# UNITED STATES BANKRUPTCY COURT
# DISTRICT OF HAWAII

ROBERT J. FARIS
BANKRUPTCY JUDGE

1132 BISHOP STREET, SUITE 250-L
HONOLULU, HAWAII 96813
(808) 522-8111
chambers@hib.uscourts.gov

08-CV-192

March 17, 2009

Honorable Lee H. Rosenthal
United States District Court
11535 Bob Casey United States Courthouse
515 Rusk Street
Houston, TX 77002-2600

Re: Amendments to Fed. R. Civ. P. 56

Dear Judge Rosenthal:

I am writing on behalf of the Conference of Chief Bankruptcy Judges of the Ninth Circuit, which represents the bankruptcy courts of the sixteen districts comprising the Ninth Circuit.

We understand that the committee is considering proposed amendments to rule 56. We wish to comment on the proposal to adopt the so-called "point-counterpoint" technique for summary judgment motions, under which the movant is required to file a statement of the undisputed facts which the movant thinks are material to the motion and the respondents must file a counterstatement.

We have varying opinions on the value of the point-counterpoint process.

Some of us think that the process forces counsel to think carefully about the facts that the movant must establish are not subject to a genuine dispute and to identify the materials in the record that pertain to those facts. These judges think that the technique tends to improve the presentation of summary judgment motions and makes it easier for the court to review them.

Others find the point-counterpoint system less useful. These judges find that attorneys often do not do a good job of preparing their statements and counterstatements, that the procedure is hard to enforce, and that the cost to the parties of preparing the statements outweighs the benefit.

While we do not agree on the merits of the point-counterpoint technique, we do agree that it should not be imposed as a uniform national procedure. We think that courts that like the technique should be free to use it (and to employ whatever variant they think best) and courts that do not should be free to reject it. A mandatory national rule would prevent courts from adopting

procedures that suit their local legal culture, the preferences of the judges, and the demands of their caseloads, and would stifle local flexibility and experimentation.

A uniform national rule would create particular problems for the bankruptcy courts. Unlike the district courts, we hear large numbers of small cases and small numbers of large cases. Individual courts might conclude that, at least in the small cases that are our bread and butter, the benefit of the point-counterpoint procedure does not justify the added cost to the parties, or that a simplified version of the procedure should apply. Therefore, we suggest that, if Fed. R. Civ. P. 56 is amended to adopt a uniform national point-counterpoint procedure, Fed. R. Bankr. P. 7056 and Bankr. P. 9014 should be amended to give the bankruptcy courts the discretion to opt out of or modify the procedure in some or all adversary proceedings and contested matters.

Thank you for your attention.

Sincerely,

Robert J. Faris

cc: Hon. Laura Taylor Swain
Peter G. McCabe
John K. Rabiej
Jim Wannamaker