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To <Rules\_Comments@ao.uscourts.gov>

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Subject: Comments on Proposed Amendments to Fed. R. Civ. P. 56

Dear Mr. McCabe and Committee Members:

The undersigned members of the Oregon State Bar submit the following comments on the proposed amendment to Rule 56(c). We are all experienced federal practitioners in the District of Oregon and other federal courts and represent a wide range of practice areas and backgrounds.

Local Rules for the District of Oregon have long required the filing of a Concise Statement of Material Facts with all summary judgment motions and we are all familiar with these statements.

We urge the Committee not to adopt a requirement that mandates the filing of a concise statement of material fact with summary judgment papers as proposed in FRCP 56(c)(2)(A)(i). We believe that the concise statement of material fact is duplicative of the fact section of the legal memoranda in support of the summary judgment motion and therefore results in an inefficient use of attorney and judicial time and client money. Since the concise statement of material fact fails to context the dispute, we believe that the fact section of the legal memoranda provides a much better place to disclose facts relevant to the case. In our experience, concise statements of fact are rarely, if ever, cited in a judicial opinion.

Additionally, the concise statements of fact frequently include recitations of non-material facts and facts which are unnecessary to the motion. This engenders a response which tends to complicate the facts in dispute rather than simplify the issue. This is especially true in administrative record review cases, which are typically resolved on cross-motions for summary judgment where both parties are filing and responding to concise statements of fact.

Lastly, the proposed rule creates a burden and a risk to the non-moving party that we believe will not further the intent of the proposed amendment, which is to increase the quality of summary judgment motions and responses. Since there is no page limit on concise statements, it is possible that a moving party could file a statement with hundreds of factual allegations. It is then up to the non-moving party to respond to each and every one of these allegations. If the non-moving party fails to deny a factual allegation, this party runs the risk of having the fact deemed admitted and undisputed. *See* proposed FRCP 56(e)(2). We believe that this outcome could lead to attorney gamesmanship and could result in an undue burden on the non-moving party.

Alternatively, should this Committee adopt FRCP 56(c)(2)(A)(i), the undersigned attorneys urge the Committee to include a page-limit requirement that all concise statements of material facts and any responses thereto be limited to five (5) pages as is required by the Oregon local rules.

Finally, we concur entirely with the comments submitted by Magistrate Judge Janice M. Stewart of the District of Oregon regarding this proposed rule change.

Signatories:

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