

- § 1:121 —Written objections to evidence submitted in support of motion for summary judgment
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A. SUGGESTED MOTION TEXT

§ 1:1 Summary judgment

Motion by Defendant:

Defendant *[or cross-defendant]* *[name]* will move this Court for an order granting summary judgment in favor of the defendant *[or cross-defendant]*, pursuant to Federal Rules of Civil Procedure, Rule 56(a), on the grounds that the action has no merit, there is no triable issue as to any material fact and defendant *[or cross-defendant]* is entitled to judgment as a matter of law.

Motion by Plaintiff:

Plaintiff *[or cross-complainant]* *[name]* will move this Court for an order granting summary judgment in favor of the plaintiff *[or cross-complainant]* and as prayed for in the complaint *[or cross-complaint]*, pursuant to Federal Rules of Civil Procedure, Rule 56(a), on the grounds there is no defense to the action, there is no triable issue as to any material fact and plaintiff *[or cross-complainant]* is entitled to judgment as a matter of law.

§ 1:2 Partial summary judgment

Motion by Defendant:

Defendant *[or cross-defendant]* *[name]* will move this Court for an order granting partial summary judgment as to *[insert portion of pleading being attacked, e.g., plaintiff's or cross-complainant's First Cause of Action, claim for punitive damages, issue of duty, etc.]*, pursuant to Federal Rules of Civil Procedure, Rule 56(a) and (g), on the grounds that *[state grounds, e.g., there is no merit to plaintiff or cross-complainant's First Cause of Action, defendant or cross-defendant does not owe any duty to plaintiff or cross-complainant, etc.]*, there is no triable issue as to any material fact and defendant *[or cross-defendant]* is entitled to summary adjudication on this issue as a matter of law.

Motion by Plaintiff:

Plaintiff [or cross-complainant] [name] will move this Court for an order granting summary adjudication as to [state portion of pleading being attacked, e.g., defendant or cross-defendant's First Affirmative Defense or the issue of defendant or cross-defendant's duty], pursuant to Federal Rules of Civil Procedure, Rule 56(a) and (g), on the grounds that [state grounds, e.g., there is no defense to the action, defendant or cross-defendant owes plaintiff or cross-complainant a duty], there is no triable issue as to any material fact and plaintiff [or cross-complainant] is entitled to summary adjudication on this issue as a matter of law.

§ 1:3 Partial summary judgment as to liabilityMotion by Plaintiff:

Plaintiff [or cross-complainant] [name] will move this Court for an order granting summary adjudication as to liability, pursuant to Federal Rules of Civil Procedure, Rule 56(g), on the grounds that there is no triable issue as to liability although there is a genuine issue as to the amount of damages.

§ 1:4 Overview of motion

Summary judgment and partial summary judgment motions are governed by the detailed statutory scheme found in Federal Rules of Civil Procedure, Rule 56. Although these motions have a number of potential procedural and evidentiary traps, and are often extensively briefed, at their core they are based upon a simple inquiry: whether the opposing party can present a triable issue of a material fact that is supported by evidence. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 321–27 (1986); *Rogers v. Girard Trust Co.*, 159 F.2d 239, 241–42 (6th Cir. 1947).

By narrowing a case to triable issues, the motion for summary judgment promotes the judicious, cost-effective and efficient use of the courts. *Klinge v. Lutheran Charities Ass'n of St. Louis*, 523 F.2d 56, 61–62 (8th Cir. 1975); *Zweig v. Hearst Corp.*, 521 F.2d 1129, 1135–36 (9th Cir. 1975); *Schreffler v. Bowles*, 153 F.2d 1, 3 (10th Cir. 1946); *Washington Post Co. v. Keogh*, 365 F.2d 965, 967–68 (D.C. Cir. 1966). To achieve this goal, the courts must “pierce” the allegations in the pleadings in order to determine if there is an issue to be tried. *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469, 472–73 (2d Cir. 1943); *Keller v. Dravo Corp.*, 441 F.2d 1239, 1245 (5th Cir. 1971); *Schreffler v. Bowles*, 153 F.2d 1, 3 (10th Cir. 1946).

Of course, it is not enough to simply raise a triable issue of fact, the opposing party must present evidence to support the fact. Thus, the motion is also used to discover whether the opposing party possesses evidence to support that triable

issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321–27 (1986); *Slagle v. U.S.*, 228 F.2d 673, 678–79 (5th Cir. 1956).

The motion for summary judgment is often used to flesh out the evidence possessed by the opposing party, particularly where an expert’s testimony is required. As a result, the motion can become a major expense, forcing the opposing party to retain an expert and pay considerable costs at an early stage of the action. In that event, a motion can become a means of encouraging settlement because often the losing defendant is willing to settle if the plaintiff can meet the challenge of the motion or a plaintiff, who is unable to come up with the extra expense or is fearful of losing the motion, may be forced into a position of accepting a settlement.

In the sections that follow, you will find relevant excerpts from the Rules of Civil Procedure and key cases that support your moving and opposition papers.

B. KEY SUPPORTING CITATIONS

§ 1:5 Summary judgment—Authority for motion [Rule 56]

Federal Rules of Civil Procedure, Rule 56(a) provides:

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

Rule 56 underwent significant amendments in December 2010. The significant changes to Rule 56(a) after the 2010 amendment are: 1. it is clarified that the court “shall” grant the motion if standard for doing so is met; 2. the court is advised to state for the record the grounds for the court’s decision with respect to the motion; 3. it is clarified that the court can grant a partial summary judgment; and 4. the standard for granting the motion is clarified in that there must be “no” genuine **dispute** [formerly “issue”] as to any material fact.”

Federal Rules of Civil Procedure, Rule 56(b) provides:

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

In December 2010, Rule 56 was changed to allow summary judgment motions to be filed at any time up until 30 days af-

ter discovery closes if there is no local rule or court order to the contrary.

As was noted herein, Rule 56 underwent significant amendments in December 2010.

Prior to December 1, 2010, Federal Rules of Civil Procedure, Rule 56(c) provided in pertinent part:

(c) Time for a Motion, Response, and Reply; Proceedings.

(1) These times apply unless a different time is set by local rule or the court orders otherwise:

(A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(C) the movant may file a reply within 14 days after the response is served.

(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

After the December 1, 2010, amendments, Federal Rules of Civil Procedure, Rule 56(c) now provides:

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

In addition, the December 1, 2010, amendments added Rule 56(f), which states:

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

- (1) grant summary judgment for a nonmovant;
- (2) grant the motion on grounds not raised by a party; or
- (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

Note: This important substantive change allows the court to grant summary judgment on grounds not raised by the parties and/or on its own motion.

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (“The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’ Fed Rule Civ Proc. 1.”)

§ 1:6 Summary judgment—Authority for motion [Rule 56]—Description and purpose

United States Supreme Court cases:

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (“Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’ Fed Rule Civ Proc. 1.”)

Circuit Court cases:

Torgerson v. City of Rochester, 643 F.3d 1031, 1043, 112 Fair Empl. Prac. Cas. (BNA) 613, 94 Empl. Prac. Dec. (CCH) P 44199 (8th Cir. 2011), cert. denied, 113 Fair Empl. Prac. Cas. (BNA) 1152, 2011 WL 3860638 (U.S. 2011) (summary judgment is a proper way to determine if a claim merits a trial and it applies to all civil actions, including discrimination cases).

Klinge v. Lutheran Charities Ass’n of St. Louis, 523 F.2d 56, 61 (8th Cir. 1975) (the purpose of summary judgment is to avoid the time and expense of trials when none of the material facts are in dispute).

Neely v. St. Paul Fire and Marine Ins. Co., 584 F.2d 341, 343 (9th Cir. 1978) (summary judgment is proper when the trial court can decide the case as a matter of pure law and does not need to weigh credibility or make factual inferences).

SMS Mfg. Co. v. U.S.-Mengel Plywoods, 219 F.2d 606,