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08-CV-127

VIA E-MAIL (Rules_Comments@ao.uscourts.gov)
& REGULAR MAIL

Peter G. McCabe, Secretary
Rules of Practice and Procedure Committee
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D C. 20544

Re: Comments on the Proposed Amendments to Rule 56 of the Federal Rules of Civil Procedure

Dear Mr McCabe:

I respectfully submit these comments regarding the Civil Rules Advisory Committee's ("The Committee") proposed amendments to Rule 56 of the Federal Rules of Civil Procedure I specifically provide my comments to the proposed amendments to Rule 56(a) ("should" v. "must") and 56(h)("Affidavits or Declarations Submitted in Bad Faith") The Committee's goals of establishing a clear, consistent national standard governing summary judgment and developing an improved summary judgment procedure without changing the standard for the entry of summary judgment are laudable. The Committee should be commended for its efforts. However, as published, the amendment to Rule 56(a) will drastically change the well-settled standard for summary judgment and create an avenue for even more inconsistency at the district court level.

Summary Judgment "Must" Be Rendered

In its efforts to amend Rule 56, the Committee has maintained that any changes to the Rule should not change the standard for granting summary judgment. This goal comports with the Committee's mission to create a clear, consistent national standard governing summary judgment that will clarify inconsistencies in the current national rule.

The amendments that were published for public comment include what defense litigators would characterize as a drastic change to the Rule and a contradiction to the Committee's goal of maintaining the current summary judgment standard. From 1938 until 2007, Federal Rule 56(c)

provided in pertinent part, "The judgment sought *shall* be rendered forthwith if the pleadings.. " As a result of Style Changes adopted by the Committee in 2007, and effective December 1, 2007, the term "shall" in the Rule was replaced with "should." Currently, Rule 56(a) provides "The judgment sought should be rendered if the pleadings " Although this change may appear to be a simple stylistic change to some, the removal of the terms *shall* and *forthwith* will result in the creation of a more discretionary standard for summary judgment at odds not only with the goals of the Committee in the revision process, but also the standards established by the federal courts

The United States Supreme Court explained in *Celotex Corp v Catrett*, 477 U.S 317 (1986), "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action '" *Celotex*, 477 U.S at 327. Summary judgment plays a vital part in the litigation of claims by ensuring that claims will not reach trial when a party's entitlement to judgment is clearly established by the evidence, or lack thereof. Summary judgment therefore "serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of litigation will be used to harass and coerce a settlement " *Washington Post Co. v Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *see also Bell Atlantic Corporation v Twombly*, 127 S.Ct. 1955, 1967, 167 L.Ed.2d 929 (2007)(Finding that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases ") Furthermore, summary judgment "serves as an instrument of discovery in its recognized use to call forth quickly the disclosure on the merits of either claim or defense on pain of loss of the case for failure to do so." 5 C. WRIGHT AND A MILLER, FEDERAL PRACTICE AND PROCEDURE § 1374, at p 559 (2d ed 1990)(citations and internal quotation marks omitted)

It is respectfully submitted that summary judgment under Rule 56 should continue to be mandatory when a litigant has met the burden of demonstrating that material facts are not in dispute. As the *Celotex* court explained, "The plain language of Rule 56(c) *mandates* the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial " *Celotex* at 322, *emphasis added* Several courts have recognized under *Celotex,* and the plain language of Rule 56(c), that summary judgment is not a discretionary remedy. *See Jones v Johnson*, 26 F.3d 727, 728 (7th Cir 1994)("summary judgment is not a discretionary remedy If the plaintiff lacks enough evidence, summary judgment must be granted "); *see also Watson v Eastman Kodak Co* , 235 F 3d 851, 857-58 (3d Cir. 2000)("[a] party's failure to make a showing that is 'sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of trial' mandates the entry of summary judgment ")(quoting *Celotex, infra*), *and see Real Estate Fin V Resolution Trust Corp* , 950 F.2d 1540, 1543 (11th Cir 1992)("[a] district

court must grant summary judgment if the moving party shows that there is no genuine dispute regarding any material fact and it is entitled to judgment as a matter of law.").

Furthermore, as the U S. Supreme Court recognized in *Lexecon Inc v. Milberg Weiss Bershad Hynes & Lerach,* 523 U S 26 (1998), "shall" is a mandatory term "which normally creates an obligation impervious to judicial discretion." *Lexecon* at 35; *see also Anderson v. Yungkau,* 329 U.S. 482, 485 ("[t]he word 'shall' is ordinarily '[t]he language of command'"), BLACK'S LAW DICTIONARY 1407 (8th ed. 2004)(defining the verb "shall" as "[h]as a duty to; more broadly, is required to...This is the mandatory sense that drafters typically intend and that courts typically uphold.").

A recent law review article written by Bradley Scott Shannon, Associate Professor of Law at Florida Coastal School of Law, addressed the Committee's change of the word "shall" to "should." B.S. SHANNON, *Should Summary Judgment Be Granted?*, 58 AM. U. L REV 85 (2008) In the article, Professor Shannon suggests that the "seemingly innocent change [from shall to should] might well result in a radical transformation of federal summary judgment practice, a significant aspect of modern federal civil litigation." 58 AM U. L. REV. at 87 After conducting a review of the language of former Rule 56 and several Supreme Court decisions, he asserts that "there is little question that 'shall,' when used in connection with a district court's duty with respect to a proper motion for summary judgment, meant that the court was required to grant the motion " *Id* at 92. Professor Shannon suggests that as a result of the change to "should," "now, even when a motion for summary judgment is properly made and supported, it need not be granted." *Id* at 95. The Professor's comments provide support for the argument that the change from shall to should will create a change in the summary judgment standard, a result that the Committee specifically sought to avoid

In addition, the article discusses the utility, or rather the lack thereof, of the "should" standard in summary judgment procedure As an example of why such a standard is treacherous, Professor Shannon poses the following hypothetical:

> Suppose the following law has been proposed to a state legislature: 'All motor vehicles should be driven at or below the posted speed limit.' Should a rational legislator vote in favor of such a law? Is it enough that the legislator believes driving at or below posted speed limits is a good idea? Or should the legislator also consider how a rational driver is supposed to apply this standard? What would be a sufficient reason for exceeding the posted speed limit? Superior driving ability? Greater fuel economy? Would it be enough if the driver were to say, 'Well, maybe I should drive the posted speed limit, but I just feel like driving a little faster today.' And if a law enforcement officer were to disagree with the decision made by the driver and issue a citation, on what basis would a court determine who was right? The general unworkability of such a standard – not to mention the potential for injustice – seems manifest *Id* at 101

The Professor's example strikes to the heart of the problem created if "should" is the standard for summary judgment. If a district court is faced with a properly made and supported motion for summary judgment, under the new "should" standard the court has the discretion to say, "I feel like driving a little faster today" and may deny the motion. This discretionary power would allow the lower courts to establish an even more inconsistent standard for summary judgment and therefore would defeat the Committee's goal of creating a clear, consistent national standard As Professor Shannon aptly noted, "Though discretion might have its virtues, it also must be recognized that discretion 'often concentrates unbridled power in few hands, fails to create clear or predictable guidelines, and permits disparate treatment of like cases.'" *Id.* at 119.

In order to avoid the potential confusion and inconsistency that will be created if "should" is used as the standard for summary judgment, it is recommended that the term "must" replace "should " Although the Committee has indicated that a change to "must" could signal a change in the standard, the term "should" will most definitely place the standard established by *Celotex* in question. Furthermore, if the discretion of the courts is the Committee's concern, it should be noted that even the term "must" gives the court the discretionary power to deny a motion for summary judgment, as long as there is a genuine dispute as to a material fact. The use of "must" would maintain the existing standard established both in the Rules since 1938 and by the Supreme Court in *Celotex* and its progeny In sum, under the proposed Rule 56(a), summary judgment is proper where there is no genuine dispute as to a material fact. If a motion for summary judgment is properly made, and no genuine dispute exists, then, pursuant to federal case law and common practice, the motion "must" be granted.

In the alternative, the Committee has suggested in its Report that an amendment could be developed wherein "summary judgment *must* be granted when there is no genuine dispute of material fact and a party is entitled to summary judgment on all claims, and that summary judgment *should* be granted when there is no genuine dispute as to some smaller part of an action " Committee Report dated May 9, 2008, as supplemented June 30, 2008, at p 25, *emphasis added.* Although questions arise as to the propriety of permitting the courts to have discretion in denying a properly made motion for partial summary judgment, those questions are overshadowed by the importance of narrowing the issues for trial and providing the movant with certainty on issues about which there are no genuine disputes as to material fact Accordingly, so long as any amendment to Rule 56(a) indicates that complete summary judgment "must" be granted, the discretionary standard of "should" would be acceptable for rulings on partial summary judgment.

Objective Cost Allocation Test Should Be Adopted

Currently, Rule 56(g) requires a court to "order the submitting party to pay the other party the reasonable expenses, including attorney's fees," it incurred in responding to additional

discovery procedures that arose as the result of an affidavit or declaration submitted in opposition to a motion for summary judgment. Fed R C P 56(g). The Committee has proposed that Rule 56(g) be amended to provide the courts with the discretionary power to impose such costs upon a party that submits affidavits or declarations "in bad faith" in opposition to a motion for summary judgment.

It is respectfully submitted that this portion of the Rule should apply not only to affidavits submitted in bad faith, but also to Statements of Material Facts and the undisputed fact procedure as contemplated in the proposed Rule. In this way, the Rule would provide some deterrent to unauthorized fishing trips by parties that seek to extend discovery by qualifying a response, contesting undisputed facts without support, or that submit a non-responsive, unsupported affidavit. It is suggested that the following amendment to proposed Rule 56(h) be considered by the Committee:

> **Rule 56(h) Materials Submitted Without Reasonable Justification.**
> If satisfied that a motion, response, reply, affidavit or declaration under this rule is submitted without reasonable justification, the court – after notice and a reasonable opportunity to respond – may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result.

This Rule would provide judges with an objective, neutral tool to ensure adherence to the Rule and penalize questionable litigation tactics. This objective cost allocation is preferable to the current proposal, which conditions sanctions upon whether a party has submitted affidavits in bad faith or solely for the purposes of delay. Fed. R. Civ. P 56(g). Under the current standard, the imposition of costs relies on the subjective intent of the attorney, which may be difficult or impossible to determine. By adopting an objective test, the courts will have the ability to deter parties from making unsupported responses and to ensure that the new undisputed fact procedure is used to shorten litigation, rather than prolong it.

Conclusion

By changing "shall" to "should," the standard for summary judgment, established by Rule in 1938 and clarified by the Supreme Court, will be modified The Committee will have inadvertently strayed from its goal of avoiding any changes to this standard To ensure that any amendments to the Rule do not change the summary judgment standard, it is respectfully recommended that the term "must" be utilized in Rule 56(a) The word "must" is the proper term to replace "shall" and comports with the current standard. Furthermore, an objective cost allocation test should be adopted to serve as a deterrent to discovery expeditions for facts that do not exist If these changes are made, the resulting form of Rule 56 will stand as a testament to

the notable efforts of this Committee to advance the Rule 1 mandate of securing "the just, speedy, and inexpensive determination of every action."

Respectfully submitted,

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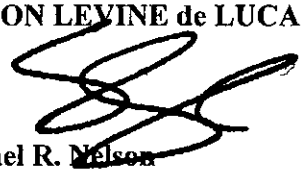

Michael R. Nelson

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