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08-CV-191

John K. Rabiej
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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 on proposed amendments to Fed. R. Civ. P 56. These comments are submitted on behalf of the National Association of Consumer Advocates. 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 ("SUF"), which could require the submission, in "correspondingly numbered paragraphs," of dueling fact lists.

By way of introduction, the National Association of Consumer Advocates ("NACA") is a nationwide, nonprofit corporation with over 1,000 members who are private and public sector attorneys, legal services attorneys, law professors, law students and non-attorney consumer advocates, whose practices or interests primarily involve the protection and representation of consumers. Its mission is to promote justice for all consumers. NACA is dedicated to the furtherance of ethical and professional representation of consumers. Its *Standards And Guidelines For Litigating And Settling Consumer Class Actions* may be found at 176 F.R.D 375 (1998).

About 150 of NACA's members are California consumer attorneys or non-attorney advocates who regularly represent and advocate for consumers residing in California. Included within these cases are numerous cases brought under California's state statutes against financial institutions, including nationally-chartered banks, and retail sellers of goods and services Therefore, NACA has a substantial interest in resolution of the proposed amendments to Rule 56.

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1. The Proposed Amendment to Rule 56 Would Prejudice the Right to a Jury Trial and Should Be Rejected on This Basis Alone.

Rule 56, properly understood and applied, is a device to determine whether a party's right to a trial by jury or a court trial should be interdicted when there are no material issues of fact in dispute and the questions are solely ones of law to be decided by a judge. Because summary judgment is a limited device, it is not a substitute for the enshrined right to a trial by jury. Indeed, the right to trial by jury is not only specifically set forth in the Seventh Amendment to the Constitution, but it is explicitly enumerated in the Declaration of Independence as one of the rights denied to the citizenry of Great Britain by King George III.

It's historic and foundational importance in the history of this country is amplified by two decisions of the United States Supreme Court in the 1950s. In *Beacon Theatres, Inc v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen, Inc v. Wood*, 369 U.S. 469 (1962), the Court emphasized that where both legal and equitable claims are presented in a case, the legal claims must be tried first so as not to foreclose the right of the jury to decide the legal issues giving rise to damages. The principle decided in those two cases has never been questioned in the last 50 years, despite encroachments on the right to a jury trial (and a trial in a public forum) by corporate entities which insert binding mandatory arbitration clauses in a broad variety of consumer and employment contracts nationwide under the auspices of the Federal Arbitration Act, 9 U.S.C. section 1 *et seq.* and its state counterparts.[1]

Rule 56 should not be amended in a way to create traps for the unwary. The Rule as interpreted by the United States Supreme Court in the 1980s already imposes burdens on the non-moving party to identify with specificity material facts in dispute and to support them with admissible evidentiary material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Summary judgment is a drastic remedy and must be granted cautiously. In considering such a motion a judge's sold responsibility is to determine whether there is a genuine issue for trial. "Credibility determinations, the weighing of the evidence, and the *drawing of legitimate inferences* from the facts are *jury* functions . . . ." *Anderson v. Liberty Lobby, supra*, at 249-255 (emphasis added).

Many new cases have now been thrown into the federal jurisdictional realm by statutes such as so-called Class Action Fairness Act, 28 U.S.C §§ 1332 *et seq.* Beginning in February, 2005, that statute requires many entirely state law-based claims asserted on behalf of a class to be filed and/or litigated in federal court. So long as a principal defendant is domiciled outside of the forum state and the amount in controversy for all members of the class exceeds $5 million, those claims are now required to be litigated in federal court, even though no federal cause of action is pled Many lawyers representing plaintiffs in those cases are not nearly as well versed in federal procedure, including the specific federal requirements of Rule 26, as they are with state

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[1] *See, e.g.*, California Arbitration Act, Code of Civil Procedure section 1295.

law counterparts. And as members of this Committee are well aware, state law counterparts to Rule 56 differ from state to state and impose different requirements and different burdens, including evidentiary ones.[2]

This additional factor should be given careful consideration in deciding whether to further increase the burdens on the non-moving party, particularly when viewed against the general overriding principle that cases are to be resolved on their merits and that there is a strong presumption favoring trials, not summary disposition.

2. Requiring SUFs Would In Almost All Cases Assist Neither the Parties Nor the Court.

It cannot be disputed that requiring the submission of numbered statements of undisputed facts ("SUF") on each and every summary judgment motion, to be refuted in specific responses, would add enormous cost both in time and dollars to the litigation process. The price of proposed Rule 56(c) would not amount to increased fairness; instead, it would decrease the emphasis on the established concepts of credibility and inference.

To be sure, there may be some cases in which the use of SUFs would benefit both the parties and the court, but based on our experience, this would be the clear exception, not the rule. Imposing a blanket national rule mandating this additional costly and time-intensive process would increase the burdens upon both the court and the parties without providing any corresponding benefit to them or the system as a whole.

Moreover, and significantly, the imposition of such a requirement would only incentivize the use of SUFs by attorneys who have the advantage of hourly based billing. At a sensitive time in the case, adding additional burdens which do not crystalize issues or serve to identify material issues of fact in dispute or undisputed, would serve no measurable gain to the litigation process. There are plenty of other ways, and motions, to weed out non-meritorious cases prior to trial. But the finances of the parties should never outweigh the merits of their respective positions or dictate litigation decisions.

In addition, as written, proposed Rule 56(c) appears to favor the moving party, most often the defendant, by giving it both the first and the last say, while imposing on the non-moving party, usually the plaintiff, a single chance to respond. Despite this seemingly unfair procedural advantage to the moving party, the burden of proof is always placed on the plaintiff. That being the case, the plaintiff should always have the last word as s/he does at trial.

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[2] *See, e g.*, Cal Rules of Court rule 3.1350, *et seq.*; Cal. Code of Civ. Proc. § 437c.

3. **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 propriety of every federal rule, and every proposed amendment thereto, must be considered in juxtaposition 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." To achieve this direction, the cost of every additional procedure and procedural requirement must be scrutinized. Amendments that promote the "just, speedy, and inexpensive determination of every action and proceeding" should be embraced. All others should be rejected as contrary to the general and proper goal of simplifying and clarifying the style, and streamlining the functioning, of the Civil Rules as a whole. The cost of proposed Rule 56(c), in additional legal and judicial resources, together with decreased fairness in many situations, is simply too great.

While the 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. NACA submits 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.

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

Respectfully,

James C. Sturdevant

On behalf of the National Association of Consumer Advocates

JCS:bn