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Robert L. Ernst
Deputy General Counsel
Litigation

Verizon Wireless
One Verizon Way
VC52N059
Basking Ridge, NJ 07920-1097

Phone 908-559-7437
Fax 908-559-7109
robert.l.ernst@verizonwireless.com

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

Re: Comments and Request to Testify on Proposed Amendments to Rule 56

Dear Mr. McCabe:

I am writing in strong support of the Civil Rules Advisory Committee's proposed amendments to Rule 56 of the Federal Rules of Civil Procedure. These amendments will help make the summary judgment process more efficient as well as conform more closely to the realities of modern summary judgment practice. I would like to thank the members of the Civil Rules Advisory Committee for their work in connection with these amendments as well as for inviting Verizon Wireless to participate at the Committee's public forum last November.

Verizon Wireless is one of the country's leading wireless telecommunications companies with operations across the United States. We are at any given time a party in civil cases, both as plaintiff and defendant, in federal district courts throughout the nation.

The ability to have a motion for summary judgment heard and decided in a timely fashion is critical to our efforts to manage litigation in an efficient and cost-effective manner. Cases in which we are involved often involve primarily issues of law with little dispute as to the material facts at issue. Having these cases decided at the summary judgment stage, rather than expending the time and money necessary to take a case to trial, is beneficial not only to the parties in the case but to the court system and society in general.

The proposed amendments to Rule 56 would, in our view, help make more efficient the process of filing and considering motions for summary judgment, and would bring the summary judgment practice reflected in the Rules into conformity with current summary judgment practice. Most prominently, the requirement in amended Rule 56(c) for the moving party to present a separate statement of undisputed facts, and for the opposing party to respond to each of these facts, reflects a procedure that is already required by local rules in many federal district courts. In our experience, the use of these separate statements helps the parties to narrow and focus the relevant facts that the court must consider in deciding the motion. While parties may incur some additional cost to prepare these separate statements, we believe that any such cost is more than outweighed by the efficiency these separate statements bring to the orderly presentation of a motion for summary judgment. These costs should not deter the filing of well founded motions.

The Committee has specifically requested comment on whether the language of amended Rule 56(a) should be changed to reflect that a court "must," rather than "should," grant summary judgment if there is no genuine dispute as to any material fact. In our view, use of the word "must" rather than "should" would improve the Rule by removing any ambiguity as to whether parties are entitled to summary judgment as a matter of right where they have shown that no material issue of fact exists. We believe this change comports both with existing law and the overall goal of efficiently deciding disputes through summary judgment motions where appropriate. Unfortunately, some courts historically have shown a reluctance to grant well founded summary judgment motions, and we fear that use of the word "should" in the amended Rule could be read to validate such an approach. This would undermine the purpose of the Rule and unfairly subject parties (as well as the court system) to the costs and expense of an unwarranted trial.

While we understand that courts must have discretion with regard to the timing and method by which summary judgment motions are presented and considered, we believe that courts have and will continue to have such discretion under other provisions of Rule 56, such as those allowing a court to adjust the timing and presentation of a motion as well as the court's ability under Rule 56(d) to defer consideration of a summary judgment motion where the nonmovant shows that it is unable to present facts essential to its position. Where, however, a party has through a fair process shown that it is entitled to summary judgment, we do not believe there is any need to provide the court with discretion to deny such a motion.

In the alternative, we would support the Committee's suggestion in its request for comment that the "should" language be retained in connection with motions for partial summary judgment, but that the Rule provide that a court "must" grant summary judgment where there is no material issue of fact as to all claims against a party. In the partial summary judgment context, where claims presented in a case may be interdependent, we can theoretically envision circumstances where it might be more efficient to preserve certain claims as part of a more global trial even in the absence of a genuine material fact on that particular claim. Moreover, given that a party will proceed to trial in any event, the downside of not granting a properly supported partial summary judgment motion is not as great as in the context of a motion for complete summary judgment that would spare a party the unnecessary expense of a full trial on the merits.

Regardless of how the Committee resolves this specific issue, however, we support the adoption of the proposed amendments to Rule 56 as advancing the cause of the efficient administration of justice.

Verizon Wireless would welcome the opportunity to testify in support of these amendments at the public hearing to be held in Washington, D.C. on November 17, 2008. I would ask that my colleague, Leigh Schachter, Assistant General Counsel for Litigation for Verizon Wireless, be permitted to testify on behalf of Verizon Wireless at the hearing.

Once again, we thank the committee for its work on this important project.

Very truly yours,

Robert Ernst