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VIA FEDERAL EXPRESS
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Re: Proposed Rule Amendments - Rule 56

To the Honorable Committee Chair and Members and Messrs. McCabe and Rabiej

This statement is respectfully submitted by the undersigned, as a summary of my testimony at the forthcoming February 2, 2009, public hearing on proposed amendments to Fed. R. Civ P. 56. These comments are submitted on behalf of Public Justice, a national public interest law firm with offices in Washington, D.C , and Oakland, California, and the Public Justice Foundation. We appreciate the opportunity to submit comments and testify regarding the proposed changes to Rule 56; specifically, the proposed Rule 56(c)(2)(A) and (B) "Statement of Undisputed Fact" requirements, which could require the submission, in "correspondingly numbered paragraphs," of dueling fact lists

By way of introduction, Public Justice is a national organization that uses the efforts and resources of trial lawyers to pursue precedent-setting and socially-significant civil litigation. Litigating throughout the state and federal courts, Public Justice prosecutes cases designed to

advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. The Public Justice Foundation is a non-profit charitable and educational membership organization that supports Public Justice's activities and educates the public, lawyers, and judges about the critical social issues in which Public Interest is involved. Its thousands of members, primarily plaintiffs' trial lawyers and law firms (including the undersigned), participate in formulating the organization's policies and work as cooperating counsel on Public Justice's cases. The Public Justice Foundation's members regularly represent plaintiffs in a broad range of personal injury, employment discrimination, commercial, civil rights, tort, and other cases in the federal courts.

The Proposal to Amend Rule 56 to Require Enumerated Statements of Fact in Every Case Would Dramatically Increase the Expense – and Decrease the Fairness – of Civil Litigation

The efficacy of every Federal Rule of Civil Procedure, and every proposed amendment thereto, must be judged with reference to Fed. R. Civ. P. 1, which mandates that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." In accordance with this overarching direction, the price tag of every added procedure must be scrutinized. Amendments that promote the "just, speedy, and inexpensive determination of every action and proceeding" are to be embraced. All others, we submit, should be rejected as contrary to the general and salutary trend toward simplifying and clarifying the style, and streamlining the functioning, of the Civil Rules as a whole. The price of proposed Rule 56(c), in added cost, in decreased fairness, and in the deep discount it places on the central adjudicatory concepts of inference, credibility, and context, is too high.

While the tripartite formulation of "just, speedy and inexpensive" is comprised of equal and complementary parts, in practice they are frequently placed in tension. All too often, the effort to secure due process has lead to procedures that increase cost and delay, thereby rendering civil litigation so costly and protracted that fairness, especially to the side with fewer resources, is compromised or foreclosed, rather than promoted or secured. Any amendment that adds steps or costs to a motion or procedure should start with a presumption against it, an inference of unfairness that it must overcome. We submit that, despite the honorable intentions of its drafters, proposed Rule 56(c) fails to overcome this inference and does not withstand the Rule 1 cost/benefit analysis.

1. Requiring SUFs Would Result In Their Use In Cases Where They Do Not Assist The Parties Or The Court.

There can be no dispute that requiring the submission of numbered statements of undisputed fact ("SUFs") on all summary judgment motions, to be correspondingly refuted in responses thereto, would add cost (in dollars and time) to the process — to the moving and responding parties, and to the reviewing court. The question must be asked: would the inevitable multiplication of briefs, boxes, and binders similarly increase the speed, economy, and

fairness of the summary judgment procedure? The intuitive answer and, more persuasively, the answer borne of actual experience with summary judgment in practice, is that it would not.

We recognize that there may be some cases in which the use of SUFs will, in the considered judgment of the court, assist it rather than merely add to its burden. In such cases, judges are already empowered to require them. Rule 16(c)(2), for example, enables judges to take a flexible, "whatever works" approach to summary judgment – and to other procedures – so long as the procedures deployed facilitate "the just, speedy, and inexpensive" disposition of the action. *See* Fed. R. Civ. P. 16(c)(2)(P). Most often, however, the utility of SUFs cannot be determined until the moving papers, and perhaps the responses as well, have been filed. Injecting a blanket national rule *mandating* SUFs will undoubtedly give rise to their use in cases where they do not assist – and will actually increase the burdens upon – both judges and litigating parties.

Imposition of such a requirement would also increase the number of cases in which attorneys utilize the summary judgment device merely to "educate" judges on the factual contentions in their cases. The cost of such "education" can be astronomical, and our concern is that the proposed Rule would make it higher still We submit that enlightened procedural reform would abolish (or render discretionary), rather than permit, such ponderous "educational" devices Although it may be tempting to add an SUF requirement as a filter to discourage the filing of nonmeritorious, but purportedly "educational," summary judgment motions, we fear that, as is often the case, the finances of the parties, rather than the merits of their positions, will dictate such litigation decisions The default rule should be to discourage, rather than require, SUFs.

It should be noted that we are by no means opposed to the use of the summary judgment device – with or without SUFs – in appropriate cases When properly utilized, the device can reduce cost and delay by dispensing with trial by finders of fact when there are no facts that remain to be found; that is, when the pertinent facts are well-defined and uncontestable.

But this is a rare occurrence in the type of complex disputes that are the province of the federal courts A Rule amendment that adds another costly and time-consuming step to pretrial procedure would weight the typical case with greater cost, and create another barrier to trial, without the upside prospect of swifter or fairer resolution.

2. Requiring SUFs Would Undermine The Truth-Finding Function Of The Courts By Forcing Judges To Rely On Distorted Versions Of Reality.

Requiring SUFs in every case would also fundamentally distort the litigation process by substituting a digital version of "reality" for complex real-world disputes The public trial remains our touchstone of due process. Summary judgment, its pale and paper substitute, should only be utilized when the absence of reasonable disputes regarding material facts leaves only questions of law to be determined. While it might seem reasonable that requiring the parties to enumerate undisputed facts will improve the quality of the process, such a mandate is highly

unlikely, in practice, to demonstrate that no disputed facts remain. Instead, practice has shown that, rather than narrowing the issues for trial, the use of SUFs often merely results in the futile attempt to reduce complex and nuanced disputes, which typically involve matters of perception, credibility, and the clash of opposing expert opinions, into a binary system of "yes" and "no" and "on" and "off," in order to dispose of a case without the noise, drama, confrontational tension, suspense, and resulting truth of an actual trial.

The proposed rule would further distort the truth by making it impossible to determine the materiality of any given fact. Under the contemplated new procedure, "facts" and counter "facts" are added, yet the necessary materiality of such facts is unremarked upon in the proposed amendment. And, despite their potentially endless proliferation, these "facts" would remain stripped of the inference, credibility, admissibility, and context they require – the very elements on which their dispositive significance – their materiality – depends.

We submit that, given a choice, the procedure that better mirrors the reality of life and the function of litigation should be employed. The summary judgment procedure has become steadily more "digital," reducing the complications and nuances of every controversy to a series of either/ors This binary approach, which characterizes the virtual reality in which each of us spends increasing time, and with which, enthusiastically or reluctantly, we have become more familiar, works admirably to approximate reality online and on our laptops Yet it does not fully or truly comport with the reality of human thought, action, and experience Like it or not, people are analog creatures. The whole truth, which we demand that our law uphold, and which our procedures are designed to reveal, is often greater than the sum of its parts Summary judgment views the parts alone, and the SUF proposal would further elevate the parts, giving them a decisive power they do not deserve. Erecting a haystack of SUFs frustrates and obscures the search for that ultimate rarity: the truly material and genuinely undisputed fact on which a purely legal question turns. When the truth resides between the lines (and outside the boxes) of the already voluminous documents and statements currently submitted, the added requirement of a numbered SUF format will not aid the quest to find it.

3. The Proposed Amendment Would Unfairly Advantage The Moving Party And Further Distort The Truth By Not Permitting A Surreply.

Proposed Rule 56(c) is also lopsided: it favors the movant (usually the defendant) by giving it the first and last word, while the plaintiff, on whom the burden of proof remains, has one chance to oppose A surreply opportunity, at the least, should be permitted, in this duel of "facts," to give each side the same number of shots A procedural accretion that in turn requires additional exchanges of papers to preserve the balance of due process should be strictly scrutinized

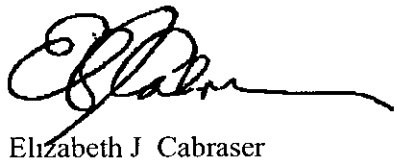
4. A Return To Trials, Rather Than Further Codification Of Rule 56, Will Better Promote Rule 1's Overarching Goals of Fairness and Efficiency.

Trials are expensive, and given the clients and causes championed by both the public interest and private plaintiffs bar, we are necessarily advocates of economy. Cost and delay are the deadliest barriers to justice that we face. Strategies of attrition, resistance, and delay have, to our clients' detriment, all too often exploited loopholes and unintended opportunities in procedures that were designed to serve and balance the legitimate interests of both sides. As a result, the addition of more procedural requirements, at any pretrial stage, is presumptively suspect. Trials, while expensive, are the ultimate protection against injustice. Procedural innovations, including time limits, bifurcation, and aids to juror comprehension, are and should be increasingly used to decrease cost, while increasing effectiveness, and preserving the jury's irreplaceable fact-finding function. Judges concerned that a particular case does not warrant a "full blown" trial have alternative dispute resolution tools, such as the summary judgment trial Summary jury trials expose contested claims and defenses, and the witnesses, advocates, and experts who support them, to an abbreviated trial by fact finders and provide useful information on how these play, in the real world

Summary jury trials would be far more effective (and easier on the courts) in providing all involved with an "education" on the case, and in enabling the parties to put such education to practical use through an informed resolution by settlement, than would a summary judgment procedure freighted with the additional cost of mandatory SUFs. Summary judgments beget the additional cost and delay of appeal. Summary jury trials beget settlements Real trials do beget appeals, but appeals that benefit from a full trial record, in which the evidence itself, not merely the parties' and the courts' conclusory summaries thereof, are available for scrutiny and review

For these reasons, we respectfully submit that Rule 56 should not be amended to require SUFs and corresponding refutations in every case.

Respectfully,



Elizabeth J Cabraser

On behalf of Public Justice and the Public Justice Foundation

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