MEMORANDUM

DATE: April 1, 2008

TO: Judge Michael Baylson
Professor Edward Cooper
Judge Mark Kravitz
Judge Lee H. Rosenthal

FROM: Andrea Kuperman

SUBJECT: Use of "Deemed Admitted" Provisions in Local Summary Judgment Rules

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This memorandum addresses research regarding proposed amendments to FED. R. CIV. P. 56(e), particularly with respect to the proposal to permit a court to deem facts uncontested where the nonmovant fails to respond to the motion for summary judgment or fails to respond in the proper format required by the rule. Specifically, the question has been raised as to whether deeming facts admitted could be considered to be inconsistent with the current summary judgment standard—*i.e.*, that a movant is entitled to summary judgment only if there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law. Many districts have implemented local rules that contain similar provisions to the proposed amendments to Rule 56, including provisions that permit courts to deem facts admitted. The Subcommittee requested that I research case law regarding how courts have implemented such rules with "deemed admitted" provisions and the reaction that the appellate courts have had to such local rules. In looking at the cases, I also examined whether the courts in districts that permit uncontested facts to be deemed admitted have automatically deemed facts admitted where the response was not in proper form or whether they

have required support for the facts before deeming them admitted.[1]

I. Courts Approving of Use of "Deemed Admitted" Practice

Most of the circuit court cases I reviewed approved of local rules that permit courts to deem facts admitted in the absence of a proper response to a motion for summary judgment.

The Supreme Court briefly addressed this issue in *Beard v. Banks*, 548 U.S. 521, 126 S. Ct. 2572 (2006). Although the issue before the Court was not directed to the propriety of a local summary judgment rule permitting the deemed admission of facts, the Court did note that such a rule had applied and did not express concern regarding such a rule. In *Beard*, a prisoner brought suit under the First Amendment against the Secretary of the Pennsylvania Department of Corrections, asserting that the Department had violated the rights of a certain group of inmates by restricting access to newspapers, magazines, and photographs. 126 S. Ct. at 2577. The Secretary moved for summary judgment, and filed a "Statement of Material Facts Not in Dispute," in accordance with Western District of Pennsylvania's local rule. *Id.* The applicable local rules provided that facts asserted in a statement of material facts submitted in support of a summary judgment motion are deemed admitted if not controverted by the opponent.[2] The plaintiff (who was represented by counsel) failed to respond to the Secretary's statement of facts, and instead filed his own crossmotion for summary judgment. *Id.* The plaintiff did not dispute any of the facts set forth by

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[1] Because a search for cases addressing the deemed admitted standard in summary judgment turned up thousands of results, I have focused my research on a sampling of the more recent cases that have substantively addressed the practice of deeming facts admitted in summary judgment. I have also largely focused on appellate cases because I found that many of those often discussed both what was done at the district court level as well as what was done at the appellate level, and sometimes also discussed whether the implementation of local rules comported with the national summary judgment standard.

[2] The local rule at issue provides, in part: "Alleged material facts set forth in the moving party's Concise Statement of Material Facts or in the opposing party's Responsive Concise Statement, which are claimed to be undisputed, will for the purpose of deciding the motion for summary judgment be deemed admitted unless specifically denied or otherwise controverted by a separate concise statement of the opposing party." W.D. PENN. L.R. 56.1(E).

the Secretary's statement, and the Secretary argued that the plaintiff ought to be deemed to have admitted the Secretary's facts, based on the applicable local rule. The district court deemed the facts admitted and granted summary judgment. *Id.* This holding was reversed at the Third Circuit, which held that the prison's regulation could not be supported as a matter of law by the record in the case. *Id.* The Supreme Court reversed the Third Circuit, in a plurality opinion authored by Justice Breyer and joined by Chief Justice Roberts, Justice Kennedy, and Justice Souter,[3] finding that it was appropriate for the uncontroverted facts to have been deemed admitted. The Court noted: "The upshot is that, if we consider the Secretary's supporting materials, i.e., the statement [of material facts] and deposition, by themselves, they provide sufficient justification for the [prison's] Policy." *Id.* at 2580. The court focused on the fact that the plaintiff had not provided any fact-based or expert-based evidence to refute the summary judgment motion in the manner provided by the rules. *Beard,* 126 S. Ct. at 2580 (citing FED R. CIV. P. 56(e)). Instead, in the plaintiff's crossmotion for summary judgment, the plaintiff asserted that the Policy was "unreasonable as a matter of law." *Id.* at 2581. The Court held that the Third Circuit had "placed a high summary judgment evidentiary burden upon the Secretary, *i.e.*, the moving party," and that the Circuit court's conclusion offered "too little deference to the judgment of prison officials . . . ." *Id.* The Court concluded: "Here prison authorities responded adequately through their statement and deposition to the allegations in the complaint. And the plaintiff failed to point to "'specific facts'" in the record that could 'lead a rational trier of fact to find' in his favor." *Id.* at 2582 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (quoting FED. R. CIV. P. 56(e))).

Justice Ginsburg wrote a dissenting opinion in *Beard*, noting that "[a]s the plurality

[3] Justice Alito took no part in the decision, and Justice Thomas, joined by Justice Scalia, wrote a concurring opinion.

recognizes, there is more to the summary judgment standard than the absence of any genuine issue of material fact; the moving party must also show that he is 'entitled to a judgment as a matter of law.'"[4] *Beard*, 126 S. Ct. at 2592 (Ginsburg, J., dissenting) (citing FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–55 (1986)). Justice Ginsburg continued: "Here, the Secretary cannot instantly prevail if, based on the facts so far shown and with due deference to the judgment of prison authorities, a rational trier could conclude that the challenged regulation is not 'reasonably related to legitimate penological interests.'" *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Justice Ginsburg noted that the Secretary's support for summary judgment was slim, and that the statement of undisputed facts contained a broad assertion that the regulation at issue served to "'encourage . . . progress and discourage backsliding.'" *Id.* Justice Ginsburg disagreed with the plurality that such statements were sufficient to show that the regulation was reasonably related to inmate rehabilitation, and stated that deference to the views of prison authorities "should come into play, pretrial, only after the facts shown are viewed in the light most favorable to the nonmoving party and all inferences are drawn in that party's favor." *Id.* at 2592–93 (citing *Liberty Lobby*, 477 U.S. at 252–55; *cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150–51 (2000)). Although not addressed in her dissenting opinion, Justice Ginsburg's view would seem consistent with the idea that even if a movant's facts are to be deemed admitted as a result of an improper response to a summary judgment motion, those facts could not be the basis for granting summary judgment without some showing in the record to support those facts.

A. Discretion to Enforce Local Rules

One key factor that appellate courts have expressed in reviewing district court opinions that

[4] Justice Stevens wrote a separate dissenting opinion, joined by Justice Ginsburg, but that opinion focused on the Fourteenth and First Amendment issues, rather than the summary judgment standard.

deem facts admitted in the summary judgment context is the deference given to district courts' application of local rules. The appellate courts review those determinations only for an abuse of discretion and thus do not seem to have difficulty affirming a district court's decision to deem facts admitted in accordance with local rules. *See, e.g.*, *CMI Capital Market Inv., LLC v. Gonzalez-Toro*, No. 06-2623, 2008 WL 713577, at *3 (1st Cir. March 18, 2008) (where the nonmovants failed to submit a separate statement of material facts in accordance with the local rule, "[t]he district court was . . . within its discretion to deem the facts in the [movant's] statement of material facts admitted."); *Ríos-Jiménez v. Principi*, No. 06-2582, 2008 WL 651630, at *4 (1st Cir. March 12, 2008) ("In the event that a party opposing summary judgment fails to act in accordance with the rigors that such a [local summary judgment] rule imposes, a district court is free, in the exercise of its sound discretion, to accept the moving party's facts as stated.") (citations omitted); *John S. v. County of Orange*, No. 05-55021, 2007 WL 625249, at *1 (9th Cir. Feb. 26, 2007) (unpublished) ("It was not error for the district court to deem the material facts submitted by defendants as admitted and to grant summary judgment on procedural grounds.") (citing C.D. CAL. L.R. 56-3); *Libel v. Adventure Lands of Am., Inc.*, 482 F.3d 1028, 1033 (8th Cir. 2007) ("The district court was not obliged to scour the record looking for factual disputes. Therefore, the district court committed no abuse of discretion when it deemed admitted Adventure Lands's statements of undisputed facts where Libel's responses violated Local Rule 56.1."); *Kelvin Cryosystems, Inc. v. Lightnin*, No. 05-4880, 2007 WL 3193731, at *3 (3d Cir. Oct. 29, 2007) (unpublished) ("We have long recognized that deemed admissions 'are sufficient to support orders of summary judgment.'")[5] (quoting

[5] On appeal, the appellants did not contest the district court's treatment of the movant's statement of uncontested facts as admitted after the appellants had failed to submit a statement in response, but argued that the district court erred in refusing to consider the facts alleged by appellants. *Kelvin Cryosystems*, 2007 WL 3193731, at *3. The Third Circuit rejected that argument because the district court had stated that it considered the facts alleged in the appellant's

Anchorage Assocs. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 176 n.7 (3d Cir. 1990)); *Mariani-Colón v. Dep't of Homeland Sec.*, 511 F.3d 216, 219 (1st Cir. 2007) ("This court has previously held that submitting an 'alternate statement of facts,'rather than admitting, denying, or qualifying a defendant's assertions of fact 'paragraph by paragraph as required by Local Rule 56(c),' justifies the issuance of a 'deeming order,' which characterizes defendant's assertions of fact as uncontested.") (citing *Cabán Hernández v. Philip Morris USA, Inc.*, 486 F.3d 1, 7 (1st Cir. 2007)); *Reasonover v. St. Louis County, Mo.*, 447 F.3d 569, 579 (8th Cir. 2006) ("District courts have broad discretion to set filing deadlines and enforce local rules," and "[w]ith Resonover failing to file a timely response [to the summary judgment motion], the district court did not abuse its discretion in deeming facts set forth in Officer Pruett's motion admitted.") (citing E.D. MO. L.R. 7-4.01(E)); *Hill v. Thalacker*, No. 06-1265, 2006 WL 3147274, at *2 (7th Cir. Nov. 1, 2006) (unpublished) ("[T]he district court acted within its discretion when it ignored Hill's proposed findings of fact and deemed Thalacker's facts admitted, given Hill's failure to follow the court's summary judgment procedures.")[6] (citing *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003)); *Mercado-Alicea v. P.R. Tourism Co.*, 396 F.3d 46, 50, 51 (1st Cir. 2005) (affirming the district court's decision to deem facts admitted and noting that "'[d]istrict courts enjoy broad latitude in administering local rules,'" and "[d]istrict courts are not required to ferret through sloppy records in search of evidence supporting a party's case.") (citations omitted); *Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) ("We have consistently upheld the enforcement of this [local summary judgment] rule, noting

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opposition brief and "found the arguments relating to those facts 'unpersuasive.'" *Id.*

[6] The nonmovant was pro se, but the court found that "even pro se litigants must follow procedural rules of which they are aware, and district courts have discretion to enforce those rules against such litigants." *Hill*, 2006 WL 3147274, at *2 (citing *Metro Life Ins. Co. v. Johnson*, 297 F.3d 558, 562 (7th Cir. 2002); *Greer v. Bd. of Educ. of Chicago*, 267 F.3d 723, 727 (7th Cir. 2001)). The court concluded that even if the district court had considered the affidavits submitted by the nonmovant in response to the summary judgment motion, "it would not have changed the ultimate outcome." *Id.*

repeatedly that 'parties ignore [it] at their peril' and that 'failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted.'")[7] (citing *Ruiz Rivera v. Riley*, 209 F.3d 24, 28 (1st Cir. 2000)); *Espinoza v. Northwestern Univ.*, No. 03-3251, 2004 WL 1662281, at *2 (7th Cir. July 20, 2004) (unpublished) (the district court did not abuse its discretion in deeming the movant's facts admitted and in granting summary judgment upon the nonmovant's failure to respond to a summary judgment motion without excuse) (citing *Ammons v. Aramark Uniform Servs., Inc.*, 368 F.3d 809, 817 (7th Cir. 2004); *Dade v. Sherwin-Williams Co.*, 128 F.3d 1135, 1139–40 (7th Cir. 1997)); *Northwest Bank and Trust Co. v. First Ill. Nat'l Bank*, 354 F.3d 721, 724–25 (8th Cir. 2003) (finding no abuse of discretion where the district court, "[a]s a sanction for noncompliance [with the local summary judgment rule], . . . ordered that Northwest be deemed to have admitted all of FINB's Statement of Material Facts," and limited its consideration of the nonmovant's "Statement of Additional Material Facts" to those that were specifically referenced by the nonmovant in its opposition brief to the extend they did not contradict the facts submitted by the movant.).

B. Approval of Local Rules Simplifying Summary Judgment Procedure

Some appellate courts have gone further than finding that the district court has discretion in applying local rules, and have also affirmatively commented on the value of local rules providing structured summary judgment procedures that permit courts to deem facts admitted as a sanction for noncompliance. For example, in *CMI Capital Market Inv., LLC v. Gonzalez-Toro*, No. 06-2623, 2008 WL 713577, at *3 (1st Cir. March 18, 2008), the appellants had submitted an opposition to a

[7] The court noted that the District of Puerto Rico amended its local rules in September 2003, but since the lawsuit was brought before the amended rules' effective date, the case was analyzed under the pre-amended version. *Cosme-Rosado*, 360 F.3d at 44 n.4.

summary judgment motion, but did not include an opposing statement of material facts as required by the local rule.[8] 2008 WL 713577, at *2. In commenting on what it termed "the anti-ferret rule," the First Circuit stated that "[t]he purpose of this rule is to relieve the district court of any responsibility to ferret through the record to discern whether any material fact is genuinely in dispute." *Id.* The court explained that "[t]he deeming order is both a sanction for the parties and a balm for the district court: the parties are given an incentive to conform to the rule (provided they wish to have their version of the facts considered), and the district court is in any case relieved of the obligation to ferret through the record." *Id.* at *2 n.2. The court also noted that "[w]hen summary judgment is granted after a deeming order, [the First Circuit is] bound by the order as well, provided it was not an abuse of the district court's discretion." *Id.* at *3.

In *Ríos-Jiménez v. Principi*, 2008 WL 651630 (1st Cir. March 12, 2008), the First Circuit again acknowledged the importance of local rules simplifying summary judgment:

> "Such rules were inaugurated in response to this court's abiding concern that without them, 'summary judgment practice could too easily become a game of cat-and-mouse.' *Ruiz Rivera v. Riley*, 209 F.3d 24, 28 (1st Cir. 2000). Such rules are designed to function as a means of 'focusing a district court's attention on what is—and what is not—genuinely controverted.' *Calvi v. Knox County*, 470 F.3d 422, 427 (1st Cir. 2006). When complied with, they serve 'to dispel the smokescreen behind which litigants with marginal or unwinnable cases often seek to hide [and] greatly reduce the possibility that the

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[8] The local rule at issue, the District of Puerto Rico Local Rule 56(c), provided:

> A party opposing a motion for summary judgment shall submit with its opposition a separate, short, and concise statement of material facts. The opposing statement shall admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule.

D.P.R. L.R. 56(c). The rule also provides: "Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, *shall be deemed admitted unless properly controverted*." *CMI Capital Market Inv., LLC*, 2008 WL 713577, at *2 (quoting D.P.R. L.R. 56(e)) (emphasis added by court).

district court will fall victim to an abuse.' *Id.*

> Given the vital purpose that such rules serve, litigants ignore them at their peril. In the event that a party opposing summary judgment fails to act in accordance with the rigors that such a rule imposes, a district court is free, in the exercise of its sound discretion, to accept the moving party's facts as stated."

Ríos-Jiménez, 2008 WL 651630, at *4 (quoting *Cabán Hernández*, 486 F.3d at 7). The court in *Ríos-Jiménez* concluded that the local rule was "intended to prevent parties from shifting to the district court the burden of sifting through the inevitable mountain of information generated by discovery in search of relevant material." *Id.*; *see also Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 14–15 (1st Cir. 2004) (noting that the local rules such as the District of Puerto Rico's local rule regulating summary judgment practice have been adopted pursuant to the First Circuit's suggestion and that the First Circuit has consistently upheld the use of such rules).

Similarly, in *Northwest Bank and Trust Co. v. First Ill. Nat'l Bank*, 354 F.3d 721, 724 (8th Cir. 2003), the Eighth Circuit approved of Local Rule 56.1 used in the Northern and Southern Districts of Iowa. That rule provides that the moving party must file a concise statement of material facts supported by citations to an appendix, and the opposing party must file a response to that statement that "'expressly admits, denies, or qualifies' each of the movant's material facts," and that cites to an appendix for any fact not expressly admitted. *Id.* (citing IOWA L.R. 56.1). The opponent is also required to file its own statement of material facts with citations to an appendix. *Id.* (citing IOWA L.R. 56.1). The Eighth Circuit approved of the rule, stating "[t]he concision and specificity required by Local Rule 56.1 seek to aid the district court in passing upon a motion for summary judgment, reflecting the aphorism that it is the parties who know the case better than the judge." *Id.* at 725 (citing *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994)). The court further

explained that "Local Rule 56.1 exists to prevent a district court from engaging in the proverbial search for a needle in the haystack." *Id.*

C. Necessity of Finding Support in the Record Before Deeming Facts Admitted

Several appellate courts have commented as to whether the facts to be deemed admitted must actually have support in the record in order for courts to rely on them in granting summary judgment. For example, in *Espinoza v. Northwestern Univ.*, No. 03-3251, 2004 WL 1662281, at *2 (7th Cir. July 20, 2004) (unpublished), the Seventh Circuit found no abuse of discretion in the district court's decision to deem facts admitted, noting that the movant's facts were "supported by the record, including affidavits . . . ," and that the nonmovant had not offered an excuse for failure to respond to the motion for summary judgment. While not an express statement that district courts must find support in the record before deeming facts admitted, *Espinoza*'s holding supports the proposition that it is more appropriate to deem facts admitted if there is support for those facts.

Similarly, in *Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) , the First Circuit affirmed the district court's decision to deem admitted "properly supported facts set forth in [the movant's] statement" of material facts. The district court had found that the nonmovants had "failed to provide a supported factual basis for their claims against Serrano . . . ." *Id*. at 44–45. After deeming the movant's facts admitted and properly-supported, the district court had found that there was no genuine issue of material fact and granted summary judgment. *Id.* The appellate court affirmed, finding that "summary judgment rightly followed" the deemed admission of the movant's facts. *Id.* at 46. The First Circuit quoted *Tavarez v. Champion Prods., Inc.*, 903 F. Supp. 268, 270 (D.P.R. Nov. 1, 1995), for the proposition that "'[a]lthough [failure to comply with Local Rule 311.12] does not signify an automatic defeat, it launches the nonmovant's case down the road

toward an easy dismissal.'" *Cosme-Rosado*, 360 F.3d at 46. Thus, the court seemed to indicate that the facts deemed admitted require support in the record and that the nonmovant's failure to comply does not result in an automatic grant of summary judgment, but also indicated that once the nonmovant fails to comply with the local rule, it is much easier for the movant to obtain summary judgment.

In *Mariani-Colón v. Dep't of Homeland Sec.*, 511 F.3d 216, 219, 219 n.1 (1st Cir. 2007), the First Circuit upheld the district court's decision to treat the movant's statement of facts as uncontested after the nonmovant failed to respond to the summary judgment in the manner required by the relevant local rule, but the court explained that a party is not necessarily entitled to summary judgment by having its facts admitted. The court stated: "'This, of course, does not mean the unopposed party wins on summary judgment; that party's uncontested facts and other evidentiary facts of record must still show that the party is entitled to summary judgment.'" *Mariani-Colón*, 511 F.3d at 219 n.1 (quoting *Torres-Rosado v. Rotger Sabat*, 335 F.3d 1, 4 (1st Cir. 2003)). While this explanation does not necessarily mean that the court is required to search for support for the uncontested facts before deeming them admitted, it does require the district court to ensure that the facts show entitlement to judgment before granting summary judgment. This requirement may prompt the district courts to examine whether the "uncontested facts" have support in the record.

The Eighth Circuit has also indicated that facts should not be deemed admitted without some support in the record and that the nonmovant's failure to properly respond to a summary judgment motion does not automatically entitle the movant to judgment. In *Reasonover v. St. Louis County, Mo.*, 447 F.3d 569, 579 (8th Cir. 2006), the defendant failed to file a timely response to a summary judgment motion, as required by the federal rules and the Missouri local rule on summary judgment.

The Eighth Circuit rejected an argument that the district court's order deeming the facts set forth in the motion for summary judgment admitted amounted to a default judgment. *Id.* The Eighth Circuit explained that "[t]he [district] court considered the admitted facts in light of the relevant law and ruled based on the merits." *Id.* (citing *Bennett v. Dr Pepper/Seven Up, Inc.*, 295 F.3d 805, 809 (8th Cir. 2002)). Based on the uncontroverted facts in the motion, the circuit court found that summary judgment had been appropriate. *Id.* As in *Mariani-Colón*, the *Reasonover* court did not specifically state that the district court was required to find the facts to be supported by the record before deeming them admitted. However, the fact that the court noted that the district court's decision to deem facts admitted did not amount to a default judgment because it had ruled on the merits after deeming facts admitted, may imply that there ought to be some support for the deemed admitted facts before a grant of summary judgment is based on such facts.

In *Magee v. Earl*, 122 F.3d 1056, 1995 WL 595547 (2d Cir. 1995) (unpublished), the Second Circuit concluded that deemed admission of facts had been appropriate under the local rules because the facts were both supported and uncontested. In that case, the defendants moved for summary judgment and submitted a statement of material facts as required under the local rule. *Id.* at *2. The Second Circuit explained that the local rule required that the moving party submit a statement of facts and that "[f]acts thus *asserted and supported* as required by FED. R. CIV. P. 56(e) are deemed admitted unless controverted by the party opposing summary judgment in a submission pursuant to [Local] Rule 3(g)."[9] *Id.* at *1 (emphasis added). The district court granted summary judgment, and the Second Circuit affirmed because the defendants' asserted facts had been uncontested and were

[9] Similar language was used in *Rand v. United States*, 818 F. Supp. 566, 571 (W.D.N.Y. 1993): "When a party has moved for summary judgment on the basis of asserted facts *supported as required by FED. R. CIV. P. 56(e)* and has . . . served a concise statement of the material facts as to which it contends there exist no genuine issues to be tried, those facts will be deemed admitted unless properly controverted by the nonmoving party." *Id.* at 571 (quoting *Glazer v. Formica Corp.*, 964 F.2d 149, 154 (2d Cir. 1992)) (emphasis added).

supported by references to the plaintiff's deposition, and were therefore properly deemed admitted. *See id.* at *2. After the deemed admission of the defendants' facts, there was no evidence on which a rational jury could find for the plaintiff and summary judgment was appropriate. *Id.*

In *Doe v. Todd County School Dist.*, No. 05-3043, 2006 WL 3025855, at *7–8 (D.S.D. Oct. 20, 2006), the court applied the local rule regarding deemed admission where both parties had failed to comply with the requirements of the rule, and ultimately determined that even when a motion is unopposed, it cannot be granted without sufficient support in the record. In that case, the plaintiff claimed that the defendants' statement of undisputed facts did not comply with the requirements of the local summary judgment rule, while the defendants argued that the plaintiff's response to their summary judgment motion failed to comply with both Fed. R. Civ. P. 56(e) and with the local rule because the plaintiff did not respond to the substance of the defendants' motion or include a statement of material facts.[10] *Doe*, 2006 WL 3025855, at *7. The court held that "[t]he failure to comply with a local rule requiring that a motion for summary judgment be accompanied by a concise statement of material facts which the movant contends are not genuinely in dispute is a sufficient basis on which to deny a motion for summary judgment." *Id.* (citations omitted). However, the court explained that while "[t]he usual sanction for noncompliance with this [local] rule is the [other party's] facts being deemed admitted for purposes of the motion," the deemed admission "is not fatal since the standard of review for summary judgment requires the Court to view the facts in the light

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[10] The local rule at issue provided:

> [U]pon any motion for summary judgment . . . there shall be annexed to the motion a separate, short, and concise statement of material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact in this Local Rule's required statement shall be presented in a separate, numbered statement with an appropriate citation to the record in the case.

Doe, 2006 WL 3025855, at *7 (quoting D.S.D. L.R. 56.1(b)).

most favorable to the party opposing the motion and to give that party the benefit of all reasonable inferences to be drawn from the underlying facts disclosed in the pleadings and affidavits." *Id.* at *8. (citation omitted). The court stated that where the court reviews the entire record, the failure to comply with the local rules is "'of little consequence.'" *Id.* (quoting *Hansen v. Actuarial and Employee Ben. Servs. Co.*, 395 F. Supp. 2d 881, 884 n.2 (D.S.D. 2005)). The court concluded that "[u]nder either the sanction or the summary judgment standard the result is the same, the plaintiff's facts are deemed admitted for purposes of the motion. Thus, the material facts from the plaintiff's complaint will, for the purposes of this motion for partial summary judgment, be treated as undisputed." *Id.* However, because the plaintiff failed to submit a statement of material facts, the defendants' statement of material facts was to be deemed admitted. *Id.* "For the sake of the motion, the defendants' statement of facts is the plaintiff's complaint. This is the same set of facts the Court is compelled to employ by the summary judgment standard. Therefore, the facts stated in the plaintiff's complaint are deemed admitted for the purposes of this motion." *Doe*, 2006 WL 3025855, at *8. The court noted, however, that "'even when a defendant's motion for summary judgment is not opposed by plaintiff, the district court must satisfy itself that, on the record before it, there are no genuine issues of material fact as to at least one of [the] necessary elements of plaintiff's case.'" *Id.* (quoting *Noland v. Commerce Mortg. Corp.*, 122 F.3d 551, 553 (8th Cir. 1997)).

Some other courts have implied that relying on deemed admitted facts without searching for support for those facts in the record might be acceptable, but I did not find many cases supporting this proposition. For example, in *John S. v. County of Orange*, No. 05-55021, 2007 WL 625249, at *1 (9th Cir. Feb. 26, 2007) (unpublished),[11] the Ninth Circuit approved a grant of summary

[11] The court did not publish its decision and it was labeled as not precedential. *John S.*, 2007 WL 625249, at fn.**.

judgment where an inadequate opposition to the summary judgment motion was filed. The court found that the opponent's "untimely, unsworn, and conclusory 'supplemental statement' did not comply with the district court's explicit instructions or the local rules. C.D. CAL. L.R. 56-2. It was not error for the district court to deem the material facts submitted by defendants as admitted and *to grant summary judgment on procedural grounds*."[12] *John S.*, 2007 WL 625249, at *1 (emphasis added). The Ninth Circuit also noted that granting summary judgment on the merits was not erroneous. *Id.* The fact that the court had reviewed the merits makes it unclear whether summary judgment could have been granted based on deemed admitted facts without finding support in the record, but the court's approval of summary judgment on "procedural grounds" implies that facts could be deemed admitted without finding support for them in the record.

Given that courts have approved of local rules deeming facts admitted for the very reason that it avoids requiring the district court to search through a voluminous record to ensure that there is no material issue of fact, it may follow that some courts would approve of deeming facts admitted in the absence of a proper response, without requiring the court to search for proper support for those facts. *See, e.g.*, *Ríos-Jiménez*, 2008 WL 651630, at *4 ("Should the Court excuse this blatant non-compliance [with the local summary judgment rule], the district court would be forced to 'grope unaided for factual needles in a documentary haystack.'") (quoting *Cabán Hernández*, 486 F.3d at 8). However, most courts seem to emphasize the importance of the summary judgment standard,

[12] In another case using similar language, the magistrate judge recommended dismissal for failure to prosecute, but also found that "the plaintiff's failure to respond to the defendants' statements of material fact [submitted with defendants' summary judgment motion] constitutes an admission of each of those facts. *See* FED R. CIV. P. 56(e); LR 56.1(b)(4). Accordingly, the defendants are entitled to summary judgment *on procedural grounds*." *Stewart v. Kautzky*, No. C05-3030-MWB, 2006 WL 1594186, at *1 (N.D. Iowa June 6, 2006) (unreported) (emphasis added). The court also found that summary judgment would be appropriate in view of the claims, the facts in the complaint, the deemed admitted facts, exhibits and affidavits submitted in support of summary judgment, and statements from a motion for extension of time. *Id.* Thus, although the case noted that judgment on procedural grounds would be appropriate, it also found that the record supported judgment as a matter of law.

finding that deemed admitted facts are not sufficient to support summary judgment without an evaluation of whether the standard has been met. This emphasis implies that it would be appropriate for the court to find support for the facts to be deemed admitted before relying on them for purposes of granting summary judgment.

D. Consideration of Additional Facts Presented by Nonmovant

Another issue that has been addressed by some courts considering the propriety of deeming facts admitted in summary judgment motions is whether a nonconforming response prevents consideration of additional facts submitted by nonmovant. For example, in *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 14–15 (1st Cir. 2004), the First Circuit considered whether the district court had erred in analyzing the defendant's summary judgment motion by restricting consideration of the plaintiff's evidence on the basis of the plaintiff's failure to comply with the local rules. *See Euromodas*, 368 F.3d at 15. The defendant's motion complied with the local rule, but the plaintiff's response omitted a separate statement listing the controverted material facts. *Id.* The district court found this to be a violation of the local summary judgment rule and both deemed the facts listed by the movant to be admitted and limited the summary judgment record to those facts. *Id.* (citing *Euromodas, Inc. v. Zanella, Ltd.*, 253 F. Supp. 2d 201, 203–04 (D.P.R. 2003)). The plaintiff did not object to the district court deeming the defendant's facts admitted, but argued that the court should have taken the plaintiff's facts in its opposition into account as well. *Id.* The First Circuit agreed that the district court had erred in its interpretation of the local rule because the rule did not require the summary judgment motion's opponent to put forth its version of the facts in a separate statement. *Id.* A separate statement was required under the rule only if the nonmovant sought to controvert any of the facts listed in the movant's statement of facts. *Id.* The court explained that in this instance, the plaintiff did not take issue with the defendant's statement of facts, but believed they were

incomplete and wished to submit additional facts. *Euromodas*, 368 F.3d at 15. The First Circuit stated that the local rule, as it existed at the time,[13] did not require additional facts to be presented in any particular form. *Id.* The First Circuit concluded that "[b]ecause those additional facts [submitted by the nonmovant] were supported by the record, the lower court should have considered them (while at the same time accepting the facts set forth in the movant's Local Rule 311.12 statement)." *Id.* at 15–16.

In *Northwest Bank & Trust Co. v. First Ill. Nat'l Bank*, 354 F.3d 721, 724 (8th Cir. 2003), after the defendant filed a summary judgment motion, the plaintiff filed an opposition that included both a "Response to Defendants' Statement of Material Facts," and a "Statement of Additional Material Facts Precluding Summary Judgment." The district court found that neither of the plaintiff's statements of material facts complied with the local rule requirements, and sanctioned the plaintiff by deeming admitted all of the facts in the defendant's statement and by limiting consideration of the plaintiff's statement of additional facts to only "those facts that were specifically referenced by [plaintiff] Northwest in its brief in opposition to summary judgment to the extent that they did not contradict those of [defendant] FINB." *Northwest Bank & Trust*, 354 F.3d at 724–25 (citing *Northwest Bank & Trust Co. v. First Ill. Nat'l Bank*, 221 F. Supp. 2d 1000, 1003–06 (S.D. Iowa 2002)). The court found that the district court's holding was not an abuse of discretion, and that the court had actually been lenient in considering the specific facts referenced in the plaintiff's brief. *Id.* at 725.

In *CMI Capital Mkt. Invest., LLC v. González-Toro*, No. 06-2623, 2008 WL 713577 (1st Cir. March 18, 2008), the court noted that it had previously held that "failure to set forth a paragraph-by-

[13] The local rule had been amended since the filing of the summary judgment motion, and the First Circuit reserved its view as to what the new language required. *Euromodas*, 368 F.3d at 15 n.3.

paragraph admission or denial of the movant's material facts justifies a deeming order even where the opposition does propound other facts." 2008 WL 713577, at *3 n.3 (citing *Hernandez v. Philip Morris USA, Inc.*, 486 F.3d 1, 7 (1st Cir. 2007)). The court continued, "*Hernandez* leaves open the possibility that facts marshaled in opposition might be accepted to 'augment' the facts contained in movant's statement of material facts, rather than contradict them." *Id.* (citing *Hernandez*, 486 F.3d at n.2). However, the court did not decide that issue, instead evaluating the record as though the facts had been accepted by the district court to augment the movant's facts, and finding that they did not change the result. *Id.* The First Circuit noted that although the opposition to the summary judgment contained some facts, they would only be considered to the extent that they did not contradict the facts deemed admitted by the district court, because the nonmovant failed to satisfy the "anti-ferret" rule. *Id.* at *5. The court stated that "the district court would likely have been free to disregard the facts in the opposition itself," but did not decide that question because the district court had not explicitly rejected or accepted those facts and because the facts made no difference to the outcome. *Id.* at *5 n.4.

The Seventh Circuit considered whether failure to properly cite supporting evidence in an opposition to a summary judgment motion warrants both deeming the movant's facts admitted and ignoring the facts proposed by the nonmovant in *Hill v. Thalacker*, No. 06-1265, 2006 WL 3147274, at *2 (7th Cir. Nov. 1, 2006) (unpublished). In *Hill*, the district court's summary judgment rules required that each controverted or additional fact that a party proposed had to be accompanied by specific, supporting evidence. *Id.* at *1. In the plaintiff's response to the summary judgment motion, he attached supporting affidavits, but failed to refer to them specifically, instead "allud[ing] vaguely to unspecified 'attached' material." *Id.* The district court deemed the defendant's facts admitted because of the plaintiff's failure to comply with the summary judgment procedure, and

granted summary judgment for the defendant. *Id.* at *2. The Seventh Circuit concluded that "the district court acted within its discretion *when it ignored Hill's proposed findings of fact* and deemed Thalacker's facts admitted, given Hill's failure to follow the court's summary judgment procedures." *Id.* (citing *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003); *Tatalovich v. City of Superior*, 904 F.2d 1135, 1140 (7th Cir. 1990)) (emphasis added) . Thus, in the context of an opposition submitting additional facts without following the procedure, the court concluded that those facts could be ignored by the district court.

II. Disapproval of Deeming Facts Admitted

A. Cases Finding Deemed Admission Inappropriate Under the Facts of the Case

Although many appellate courts have approved of the use of local rules to deem facts admitted in summary judgment, others have disapproved of the application of deeming facts admitted in certain circumstances.

For example, in *Deere & Co. v. Ohio Gear*, 462 F.3d 701, 703 (7th Cir. 2006), the Seventh Circuit held that the district court had abused its discretion by deeming facts admitted under the procedural posture of the case. In that case, the plaintiff had request additional time to take expert witness discovery and respond to a motion for summary judgment, which was granted by the court. *Deere*, 462 F.3d at 703. The defendant moved for an extension of the new expert witness discovery deadline, and the motion went undecided for several months. *Id.* As a result, the defendant's experts were not deposed and the plaintiff missed the deadline for responding to the defendant's summary judgment motion. *Id.* The court did not address the pending discovery dispute, but did find the plaintiff's failure to respond to the summary judgment motion to be an admission of the facts submitted in support of the defendants' summary judgment motion, and granted summary judgment for the defendant. *Id.* On appeal, the Seventh Circuit found this to be an abuse of

discretion because although the plaintiff took the risk of having facts deemed admitted by failing to respond to summary judgment in the time permitted, "[t]he history of the motions practice in this case was such that the court should not have bypassed all the accumulated discovery motions to grant summary judgment on the basis of procedural default." *Id.* at 706–07.

In *Chidester v. Utah County*, No. 06-4255, 2008 WL 635361, at *10–11 (10th Cir. March 6, 2008) (unpublished), the Tenth Circuit also held that the circumstances at issue did not warrant the deemed admission of facts. In that case, the neighbors of a residence that was a target for a police raid sued police officers for violation of their Fourth Amendment rights. *Id.* at *1. The officers moved for summary judgment on the ground of qualified immunity, which the district court granted for some of the defendants but denied for two others. *Id.* On appeal, the appellant argued that District of Utah Local Rule 56-1(c) required the district court to accept as fact the appellant's version of the facts, and that summary judgment was required under those facts. *Chidester*, 2008 WL 635361, at * 10. The local rule at issue provided that "'[a]ll material facts of record meeting the requirements of FED. R. CIV. P. 56 that are set forth with particularity in the statement of the movant will be deemed admitted for the purpose of summary judgment, unless specifically controverted by the statement of the opposing party identifying material facts of record meeting the requirements of FED. R. CIV. P. 56.'" *Id.* (quoting D. UTAH CIV. R. 56-1). The Tenth Circuit summarily rejected the argument that the local rule required summary judgment on qualified immunity grounds simply because the movant argued that the plaintiffs had not put forth any evidence to prove that the movant had "'manufactured the fact[s]'" giving rise to his qualified immunity claim. *Id.* at *11.

B. Concern Regarding the Practice of Deeming Facts Admitted

The research uncovered a few cases that have expressed concern regarding local rules that

permit facts to be deemed admitted in the summary judgment context. In *DeRienzo v. Metro. Transport. Auth.*, No. 05-7021-cv, 2007 WL 1814277 (2d Cir. June 20, 2007) (unpublished), the plaintiff failed to follow the applicable local rule by failing to file a counterstatement to the defendants' statement of material facts. 2007 WL 1814277, at *1. The district court deemed the defendants' facts to be admitted and declined to consider additional facts presented by the plaintiff. *Id.* On appeal, the Second Circuit noted that "[t]he fact that Plaintiff failed to comply with Local Rule 56.1 'does not absolve the party seeking summary judgment of th[is] burden of showing that it is entitled to judgment as a matter of law, and a Local Rule 56.1 Statement is not itself a vehicle for making factual assertions that are otherwise unsupported in the record.'" *Id.* (quoting *Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir. 2003)). The court held that even assuming it had not been error to deem the facts from the Defendants' Rule 56.1 statement admitted and to consider only those facts on summary judgment, the district court had still erred in granting summary judgment under the facts . *Id.* at 645. The Second Circuit suggested that the district court on remand ought to decide whether it would be proper to consider only the facts in the defendants' statement of facts, or "in an exercise of its discretion," to consider other facts in the record. *Id.* at 646. The court said that it "note[d] for future guidance that the district court erred in concluding that *Giannullo v. City of New York*, 322 F.3d 139 (2d Cir. 2003), overruled *Holtz* [*v. Rockefeller & Co.*, 258 F.3d 62 (2d Cir. 2001),] and established a new rule that the district court must deem the facts contained in a Rule 56.1 Statement admitted whenever the opposing party fails to contest them in a properly-filed Counterstatement. The panel in *Giannullo* was not empowered to overrule *Holtz's* holding that a district court had discretion to overlook a party's failure to comply with Local Rule 56.1, . . ., nor did it purport to do so." *Id.* at 646–47 (internal citations omitted). The court noted the potential for conflict between the local summary judgment rule and the national one: "[W]hile

DeRienzo's submission failed to comply with Local Rule 56.1, it may have met the requirements of FED. R. CIV. P. 56. On remand, the district court should address whether a refusal to consider any of the facts proffered by DeRienzo would constitute an impermissible application of Local Rule 56.1, by putting the Local Rule in conflict with the Federal Rule." *Id.* at 647 (citing 28 U.S.C. § 2071(a)).

In *Mutual Fund Investors, Inc. v. Putnam Mgmt. Co.*, 553 F.2d 620 (9th Cir. 1977), the Ninth Circuit questioned whether a local summary judgment rule could conflict with the national summary judgment rule. In that case, after the movant had made a sufficient showing for summary judgment, the nonmovants did not file any opposing affidavits "'because the factual bases for the (appellants') opposition are amply set forth in the affidavits filed by (appellees) and by deposition testimony of (appellees[']) representatives.'" *Putnam*, 553 F.2d at 624. The local rule for the Central District of California at the time provided: "In determining any motion for summary judgment, the court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by affidavit filed in opposition to the motion." *Id.* at 625 (citing C.D. CAL. L.R. 3(g)(3)).[14] The court noted that Rule 56 of the federal rules (in effect at the time) "provides that a party opposing a summary judgment motion need not file contravening affidavits where the movants' own papers demonstrate the existence of a genuine issue of material fact." *Id.* (citing *Hamilton v. Keystone Tankship Corp.*, 539 F.2d 684, 686 (9th Cir. 1976 (citing *Island Equipment Land Co. v. Guam Econ. Dev. Auth.*, 474 F.2d 753 (9th Cir. 1973);

[14] The current local rule that seems to have replaced this older version provides: "In determining any motion for summary judgment, the Court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the "Statement of Genuine Issues" and (b) controverted by declaration or other written evidence filed in opposition to the motion." C.D. CAL. L.R. 56-3.

Advisory Note of 1963 to Subdiv. (e), Rule 56)). The court did not resolve whether there was a disparity between the local rule and the national rule because the district court had based its decision on an examination of the whole record, rather than deeming facts admitted. *Id.* The court stated: "we caution that it is highly questionable whether the district court can mandate the entry of summary judgment solely on the failure of the adverse party to file opposing papers 'where the movant's papers are themselves insufficient . . . or on their face reveal a genuine issue of material fact.'" *Id.* (quoting *Hamilton*, 539 F.2d at 686 n.1; *Wang v. Lake Maxinhall Estates, Inc.*, 531 F.2d 832, 835 n.10 (7th Cir. 1976) (Stevens, J.)).

III. Conclusion

In sum, the courts of appeals generally seem to grant broad discretion to district courts in applying local rules to streamline the summary judgment process. There has been quite a bit of emphasis on the need to avoid requiring the district court to scour the record to determine if there is a genuine issue of material fact. Courts of appeals have often approved of the sanction of deeming the opponent's facts admitted in the absence of a proper response in order to further that goal. Nonetheless, it appears that the courts do not often simply grant the movant's motion on the basis of an improper response. The cases often imply that the court has determined that the facts have some support in the record and that the movant is entitled to summary judgment before granting a motion based on facts that have been deemed admitted pursuant to a local rule.