discourage overly aggressive summary-judgment practice, and especially discouraging the practice of filing overly expansive lists of material facts. One means to do so, which would have the salutary effect of concentrating the focus of the parties and the bench on the facts that are pivotal, would be a rule amendment providing that summary judgment will be denied if any of the movant's "material facts not in dispute" are, in fact, disputed or otherwise (for any of the reasons inventoried above) not a legitimate basis to rely on for summary judgment purposes.

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