Statement of Andrew B. Downs Regarding Proposed Changes to Rule 56, F.R.Civ.P.

My name is Andrew B. Downs. I am a shareholder in the firm of Bullivant Houser Bailey PC, resident in its San Francisco, California office, and also serve as the Shareholder-in-Charge of Bullivant's Las Vegas, Nevada Office. I have been a member of the California Bar since 1983 and of the Nevada Bar since 2002. I practice extensively in federal court in both states and occasionally appear on a *pro hac vice* basis in other federal courts. My practice is focused on complex civil litigation, most of it insurance coverage related, where I represent insurers. In the past, I also had an extensive admiralty practice, where I frequently represented business plaintiffs.

I am offering comments regarding the proposed amendments to Rule 56 only. I support the proposed amendments embodied in the proposed Rule 56(c)(2) *et seq*. The procedure outlined in that proposed Rule is very similar to the procedure which has been employed in the California state court system since January 1, 1984. California's rule is currently codified at California Code of Civil Procedure § 437c(b)(1). I have extensive experience practicing under that rule. The proposed federal rule is an improvement on the California practice in several respects, and a significant improvement on the current Rule 56:

- The inclusion of proposed Rule 56(c)(4)(A)(ii) is a cure for one of the abuses of the current California statute by parties opposing summary judgment by requiring an explanation of why a "disputed" or additional fact is material.
- The inclusion of proposed Rule 56(f) also operates to protect against abuse of the separate statement procedure by not restricting the Court to the formulations used by the parties in their submissions.

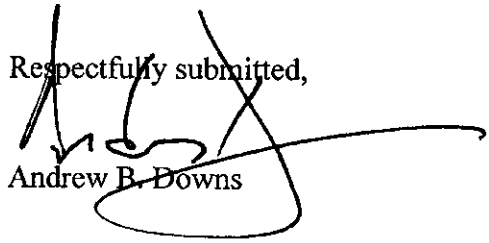
In short, the California separate statement procedure works. Variants of that procedure are used by many of the judges in the Northern District of California. They work. There are motions which are lengthy, but the statement requirement focuses the parties, particularly the moving party, on the issues which truly are suitable for summary judgment. While some "telephone book sized" motions will result, other motions will be more narrow or will not be filed at all if this rule is adopted.

Like others, I am concerned by a rule whose language is sufficient elastic so as to permit a court to deny summary judgment where it is procedurally and legally appropriate, regardless of the court's subjective reasoning for denying the motion. "Shall" should be translated as "must." If the facts and the law support the entry of judgment, a refusal to do so provides fuel for those who perceive result-oriented actions by courts or the use of calculated uncertainty to pressure parties to settle. I fully support judicial efforts to encourage settlement, but the refusal to grant relief supported by the law and the undisputed facts is not an appropriate method to encourage settlement.

Finally, some federal judges have standing orders which require that the statement of undisputed issues be a joint one. As one such standing order states "If the parties are unable

to agree that a fact is undisputed, then the fact shall be in dispute." Standing orders such as the one listed above may work where all counsel are intellectually honest and fully candid with the court (and have clients who authorize unfavorable admissions), but too often they either operate to preclude the bringing of meritorious motions or they generate ancillary motion practice when counsel requests an exception because of the opposing party's alleged failure to meet and confer in good faith. The Comment to the Rule should include language disapproving blanket rules and standing orders requiring the parties to file a single joint statement.

Respectfully submitted,



Andrew B. Downs