
THE TAIL WAGGING THE DOG: LOCAL SUMMARY JUDGMENT RULES THAT DEEM FACTS ADMITTED

*Nathaniel S. Boyer**

INTRODUCTION

Federal summary judgment procedure has an expansive and tedious underbelly: local rules. Over sixty districts have enacted rules¹ mandating that the moving party submit some sort of accompanying Statement of Material Facts (SMF), and almost all require a response-in-kind from the non-moving party.² These local SMF rules were created to streamline the summary judgment process,³ guiding the court through the facts so that the judge can more easily determine whether

* Editor-in-Chief, *Cardozo Law Review*. J.D. Candidate (June 2009), Benjamin N. Cardozo School of Law. This Note would not have seen the light of day were it not for the encouragement and counsel of Professor Maggie Lemos. I am grateful for the superb editing of Jennifer Blecher, Jonah Wexler, and all *Law Review* members who had the pleasure of cite checking a 94-district survey. Special thanks to the Honorable Harold A. Ackerman and his clerks; my first project while working in the Judge's chambers inspired this Note. Mistakes are mine.

¹ See *infra* Part I (cataloging and categorizing local summary judgment rules across all federal districts).

² For an example of a typical local SMF rule, see E.D. VA. R. 56. The rule, in full, reads as follows:

(B) Summary Judgment—Listing of Undisputed Facts: Each brief in support of a motion for summary judgment shall include a specifically captioned section listing all material facts as to which the moving party contends there is no genuine issue and citing the parts of the record relied on to support the listed facts as alleged to be undisputed. A brief in response to such a motion shall include a specifically captioned section listing all material facts as to which it is contended that there exists a genuine issue necessary to be litigated and citing the parts of the record relied on to support the facts alleged to be in dispute. In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

Id. These statements take on many monikers, depending on the district. See *infra* notes 94-96. The acronym "SMF" has been used by some courts. See, e.g., *Jackson Hewitt v. Childress*, No. 06-CV-909, 2008 U.S. Dist. LEXIS 4640, at *24 (D.N.J. Jan. 15, 2008); *Commercial Data Servers, Inc. v. IBM*, 262 F. Supp. 2d 50, 75 (S.D.N.Y. 2003).

³ See *Holtz v. Rockefeller*, 258 F.3d 62, 74 (2d Cir. 2001) ("The purpose of [the local SMF rule] is to streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties.").

there is a “genuine issue as to any material fact.”⁴

But many of these local rules go too far. Usually, assertions made in the SMFs are deemed “admitted” if they are not controverted in the non-movant’s response to the SMF.⁵ Thus, the tail is wagging the dog; a literal reading of many of these rules would suggest that, where an SMF goes uncontroverted, the court does not need to examine the record at all, and can instead rely entirely on a bald assertion in the SMF and grant a motion for summary judgment. Taken to its logical extreme, a plaintiff, bearing the burden of proof, could file a motion for summary judgment without providing any evidence, but nevertheless win on the strength of unsupported assertions in its SMF.⁶

This scenario arises with a fair amount of frequency, at least on occasions when the defendant has moved for summary judgment.⁷ The Second Circuit was presented with one particularly stark example in 2003.⁸ The plaintiff (Giannullo) alleged that NYPD officers had violated his Fourth Amendment rights by arresting him without probable cause.⁹ Giannullo had walked out of a methadone clinic and handed an addict (Oliver) a paper bag.¹⁰ Both Giannullo and Oliver were thereafter arrested, and the police found methadone on Oliver’s person.¹¹ The case boiled down to timing: Who was arrested first? If Oliver had been arrested and searched (therefore revealing the incriminating bag) *before* Giannullo was arrested, then all arresting officers would have “known”¹² enough to establish probable cause to

⁴ FED. R. CIV. P. 56(c).

⁵ See *infra* Part I.

⁶ Although such an outcome would result from the “plain language” application of many local rules, there is no case law suggesting that judges have actually adhered to such an extreme application. For an example of such hesitancy, see *Vittoria N. Am., L.L.C. v. Euro-Asia Imps., Inc.*, 278 F.3d 1076, 1081 (10th Cir. 2001) (“[W]e agree with [the plaintiff/movant] that [the defendant/non-movant’s SMF] deviates from the requirements of [the local SMF rule] in important respects. Nevertheless, we note that the district court did not rely on these imperfections in issuing its order, and [t]his court has . . . recognized that district courts have discretion in applying local rules.” (internal quotation marks and citations omitted)).

⁷ See *infra* Part II.

⁸ *Giannullo v. City of N.Y.*, 322 F.3d 139 (2d Cir. 2003).

⁹ *Id.* at 140.

¹⁰ *Id.* at 141.

¹¹ Giannullo would claim that the paper bag had only contained a “bleach kit,” which is given to methadone and heroin addicts to prevent infection from needle use. Giannullo, in his duties at the clinic, was free to distribute these bleach kits. *Id.*

¹² I put the word “known” in quotation marks because, of course, the other officers would not have *really* known about the contents of the bag. However, the doctrine of imputed knowledge allows one officer to take actions based on the knowledge of another officer. See *United States v. Colon*, 250 F.3d 130, 135 (2d Cir. 2001) (“Under the collective or imputed knowledge doctrine, an arrest or search is permissible where the actual arresting or searching officer lacks the specific information to form the basis for probable cause or reasonable suspicion but sufficient information to justify the arrest or search was known by other law enforcement officials initiating or involved with the investigation.” (citing *United States v. Hensley*, 469 U.S. 221, 230-33 (1985))).

arrest *Giannullo*—or at least enough to warrant application of the doctrine of qualified immunity.¹³

In moving for summary judgment, the defendant stated, in his SMF, that Oliver had been arrested first.¹⁴ However, this assertion was not actually supported by the evidence to which the defendant's SMF cited.¹⁵ The plaintiff submitted a response to the SMF, but did not directly controvert the defendant's assertion that Oliver had been arrested first.¹⁶ In the Eastern District of New York, all assertions in the moving party's SMF are deemed admitted unless controverted by the non-movant's response.¹⁷ The district court applied the local rule literally, deeming the uncontroverted facts "admitted." On appeal, the plaintiff-appellant argued—and the court would indeed agree—that deeming unsupported assertions "admitted" does not satisfy the requirements of Federal Rule 56.¹⁸

The Second Circuit is not alone in facing the difficult task of passing on the propriety of its district courts' local rules; nearly all of the circuits have addressed it, with little in the way of a uniform approach.¹⁹ Some circuits are careful to make sure that the assertions are actually supported by the evidence cited.²⁰ Others strictly enforce their district courts' SMF rules, freely deeming facts to be admitted if not controverted, regardless of record support.²¹ Even within circuits, there can often be little in the way of uniformity.²²

The continued use of SMF rules and "deemed admitted" provisions has drawn the attention of the Federal Judicial Conference (the body of scholars, judges, and attorneys who draft and amend the federal rules).²³

¹³ *Giannullo*, 322 F.3d at 142.

¹⁴ *Id.*

¹⁵ The Department's assertions cited to (1) the inventory of items that were found on Oliver's person when he was arrested—which said nothing about the time of Oliver's arrest—and (2) the police report stating the time of *Giannullo*'s arrest, which, once again, indicated nothing about Oliver's arrest. *Id.* at 142-43.

¹⁶ *Id.* at 146.

¹⁷ E.D.N.Y. R. 56.1(c) (All statements in the moving party's SMF "will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph . . .").

¹⁸ *Giannullo*, 322 F.3d at 143; Brief of Plaintiff-Appellant at 20, *Giannullo*, 322 F.3d 139 (No. 02-7357), 2002 WL 32443625.

¹⁹ *See infra* Part II. The Supreme Court has not yet taken a case on this conflict. There is only one case of note in which the Supreme Court even discussed such a local rule: *Beard v. Banks*, 548 U.S. 521, 527 (2006). In *Beard*, the Court dealt with a summary judgment motion in which the movant's SMF was uncontroverted and was deemed admitted. The court, however, noted that the district court's decision was not based solely on the statement of uncontroverted facts, but rather on the whole record: "[T]he complaint, the answer, the statement of undisputed facts, other agreed-upon descriptions of the system, the Dickson deposition, and the motions for summary judgment." *Id.*

²⁰ *See infra* Part II (discussing SMF case law in the Second Circuit).

²¹ *See infra* Part II (discussing SMF case law in the Seventh Circuit).

²² *See infra* Part II (discussing SMF case law in the District of New Jersey).

²³ *See, e.g.*, Comm. on Practice and Procedure, Fed. Judicial Conference, Agenda for the

In fact, since 1986, the Conference has intermittently considered revisions to the summary judgment rules that would have included, *inter alia*, revising Rule 56 to incorporate typical local SMF rules.²⁴ In 1992, the proposed revision (which did not survive) would have authorized the court to “treat[] [the opposing party] as having admitted” to any uncontroverted factual assertions that were made in the moving papers.²⁵

All this action came on the heels of a four-year project to review local rules, commissioned by the Conference, which concluded that local SMF rules that deem facts to be admitted without evidentiary support “can conflict with Rule 56 of the Federal Rules of Civil Procedure. . . . [and], therefore, should be rescinded.”²⁶

Push may have come to shove in June 2008, when the Federal Judicial Conference’s Committee on Rules of Practice and Procedure approved a revised Rule 56 for publication.²⁷ This revised rule incorporates the point-counterpoint mechanism common in many local rules.²⁸ It requires that parties include SMFs with their motions and responses, outlining the point-counterpoint procedure.²⁹ Most importantly, the proposed rule, in its current form, addresses the “central question” of this Note by explicitly permitting the court to “consider a fact undisputed for purposes of the motion.”³⁰

With many hurdles to overcome en route to becoming a Federal Rule—indeed, the earliest it would become the law of the land would be December 1, 2010—and given that amendments to Rule 56 have often

October 27-28, 2005, Meeting of the Advisory Committee on the Civil Rules 183-85 (Oct. 2005), available at <http://www.uscourts.gov/rules/Agenda%20Books/CV2005-10.pdf> (discussing the circuits’ differing approaches, and noting that the question of whether, and how, to amend the federal rule to account for local SMF practice is “fairly put”). The Federal Judicial Conference is the primary body responsible for creating and amending federal rules of procedure.

²⁴ Letter from Lee H. Rosenthal and Michael M. Baylson to Attendees of the Rule 56 Subcommittee Conference on January 29, 2007, at 1197 (Dec. 15, 2006) (Pagination refers to pages in the ALI-ABA Continuing Legal Education Database, accessible via Westlaw, “SM090 ALI-ABA 1151.”).

²⁵ *Id.* at 1185 (“Presumably the purpose is to give teeth to the requirement of detailed response.”).

²⁶ COMM. ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., INTERIM REPORT OF THE LOCAL RULES PROJECT 146 (1989) [hereinafter 1989 REPORT].

²⁷ COMM. ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 27-34 (2008), available at http://www.uscourts.gov/rules/Reports/CV_Report.pdf.

²⁸ *Id.* at 35 (“Subdivision (c) is new. It establishes a common procedure for summary-judgment motions synthesized from similar elements found in many local rules.”).

²⁹ *Id.* at 28-29. The proposed rule reads, at subsection (c)(2)(A)(ii), “The movant must . . . file . . . a separate statement that concisely identifies in separately numbered paragraphs only those material facts that cannot be genuinely disputed and entitle the movant to summary judgment” *Id.* The proposed rule reads, at subsection (c)(2)(B)(i), “A party opposing summary judgment must file a response that, in correspondingly numbered paragraphs, accepts or disputes—or accepts in part and disputes in part—each fact in the movant’s statement.” *Id.* at 29.

³⁰ *Id.* at 32.

failed in the past, the future of this proposed rule is highly uncertain.³¹ Thus, this Note will analyze the conflict between the *current* Federal Rule and local rules.

Despite all this, this issue has escaped any serious scholarly attention.³² This Note seeks to fill that gap. Focusing on federal court practice, this Note will argue that where a local summary judgment rule provides that the district court need not even verify that factual assertions are supported by the record, the local rule breaks with the requirements of summary judgment under Rule 56.³³ To guard against this, local rules should be read in such a way as to require that motions are adequately supported, thus preventing a conflict with Rule 56.³⁴ Therefore, regardless of the local rule, district courts must still be sure that the evidence cited by the movant actually supports its assertions, at least because the statement of material facts “is not itself a vehicle for making factual assertions that are otherwise unsupported in the record.”³⁵

Part I offers a brief background on summary judgment, and the first ever compilation and comparison, in a scholarly journal, of local SMF rules. Part II analyzes the approaches taken by the Second, Third, and Seventh Circuits.³⁶ Part III explains why local rules that deem

³¹ For a convenient description of the rule-making process, see James C. Duff, *The Rulemaking Process: A Summary for the Bench and Bar*, U.S. COURTS: THE FED. JUDICIARY, Oct. 2007, <http://www.uscourts.gov/rules/proceduresum.htm>. In short, a civil rule is considered by three tiers of committees before the recommendations are made to the Supreme Court. The first tier is the Advisory Committee on Civil Rules, where the reporter accumulates recommendations from practitioners, judges and professors and makes recommendations for the next Advisory Committee meeting. The Advisory Committee may have an appropriate subcommittee, such as a Rule 56 subcommittee, that does research on proposed amendments. The Advisory Committee, if it so votes and if it is approved by the Standing Committee on Rulemaking and Procedure—the second tier—then sends the amended rule to the public for a six-month comment period. After six months of gathering submissions from the public, the Advisory Committee will again meet to refine the rule and submit it to the Standing Committee for final approval. The Standing Committee, if it approves the rule, submits the proposal to the entire Judicial Conference—the third tier. Only after approval by the Judicial Conference are these rules submitted to the Supreme Court for final approval. If the Supreme Court approves the rules, then Congress has a period of time to act to stop a rule adoption or amendment. *Id.*

³² See David S. Day and Margo R. Tschetter, *The Local Rule Revision Project: The South Dakota Experience*, 38 S.D. L. REV. 500 (1993) (discussing South Dakota’s SMF rule, without delving into potential conflicts with Federal Rule 56); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989) (discussing the proliferation of local rules generally).

³³ *Giannullo v. City of N.Y.*, 322 F.3d 139 (2d Cir. 2003).

³⁴ *Jaroma v. Massey*, 873 F.2d 17, 20 (1st Cir. 1989).

³⁵ *Holtz v. Rockefeller*, 258 F.3d 62, 74 (2d Cir. 2001).

³⁶ These three circuits were chosen for analysis due to their well-developed jurisprudence on this issue and their clear, contrasting approaches. As described in Part II, *infra*, the Seventh and Second Circuits have come to different conclusions. The District of New Jersey, in the Third Circuit, is notable for deeming uncontested facts admitted, despite the fact that its SMF rule says *nothing* about admissions.

However, as mentioned *supra*, other circuits have grappled with this issue. *Compare*

uncontested facts admitted conflict with the Federal Rule. Part IV recommends that courts interpret these local rules so that facts will only be “deemed admitted” if the moving party’s SMF assertions have “appropriate record support.”

I. SUMMARY JUDGMENT AND LOCAL RULES

A. *Summary Judgment*

Summary judgment has proved a fertile area for scholarly debate, with some going so far as to say that it violates the Seventh Amendment

Burke v. Gould, 286 F.3d 513, 516-20 (D.C. Cir. 2002) (requiring that the district court consider evidence submitted pursuant to Federal Rule 56(c), regardless of the non-movant’s compliance with the local rule (over vigorous dissent)), and United States v. One Piece of Real Prop. Located at 5800 SW 74th Ave., Miami, Fla., 363 F.3d 1099, 1103 n.6 (11th Cir. 2001) (summary judgment reversed because the evidence to which the government’s SMF cited did not support the assertions in the SMF), and *Jaroma*, 873 F.2d at 20-21 (requiring “appropriate record support” so as to “interpret [the local SMF rule] so as to preserve its scope and validity without running afoul of the requirements of Fed. R. Civ. P. 56.”), with *Nw. Bank and Trust Co. v. First Ill. Nat’l Bank*, 354 F.3d 721, 724-25 (8th Cir. 2003) (finding no abuse of discretion when the district court deemed facts admitted “as a sanction for this noncompliance . . .”), and *LaMure v. Mut. Life Ins. Co. of N.Y.*, No. 95-2172, 1997 WL 10961, 106 F.3d 413 (10th Cir. Jan. 14, 1997) (Where non-movant filed evidence raising a genuine issue—but failed to file an SMF—the court “depart[ed] from [its] usual posture of construing all facts in favor of the non-moving party and accept[ed] as true all material facts contained in Mutual Life’s statement of undisputed facts.” (internal quotation marks and citations omitted)).

The Fourth Circuit Court of Appeals has not directly addressed the issue, although the court has noted that uncontested motions cannot be automatically granted, and the court must still analyze “what it has before it.” *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 416 (4th Cir. 1993). Relevant district courts in the Fourth Circuit appear to deem facts admitted without hesitation. *See, e.g.*, *JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 705, 707 (E.D. Va. 2007); *Dogwood Forest Rest Home, Inc. v. United States*, 181 F. Supp. 2d 554, 559 (M.D.N.C. 2001) (“While a court must still analyze motions for summary judgment with no response, the moving party’s facts are deemed uncontroverted.”). The Fifth Circuit Court of Appeals has not addressed the issue, either, although it generally rubber-stamps the application of “deemed admitted” provisions in local SMF rules. *See, e.g.*, *Soc’y of the Roman Catholic Church of the Diocese of LaFayette and Lake Charles, Inc. v. Interstate Fire & Cas. Co.*, 26 F.3d 1359, 1362 n.2 (5th Cir. 1994). In the Sixth Circuit, only one local rule—Middle District of Tennessee Local Rule 56.01—deems uncontroverted SMF facts to be admitted. The circuit court has never cited this rule in a reported opinion. In the district court itself, facts are generally deemed admitted. *See, e.g.*, *Williams v. Cingular Wireless, LLC*, No. 3:06-1205, 2008 WL 112102, at *1 (M.D. Tenn. Jan. 9, 2008). However, in one instance, the District Court noted that the statements in the SMF were unsupported by the evidence, and thus “declin[ed] to accept certain ‘facts’ set forth in Defendant’s [SMF]. . . .” *Ha’min v. Lewis*, 440 F. Supp. 2d 715, 727 (M.D. Tenn. 2006). The Ninth Circuit is similar: Although most of the districts have local SMF rules, only three of them deem uncontroverted and unsupported SMF assertions admitted. With regard to those three districts, the Ninth Circuit has never directly addressed the conflict addressed in this Note. *See DuBois v. Ass’n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1180 (9th Cir. 2006) (mentioning that the Hawaii district court was only obligated to consider those facts that the plaintiffs identified in their SMF).

due to its lack of common law roots.³⁷ The Supreme Court has rejected this notion,³⁸ although on less-than-persuasive grounds.³⁹ Yet more authors attack summary judgment's merits. After all, summary judgment is essentially a paper mini-trial,⁴⁰ taking up valuable judicial time and resources (perhaps more than it really saves).⁴¹ Further, summary judgment is said to favor defendants and those with resources, depriving the small-time litigant of her day in court.⁴²

Although providing resolutions to these broad concerns would exceed the scope of this Note, suffice to say that some guiding principles regarding the state of the law can be gleaned from the discussion. For one, summary judgment performs a "workhorse" task in modern litigation,⁴³ with courts taking a "liberal view"⁴⁴ in granting the motion so as to dispose of unfounded claims in this increasingly-litigious society.⁴⁵ Indeed, it has become "vital"⁴⁶ in this era of notice pleading, where plaintiffs can usually survive a motion to dismiss with little trouble.⁴⁷ However, this interest in speedy resolutions to unfounded claims must be balanced against the jury's central role as a finder of facts. This has been recognized by numerous judicial

³⁷ Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007).

³⁸ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) (citing *Fidelity & Deposit Co. of Md. v. United States*, 187 U.S. 315 (1902), for the proposition that summary judgment is constitutional).

³⁹ Thomas, *supra* note 37, at 164-66; *see also* EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 9-13 (1994) (noting that the high court has been "less than candid and forthright in their analysis [of summary judgment's constitutionality]").

⁴⁰ Early critics scathingly called it a "trial by affidavit," with the Second Circuit being highly hostile to the practice. WILLIAM DANIEL QUARLES ET AL., SUMMARY ADJUDICATION: DISPOSITIVE MOTIONS AND SUMMARY TRIALS 87 (1991).

⁴¹ John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 525-26 (2007).

⁴² *Id.* at 539-43; Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 75 (Oct. 1990) ("[S]ummary judgment fundamentally alters the balance of power between plaintiffs and defendants by raising both the costs and risks to plaintiffs in the pretrial phases of litigation while diminishing both for defendants."). Defendants file summary judgment motions far more often than plaintiffs. This is especially true in tort and civil rights cases, where defendants file 94 percent and 78 percent of the motions for summary judgment, respectively. Joe S. Cecil, *Trends in Summary Judgment Practice: A Summary of Findings*, 1 FJC DIRECTIONS 11, 15 (Apr. 1991). This is in sharp contrast to more typical case motions, which are relatively evenly split. *Id.*

⁴³ BRUNET ET AL., *supra* note 39, at 2 (a "workhorse" task of "conserving the expenditure of judicial resources").

⁴⁴ WARREN FREEDMAN, SUMMARY JUDGMENT AND OTHER PRECLUSIVE DEVICES 11 (1989).

⁴⁵ Issacharoff & Loewenstein, *supra* note 42, at 73 ("Thus armed, the courts were sent off to battle against the docket pressures of a society seemingly bent on litigation for all manner of perceived ills."). As dockets swelled between 1975 and 1989, the use of summary judgment increased, overall, from 13 percent of all cases to 17 percent of all cases. Cecil, *supra* note 42, at 12. This change was most notable in the tort and civil rights cases. Cecil, *supra* note 42, at 16.

⁴⁶ BRUNET ET AL., *supra* note 39, at 6. No other device—motions to dismiss, pretrial orders, motions *in limine*, or judgments as a matter of law—has proved as important as summary judgment to fill the "widespread desire" to curb abuse of the federal litigation system. *Id.*

⁴⁷ *Id.* at 2.

decisions noting that summary judgment should be cautiously granted.⁴⁸

This balancing act is embodied in the language of Federal Rule 56, the governing federal rule for summary judgment.⁴⁹ Under Rule 56, summary judgment can only be granted if there is “no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.”⁵⁰ Even if the court is satisfied that this standard is met, the court retains discretion to deny the motion nevertheless.⁵¹ In fact, the most recent amendment to the rule (December 1, 2007) codified this long-standing practice, changing the language from “shall” to “should.”⁵²

In making its factual determination, the district court is instructed,

⁴⁸ See, e.g., *Exxon Corp. v. Nat'l Foodline Corp.*, 579 F.2d 1244, 1246 (C.C.P.A. 1978) (“We recognize that summary judgment is to be granted cautiously in order to preserve substantive rights; nonetheless, it is entirely proper where, after following the FRCP procedures, no genuine issue of material fact remains.”); *Egelston v. State Univ. Coll. at Geneseo*, 535 F.2d 752, 754 (2d Cir. 1976) (“[S]ummary judgment must be used sparingly since its prophylactic function, when exercised, cuts off a party’s right to present his case to the jury.” (internal quotation marks and citation omitted)); *In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 263 (E.D.N.Y. 2007) (“The increasing use of . . . summary judgments . . . —as authorized by rules of practice and appellate courts—to limit jury fact finding and set aside verdicts poses a threat to the continued viability of the Seventh Amendment jury trial.”); see also FREEDMAN, *supra* note 44, at 12 (“Such a summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts.” (quoting *Corwin v. L.A. Newspaper Serv. Bureau*, 484 P.2d 953, 958 (Cal. 1971))).

⁴⁹ FED. R. CIV. P. 56.

⁵⁰ *Id.* at subsection (c).

⁵¹ *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948).

⁵² FED. R. CIV. P. 56 (commentary to the 2007 amendment). In total, the rule has undergone four amendments. 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2711 (2007). The rule was first revised in 1948, and was in large part a response to the Supreme Court’s holding in *Sartor v. Ark. Natural Gas Corp.*, 321 U.S. 620, 623-24 (1944) (“Where the undisputed facts leave the existence of a cause of action depending on questions of damage . . . , it is doubtful whether summary judgment is warranted on any showing.”). See also FED. R. CIV. P. 56 (commentary to the 1948 amendment). In *Sartor*, the court denied summary judgment as to the question of damages due to confusing wording in the last sentence of subsection (c). *Sartor*, 321 U.S. at 623 (noting that Rule 56, read, at the time, that “[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, *except as to the amount of damages*, there is no genuine issue as to any material fact” (emphasis added)); see also FED. R. CIV. P. 56 (commentary to the 1948 amendments). The second amendment was made in 1963. At that time, the Federal Judicial Conference added “answers to interrogatories” to subsections (c) and (e) so as to make clear that these pieces of evidence were to be considered in the evaluation of summary judgment. Also, and relevant for the purposes of this Note, the Conference added to subsection (e) information regarding the opposing party’s obligation to respond. The amendment was designed to abrogate a holding, articulated by the Third Circuit and adopted by some others, which permitted parties responding to summary judgment to rely on allegations in their complaint to defeat the motion. See FED. R. CIV. P. 56 (commentary to the 1963 amendment); *Chappell v. Goltsman*, 186 F.2d 215 (5th Cir. 1950); *Reynolds Metals Co. v. Metals Disintegrating Co.*, 176 F.2d 90, 92 (3d Cir. 1949); *Frederick Hart & Co. v. Recordgraph Corp.*, 169 F.2d 580 (3d Cir. 1948); *Rogers v. Girard Trust Co.*, 159 F.2d 239 (6th Cir. 1947); *Farrall v. D.C. Amateur Athletic Union*, 153 F.2d 647 (D.C. Cir. 1946). It was amended again in 1987; however, this amendment was purely technical and only designed to make the rule gender-neutral. FED. R. CIV. P. 56 (commentary to the 1987 amendment).

by subsection (c) of the federal rule, to consider “the pleadings, the discovery and disclosure materials on file, and any affidavits.”⁵³ The movant need not provide this evidence, unless it bears the burden of proof at trial.⁵⁴ Nevertheless, the party moving for summary judgment, regardless of the burden of proof, must direct the judge’s attention to this evidence (or lack thereof) in the record.⁵⁵

The responding party’s obligations are governed by subsection (e)(2).⁵⁶ Importantly, the obligations arise “when a motion for summary judgment *is properly made and supported*.”⁵⁷ Once that happens, an opposing party must show the court where a genuine issue for trial exists.⁵⁸ This can be accomplished by submitting affidavits or other evidence; the non-movant cannot rest on its assertions in its pleadings.⁵⁹ “If the opposing party does not so respond,” summary judgment can only be entered against that party “if appropriate.”⁶⁰

The rule has never been amended so as to clarify whether failure to respond in proper form—under a local SMF rule or otherwise—would constitute an admission to the truth of the fact asserted by the moving party.⁶¹ The one prior attempt the Federal Judicial Conference made to amend the rule and address this question ultimately failed.⁶²

Despite the language and guiding principles of Federal Rule 56, local SMF rules often permit uncontroverted factual assertions in the

⁵³ FED. R. CIV. P. 56(c).

⁵⁴ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

⁵⁵ *Id.* (“Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.”).

⁵⁶ FED. R. CIV. P. 56:

(2) *Opposing Party’s Obligation to Respond*. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

⁵⁷ *Id.* (emphasis added).

⁵⁸ *Celotex*, 477 U.S. at 324.

⁵⁹ *Id.* (“Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves . . .”).

⁶⁰ FED. R. CIV. P. 56(e)(2); *see also infra* note 191 and accompanying text.

⁶¹ *See* FED. R. CIV. P. 56 (commentary to all four amendments).

⁶² *See* Comm. on Practice and Procedure, Fed. Judicial Conference, Agenda for the September 7-8, 2006, Meeting of the Advisory Committee on the Civil Rules 330 (Sept. 2006), available at <http://www.uscourts.gov/rules/Agenda%20Books/AP2006-04.pdf>. Under the proposal, which eventually died in 1992, Rule 56(c) was to feature a sentence making clear that if a party fails to respond in the required fashion, any facts asserted in the moving party’s motion “may be treated as having [been] admitted.” *Id.* This provision would have “establish[ed] discretionary authority to grant summary judgment without independently determining whether the moving party has carried its burden to show lack of a genuine dispute.” *Id.* In theory, this would have been duplicative of—and thus abrogated the need for—all the local rules that require parties to respond to the moving party’s SMF at the penalty of having the moving party’s assertions be deemed admitted. *Id.*

moving papers to be “deemed admitted,” regardless of record support.⁶³ Such a rule calls for critical evaluation by courts and the Conference alike. Thus far, a wholesale evaluation, at least by the courts, has been lacking.

B. *Local Rules, Rule 83, and Identifying Conflict*

The first act to rein in the rulemaking of district court judges was the Conformity Act of 1872.⁶⁴ The Act sought to simplify the job of practitioners by urging that the district courts adopt a practice that is as close to the state practice as possible.⁶⁵ The Act was criticized for being unworkable,⁶⁶ and was effectively abrogated when the modern, nationwide rule—Federal Civil Rule 83—came into effect.⁶⁷ Under

⁶³ See *infra* Part II.

⁶⁴ Ch. 255, § 5, 6, 17 Stat. 197 (1872). The rule read:

That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: *Provided, however,* That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.

Id. (emphasis in original).

⁶⁵ The purpose of the Act was obvious on its face: to relieve the local bars of “the necessity . . . of studying two distinct systems of remedial law, and of practising [sic] according to the wholly dissimilar requirements of both.” *Nudd v. Burrows*, 91 U.S. 426, 441 (1875).

⁶⁶ The Conformity Act was a failure. Comment, *Ineffectiveness of the Conformity Act*, 36 YALE L.J. 853 (1926-27). It created a variety of problems, including choosing whether the state law was inapplicable because it did not meet “the ends of justice”; thus, courts often chose simply not to apply the state law. *Id.* at 854-57. The Act was effectively abrogated when Rule 83 came into effect. FED. R. CIV. P. 83 (commentary to the 1938 enactment).

⁶⁷ FED. R. CIV. P. 83; Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1255-56 (1967). The modern rule reads, in relevant part:

(1) *In General.* After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

Id. In arriving at this language, Rule 83 would only undergo two revisions throughout its existence. The first was in 1985, at which time the rule was amended to require public notice and an opportunity for comment in the local rulemaking process. *Id.* (commentary to the 1985 amendments) (As amended, the rule read “[e]ach district court may, . . . after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules.”). The rule was amended again in 1995, with several significant changes. First, although it may have seemed obvious, the rule now explicitly states that the local rules need to comply not only with the Federal Rules, but also Acts of Congress. *Id.* (commentary to the 1995 amendments). Furthermore, two new subsections were added. Subsection (a)(2) requires that “[a] local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply.” *Id.* However, the commentary and other publications make it clear that “rules of form” were not meant to encompass Statements of Material Facts, which remain under subsection (a)(1)’s simple

Rule 83, district courts have the authority to “adopt and amend” local rules.⁶⁸ These local rules “must be consistent with—but not duplicate—federal statutes and rules”⁶⁹ The purpose of Rule 83, according to its drafters, was to fill in the gaps left by the federal rules.⁷⁰ Those gaps, however, were few and far between due to the comprehensiveness of the federal rules.⁷¹

In the early days of the federal rules, local rules were considered a threat to the goals of the federal rules; so much so that a study was ordered by the Federal Judicial Conference, and a report was released no more than two years after the rules’ promulgation.⁷² Those researching the local rules were charged with an overriding principle: “It is the sense of the [Federal Judicial] Conference that these rules should be made in the spirit which has governed the adoption of the new procedure; the rules should be few, simple, and free from unnecessary technicalities.”⁷³

In 1940, the report, known as the “Knox Report,” was released.⁷⁴ The Knox Report stated that the federal rules “are so comprehensive as to leave very few subjects that need now to be dealt with at all by local rules.”⁷⁵ Nevertheless, the Report found that numerous local rules—some predating the FRCP, some passed in the intervening years—were not in “complete harmony with the new practice.”⁷⁶ The report

directive to avoid conflicts with the Federal Rules. *Id.* (commentary to the 1995 amendments) (“Nor does it affect the court’s power to enforce local rules that involve more than mere matters of form—for example, a local rule requiring parties to identify evidentiary matters relied upon to support or oppose motions for summary judgment.”); 12 WRIGHT ET AL., *supra* note 52, § 3152 (2007); William H. Rehnquist, Chief Justice, U.S. Supreme Court, Transmitting Amendments to the Federal Rules of Civil Procedure that Have Been Adopted by the Court, Pursuant to 28 U.S.C. 2072 (Apr. 27, 1995), in 161 F.R.D. 149.

⁶⁸ FED. R. CIV. P. 83.

⁶⁹ *Id.*

⁷⁰ *Rule 83, supra* note 67, at 1255.

⁷¹ *Id.*

⁷² Subrin, *supra* note 32, at 2016-18. According to William Mitchell, the Chairman of the Advisory Committee on Federal Rules, “[I]f the district courts continued to add meticulous details, that they think improve the Supreme Court rules, simplicity and flexibility will be impaired, and uniformity destroyed” *Rule 83, supra* note 67, at 1256 (internal quotation marks omitted).

⁷³ Subrin, *supra* note 32, at 2016.

⁷⁴ FED. JUDICIAL CONFERENCE, REPORT ON LOCAL DISTRICT COURT RULES (1940), reprinted in 4 FED. R. SERV. 969 (1941) (abridged version) [hereinafter KNOX REPORT]. The report took its name from the head of the committee, Judge John C. Knox of the Southern District of New York.

⁷⁵ *Id.* at 969-70.

⁷⁶ *Id.* at 970.

A few new local rules have unnecessarily repeated provisions of the Federal Rules or attempted to restate the effect of those provisions in different language. Others cover ground upon which the Federal Rules are intended to be complete. Others attempt to lay down rigid details to implement or supplement the Federal Rules in minor particulars which had been deliberately left unregulated Some apparently overlook specific contrary provisions of the Federal Rules. Rules such as these, which

suggested that the number of local rules be kept at a minimum so as to foster uniformity, and that district courts carefully prune any local rules that were unnecessary or in conflict with the federal rules.⁷⁷

It is safe to say that district courts have not paid much heed to the Knox Report's recommendation. Despite rule amendments and acts of Congress that were designed to curb the expansion of local rules,⁷⁸ local rule promulgation has reached incredible heights: As of 1989, there were 4,998 local federal rules,⁷⁹ and by 2002, there were 5,575 (these figures do not count sub-rules, standing orders, appendices, individual judge's rules, and other local directives).⁸⁰ This expansion has been met with consistent criticism, with one going so far as to call local rules a "procedural Tower of Babel."⁸¹

Although courts can do little to limit the expansion of local rules generally—after all, there is no statutory cap on the number local rules that may be promulgated—there are several checks in place to deter local rulemaking that *conflicts* with the federal rules. First, conflicting rules should not be created in the first place. This is clear from the language of Rule 83 itself: a local rule will plainly fail to pass muster if it is not "consistent with . . . Acts of Congress and rules adopted under [the Rules Enabling Act]."⁸² Second, the Federal Judicial Conference has the authority to abrogate local rules that it finds to be inconsistent with the federal rules.⁸³ Third, local rules are subject to judicial

create inconsistencies in practice among the various districts and leave doubt and uncertainty in the minds of the bench and bar, tend to defeat the simply general system of procedure which the Federal Rules were intended to establish for all district courts."

⁷⁷ *Id.* at 970; see *Rule 83*, *supra* note 67, at 1258.

⁷⁸ See 12 WRIGHT ET AL., *supra* note 52, § 3152 ("From an early date, local rulemaking had been viewed with skepticism by Congress."); note 67 *supra* (cataloging the various amendments to Rule 83). More recent congressional acts include the seemingly conflicted 1988 Judicial Improvements and Access to Justice Act (Judicial Improvements Act), Pub. L. No. 100-702, 102 Stat. 4642 (1988) § 403(a), (codified as amended at 28 U.S.C. § 332(d)(4) (2006)), and the Civil Justice Reform Act of 1990 (CJRA), Pub. L. No. 101-650 §§ 101-06, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-82 (2006)). While the Judicial Improvement Act ordered the Federal Judicial Conference to review all local rules and abrogate them as needed, the CJRA called for the further promulgation of local rules by ordering that each district create an individualized plan to reduce delay in the court system by 1993. Walter W. Heiser, *A Critical Review of the Local Rules of the United States District Court for the Southern District of California*, 33 SAN DIEGO L. REV. 555, 560-61 (1996) (explaining the conflict between the 1988 and 1990 Acts).

⁷⁹ 1989 REPORT, *supra* note 26, Appendix A, at 2. Districts varied greatly in their fondness of local rules, ranging from one local rule and one standing order (in the Middle District of Georgia) to 31 local rules with 434 "sub-rules" and 275 standing orders (in the Central District of California). See also Subrin, *supra* note 32, at 2020.

⁸⁰ Comm. on Practice and Procedure, Fed. Judicial Conference, Minutes for the January 10-11, 2002, Meeting of the Standing Committee on Rules of Practice and Procedure 12 (Jan. 2002), available at <http://www.uscourts.gov/rules/Minutes/jan2002.pdf>.

⁸¹ Subrin, *supra* note 32, at 2020; see *Rule 83*, *supra* note 67, at 1259.

⁸² FED. R. CIV. P. 83(a). The Rules Enabling Act, which grants to the judiciary the power to promulgate its own rules of procedure, is codified at 28 U.S.C. §§ 2072, 2075 (2006).

⁸³ Pub. L. No. 100-702 § 403(a), 102 Stat. 4642 (codified at 28 U.S.C. § 2071(b) (2006)).

review.⁸⁴ Thus, if a local SMF rule conflicts with Federal Rule 56, courts have the authority and duty to abrogate the rule, or read it in such a way as to avoid the conflict.

Rule 83 itself does not explain what it means for a local rule to be “[in]consistent” with the federal rules or a statute, but other sources have provided some substance. For instance, the Knox Report described inconsistent rules as those that “conflict[] with the spirit of the Rules, needlessly repeat[] or restate a Federal Rule, [are] preempted by the rules, or provide[] rigid procedural guidelines in areas deliberately left unregulated.”⁸⁵ The February 2004 Report on Local Rules offered a similarly broad definition of rules in conflict.⁸⁶ Despite this broad

⁸⁴ See *Frazier v. Heebe*, 482 U.S. 641, 645 (1987) (“A district court’s discretion in promulgating local rules is not, however, without limits. This Court may exercise its inherent supervisory power to ensure that these local rules are consistent with the principles of right and justice.” (internal quotation marks omitted)). In actuality, the power of appellate courts to abrogate rules significantly predates any Rule 83 mandate that local rules conform to the Federal Rules. See *Ex parte Burr*, 22 U.S. 529, 9 Wheat. 529 (1824). This older doctrine is commonly known as the “inherent supervisory power” of the court to manage its docket. A notable recognition of this doctrine came in *Link v. Wabash*, 370 U.S. 626 (1962), where the Supreme Court upheld the decision of a district court judge—not founded on any local or federal rule—to dismiss for lack of prosecution. *Id.* at 630-33. The Supreme Court found that this sort of *sua sponte* dismissal has “generally been considered an inherent power, governed not by rule or statute but by the control necessarily vested in courts manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Id.* at 630-31. Following this same thread of reasoning is *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989). In *Hoffman*, the Court held that district judges have managerial authority over joinder issues so that a court can order an employer to divulge names of potential plaintiffs in ADEA cases. *Id.* at 170-71. Although these cases seem to demonstrate that judges have always had some power to take action outside of any statutory or rules-based authority, some have suggested that behind it all is a shift in the way we view judges away from “neutral arbiters” into something more akin to case managers. See E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986) (discussing the meaning and functions of managerial judging and assessing its effectiveness); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982) (chronicling the shift away from the role of judges as neutral arbiters into case managers).

⁸⁵ Myron J. Bromberg and Jonathon M. Korn, *Individual Judge’s Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 ST. JOHN’S L. REV. 1, 9-10 (1994); see KNOX REPORT, *supra* note 74, at 969-70.

⁸⁶ STANDING COMM. ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT ON LOCAL RULES 1 (Feb. 1, 2004), available at http://www.uscourts.gov/rules/Final_Local_Rules_Report_March_%202004.pdf. The categorization of rules in conflict was similar to that of the Knox Report:

The Standing Committee has determined that the district courts should be made aware of local rules in their respective districts that fall within one of five categories: 1) a local rule that is in direct conflict with national law; 2) a local rule that is in arguable conflict with national law, i.e., the local rule does not present a direct textual conflict, but may create a conflict as applied or may be in tension with the principles and practices underlying national law; 3) a local rule that tries to duplicate national law but arguably does so in a confusing or unhelpful manner; 4) a local rule that is outmoded because it regulates a practice or form of action that no longer arises in the federal courts; and 5) local rules that do not conform with the uniform numbering system, as required by Rule 83.

Id. at 1. This report said nothing—good, bad, or neutral—about summary judgment and SMF rules. *Id. passim*.

understanding of conflicts, commentators have observed that district court judges, unsurprisingly, construe “inconsistent” very narrowly so that it does not swallow up their local rules and standing orders.⁸⁷ As a consequence, standing orders or local rules are often promulgated “with apparent disregard for the letter or spirit of the Federal Rules.”⁸⁸ Local SMF rules are no exception, and the Supreme Court has not yet passed on whether any of them conflict with Rule 56 or *Celotex*.⁸⁹

C. *The Variety of Local SMF Rules: A Survey*

SMFs are not evidence.⁹⁰ They are not affidavits to which the attorney swears, under penalty of perjury, that she has personal knowledge as to the truth of the assertions.⁹¹ Rather, SMFs are

⁸⁷ See Bromberg & Korn, *supra* note 85, at 10.

⁸⁸ *Id.* District courts may find some support for a narrow construction of “inconsistent” in the Supreme Court’s decision in *Colgrove v. Battin*, 413 U.S. 149 (1973). In *Colgrove*, the Court dealt with a District of Montana local rule that called for six-person juries in civil cases. D. MON. CIV. R. 13(d)(1) (1963) (“A jury for the trial of civil cases shall consist of six persons plus such alternate jurors as may be impaneled.”). It was challenged on the grounds, *inter alia*, that the local rule did not comport with Rule 48, which allegedly implied that courts must require 12-person juries. FED. R. CIV. P. 48 (1937) (repealed 1991) (“The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.” (The rule was amended in 1991 to permit juries of “at least 6 and no more than 12 members.” FED. R. CIV. P. 48 (commentary to the 1991 Amendment))). Justice Brennan thought otherwise, seeing no such conflict. *Colgrove*, 413 U.S. at 164. Although the rule permits parties to “stipulate” to juries of fewer than 12 people, “[i]t does not purport to prevent court rules which provide for civil juries of reduced size.” *Id.* at 164.

In coming to his conclusion, Brennan distinguished the case from *Miner v. Atlass*, 363 U.S. 641 (1960), which struck down a local rule authorizing discovery-deposition practices in admiralty cases. According to Brennan, a court of admiralty had no inherent power, independent of statute or rule to order the taking of depositions for the purpose of discovery. In *Miner*, the court saw the rules’ drafters’ declination to include admiralty cases in the discovery-deposition process to be purposeful and, therefore, a local rule which creates such a process conflicts. *Id.* at 647. In essence, the Court was unwilling to read the language broadly to imply common law traditions that trial by jury meant “jury of twelve.” *Colgrove*, 413 U.S. at 163.

Observe that this Note does not argue for such a broad reading as the Court rejected in *Colgrove*: The language and clear precedent of Rule 56 speaks for itself, and this Note does not argue for the implication of common law traditions.

⁸⁹ Just recently, the Court declined to hear an attack on a SMF-permitting local rule. *Jones v. United Parcel Serv., Inc.*, 461 F.3d 982 (8th Cir. 2006) *cert. denied*, 127 S. Ct. 2088 (2007). In opposing certiorari, the respondent observed that petitioner had not been prejudiced by the “admission” component of the SMF rule because there was adequate support in the record anyway. Thus, although it is difficult to determine the motivations behind the denial of certiorari, the issue did not appear to be ripe for review. Brief of Respondent Opposing Certiorari, *Jones*, 127 S. Ct. 2088 (No. 06-1099).

⁹⁰ *Giannullo v. City of N.Y.*, 322 F.3d 139, 142 (2d Cir. 2003).

⁹¹ *Id.* at 16. The circumstances alone make this statement obvious enough. After all, if an SMF were evidence, then (1) the attorney would be offering her own hearsay testimony, not based on personal knowledge, and (2) we would have an unlikely court rule that tells attorneys to create evidence. The fact that the SMF is not evidence is even more strongly suggested by the

documents, required by many local rules, in which the parties list facts (not conclusions or arguments) that they allege are demonstrated by the record. SMFs are just part of the motion papers required by the court; they “are the means to the end of achieving reasonably efficient, quick and fair resolutions to motions for summary judgment.”⁹²

In surveying the SMF requirements that have been adopted by 62 federal districts,⁹³ one is struck both by their overwhelming similarities and their important differences. Their common characteristics are what define them as SMF rules. For instance, the SMF rules usually explicitly require a “Statement of Material Facts,”⁹⁴ “Statement of Undisputed Facts,”⁹⁵ or the hybrid, a “Statement of Undisputed Material Facts.”⁹⁶ This is usually accomplished through an addendum to the

context and contents of the rule, which require the SMF to be submitted with or in the party’s brief (*not* describing it as an element of evidence). *See, e.g.*, D. OR. R. 56.1 (“A motion for summary judgment must be *accompanied* by . . . [a] Concise Statement of Material Facts.” (emphasis added)). Further, rules usually require that the movant’s SMF cite specific evidence, not rely on its own assertions. *See, e.g., id.* (“A party must cite to a particular affidavit, deposition, or other document (indicating both page and line number references where appropriate).”).

⁹² *Pike v. Caldera*, 188 F.R.D. 519, 540 (S.D. Ind. 1999); *see also* M.D. TENN. R. 56.01 (“In order to assist the Court in ascertaining whether there are any material facts in dispute . . .”); *Holtz v. Rockefeller*, 258 F.3d 62, 74 (2d Cir. 2001) (“The purpose of [the SMF rule] is to streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties.”); BRUNET ET AL., *supra* note 39, at 15.

⁹³ *See* S.D. ALA. R. 7.2; D. ARIZ. R. 56.1; E.D. ARK. R. 56.1; W.D. ARK. R. 56.1; C.D. CA. R. 56.1-56.4; E.D. CA. R. 56-260; N.D. CA. R. 56-2; D. CONN. R. 56; D.D.C. R. 7; S.D. FLA. R. 7.5; N.D. FLA. R. 56.1; M.D. GA. R. 56; N.D. GA. R. 56.1; S.D. GA. R. 56; D. HAW. R. 56.1; D. IDAHO R. 7.1; C.D. ILL. R. 7.1; N.D. ILL. R. 56.1; N.D. IND. R. 56.1; S.D. IND. R. 56.1; N.D. IOWA R. 56; S.D. IOWA R. 56.1; D. KAN. R. 56.1; E.D. LA. R. 56; M.D. LA. R. 56; W.D. LA. R. 56; D. ME. R. 56; D. MASS. R. 56.1; E.D. MO. R. 7-4.01; W.D. MO. R. 56.1; D. MONT. R. 56.1; D. NEB. R. 56.1; D. NEV. R. 56-1; D.N.H. R. 7.2; D.N.J. R. 56.1; D.N.M. R. 56.1; E.D.N.Y. R. 56.1; N.D.N.Y. R. 7.1; S.D.N.Y. R. 56.1; W.D.N.Y. R. 56.1; M.D.N.C. R. 56.1; D.N.D. R. 7.1; E.D. OKLA. R. 56.1; N.D. OKLA. R. 56.1; W.D. OKLA. R. 56.1; D. OR. R. 56.1; M.D. PA. R. 56.1; W.D. PA. R. 56.1; D.P.R. R. 56; D.R.I. R. 56; D.S.D. R. 56.1; M.D. TENN. R. 56.01; W.D. TENN. R. 7.2; E.D. TEX. R. CV-56; D. UTAH R. 56-1; D. VT. R. 7.1; E.D. VA. R. 56; D.V.I. R. 56; E.D. WASH. R. 56.1; N.D.W.V. R. 7.02; E.D. WIS. R. 56.2; D. WYO. R. 7.1. Although these are the 62 rules that can rather safely be described as rules requiring SMFs, this categorization is not a precise science. For instance, there are some local rules with requirements similar to that found in SMF rules, but that address briefs generally, or address the argument portion of the brief. *See, e.g.*, S.D. ILL. R. 7.1(d) (“All briefs shall contain a short, concise statement of the party’s position, together with citations to relevant legal authority and to the record. Allegations of fact not supported by citation may not be considered.”) (This rule is not considered among the 62 rules governing SMFs.).

⁹⁴ *See, e.g.*, D. ME. R. 56(b) (“Supporting Statement of Material Facts”).

⁹⁵ *See, e.g.*, E.D. CA. R. 56-260 (“Each motion for summary judgment . . . shall be accompanied by a ‘Statement of Undisputed Facts’ . . .”).

⁹⁶ *See, e.g.*, D. VT. R. 7.1 (“[a] separate, short and concise statement of *undisputed* material facts must accompany any motion for summary judgment . . .”) (emphasis in original). For more variations, try D. OR. R. 56.1 (“Concise Statement of Facts”), or the needlessly wordy S.D. IND. R. 56.1 (“Statement of Material Facts Not in Dispute”).

brief,⁹⁷ but sometimes the rule requires that the SMF be included in the appropriate section of the brief itself.⁹⁸ Although it is generally good practice for any attorney to link facts to the record through citations, 49 rules explicitly require it.⁹⁹ Thirty-seven of the rules require that the facts be laid out *seriatim* rather than permitting the attorney to organize the facts into paragraph format.¹⁰⁰ So as to avoid long SMF statements that include unimportant facts, some rules offer definitions of when a fact is “material,” the touchstone of which is usually whether the fact is “pertinent to the outcome of the issues identified in the motion for summary judgment.”¹⁰¹ Still others accomplish this end by establishing a page limit for the SMF.¹⁰²

After this statement of (undisputed) material facts is offered by the moving party, 60 jurisdictions place an affirmative obligation on the non-moving party to respond.¹⁰³ The form of this response varies.

⁹⁷ See, e.g., S.D. GA. R. 56.1 (“[I]n addition to the brief, there shall be annexed to the motion a separate, short, and concise statement of the material facts.”).

⁹⁸ See, e.g., S.D. IND. R. 56.1 (“The brief must include a section labeled ‘Statement of Material Facts Not in Dispute’ . . .”).

⁹⁹ See, e.g., D. NEB. R. 56.1 (“The statement of facts shall consist of short numbered paragraphs, each containing pinpoint references to affidavits, pleadings, discovery responses, deposition testimony (by page and line) . . .”); see also S.D. ALA. R. 7.2; D. ARIZ. R. 56.1; E.D. CAL. R. 56-260; D.D.C. R. 7; S.D. FLA. R. 7.5; N.D. FLA. R. 56.1; M.D. GA. R. 56; N.D. GA. R. 56.1; S.D. GA. R. 56; D. HAW. R. 56.1; C.D. ILL. R. 7.1; N.D. ILL. R. 56.1; N.D. IND. R. 56.1; S.D. IND. R. 56.1; N.D. IOWA R. 56; S.D. IOWA R. 56.1; D. KAN. R. 56.1; D. ME. R. 56; D. MASS. R. 56.1; E.D. MO. R. 7-4.01; W.D. MO. R. 56.1; D. MONT. R. 56.1; D. NEV. R. 56-1; D.N.H. R. 7.2; D.N.M. R. 56.1; E.D.N.Y. R. 56.1; N.D.N.Y. R. 7.1; S.D.N.Y. R. 56.1; W.D.N.Y. R. 56.1; M.D.N.C. R. 56.1; E.D. OKLA. R. 56.1; N.D. OKLA. R. 56.1; W.D. OKLA. R. 56.1; D. OR. R. 56.1; M.D. PA. R. 56.1; W.D. PA. R. 56.1; D.P.R. R. 56; D.S.D. R. 56.1; M.D. TENN. R. 56.01; W.D. TENN. R. 7.2; E.D. TEX. R. CV-56; D. UTAH R. 56-1; D. VT. R. 7.1; E.D. VA. R. 56; D.V.I. R. 56; E.D. WASH. R. 56.1; E.D. WIS. R. 56.2. Some courts go so far as to permit the denial of otherwise properly-supported motions on the grounds that the SMF does not appropriately cite to the record. See, e.g., D. CONN. R. 56 (“Counsel and *pro se* parties are hereby notified that failure to provide specific citations to evidence in the record as required by this Local Rule may result . . . in the Court imposing sanctions, including, when the movant fails to comply, an order denying the motion for summary judgment . . .”).

¹⁰⁰ See, e.g., D. ARIZ. R. 56.1 (“The specific facts shall be set forth in serial fashion and not in narrative form.”); see also S.D. ALA. R. 7.2; E.D. CAL. R. 56-260; D. CONN. R. 56; S.D. FLA. R. 7.5; N.D. GA. R. 56.1; M.D. GA. R. 56; C.D. ILL. R. 7.1; N.D. ILL. R. 56.1; N.D. IOWA R. 56; S.D. IOWA R. 56.1; D. KAN. R. 56.1; D. ME. R. 56; E.D. MO. R. 7-4.01; W.D. MO. R. 56.1; D. MONT. R. 56-1; D. NEB. R. 56.1; D.N.M. R. 56.1; E.D.N.Y. R. 56.1; N.D.N.Y. R. 7.1; S.D.N.Y. R. 56.1; E.D. OKLA.; R. 56.1; N.D. OKLA. R. 56.1; W.D. OKLA. R. 56.1; D. OR. R. 56.1; M.D. PA. R. 56.1; W.D. PA. R. 56.1; D.P.R. R. 56; D.R.I. R. 56; D.S.D. R. 56.1; M.D. TENN. R. 56.01; W.D. TENN. R. 7.2; D. UTAH R. 56-1; D.V.I. R. 56; E.D. WASH. R. 56.1; E.D. WIS. R. 56.2; D. WYO. R. 7.1.

¹⁰¹ D. NEB. R. 56.1.

¹⁰² For a particularly restrictive page limitation, see D. OR. R. 56.1 (“Page Limitations. Unless approved by the Court in advance, neither the concise statement nor any response or reply thereto, may be longer than five (5) pages.”).

¹⁰³ The two exceptions are the District of the Virgin Islands, and the Northern District of West Virginia. The Virgin Islands rule does not *require* that the non-moving party file an SMF, but simply *permits* the non-moving party to do so, without enumerating any repercussions for failure to do so. D.V.I. R. 56 (“Any party adverse to a motion submitted under this rule *may* [respond] . . .”) (emphasis added). N.D.W.V. R. 7.02 is arguably not an SMF rule: It simply

Some districts require that the responding party either “admit” or “deny” each enumerated allegation,¹⁰⁴ akin to complaint-and-answer procedure under Federal Rule 8.¹⁰⁵ Many others combine the two, instructing the non-moving party to both respond to the moving party’s allegations in kind *and* to set out any other facts that it claims are in dispute.¹⁰⁶ Once the non-moving party has lodged her response, the reply brief remains regulated by many of the SMF rules.¹⁰⁷

Under the usual numbering schemes, the SMF rules are likely located under Federal Rule 7¹⁰⁸ (e.g. “Local Rule 7.1”)¹⁰⁹ or Federal Rule 56¹¹⁰ (e.g. “Local Rule 56.1”).¹¹¹ Other nuances abound: At least five courts require, when the non-moving party is proceeding *pro se*, that the moving party’s brief includes language that warns the non-moving party of the failure to properly respond to either the SMF or the summary judgment motion as a whole.¹¹² The Northern District of California is the only district that explicitly provides that SMFs do not need to be filed unless the judge specifically requests that they be submitted.¹¹³

The provisions discussed above do not necessarily create any

notes that “[m]otions for summary judgment shall include or be accompanied by a short and plain statement of facts,” without any more description of either the moving or responding parties’ obligations. *Id.*

¹⁰⁴ See, e.g., D. NEB. R. 56.1 (“The response shall address each numbered paragraph in the movant’s statement . . .”). Perhaps the most extreme example of this format is the Middle District of Tennessee, which thoroughly micromanages the process. At the end of each of the moving party’s enumerated facts, the moving party must insert “the word ‘response’ . . . [followed by] a blank space [that is] reasonably calculated to enable the non-moving party to respond to the assertion that the fact is undisputed.” M.D. TENN. R. 56.01. Like a visit to the doctor’s office, the non-moving party must then simply fill out the pre-prepared form. *Id.* (“The response must be made on the document provided by the movant or on another document in which the non-movant has reproduced the facts and citations verbatim as set forth by the movant.”).

¹⁰⁵ See FED. R. CIV. P. 8.

¹⁰⁶ See, e.g., W.D. PA. R. 56.1 (The non-moving party must respond “to each numbered paragraph in the moving party’s [SMF] by . . . (a) admitting or denying . . . (b) setting forth the basis for the denial . . . and (c) setting forth in separately numbered paragraphs any other material facts that are allegedly at issue . . .”).

¹⁰⁷ See, e.g., D. KAN. R. 56.1 (“In a reply brief, the moving party shall respond to the non-moving party’s statement of undisputed material facts in the manner prescribed in [the subsection governing the non-moving parties’ opposition brief].”).

¹⁰⁸ FED. R. CIV. P. 7. This rule governs the forms of motions.

¹⁰⁹ See, e.g., D. IDAHO R. 7.1.

¹¹⁰ FED. R. CIV. P. 56. This rule, as discussed *passim*, governs summary judgment.

¹¹¹ See, e.g., E.D. ARK. R. 56.1.

¹¹² See, e.g., S.D. IND. R. 56.1 (The moving party must state in its papers that “a fact stated in the moving party’s Statement of Material Facts and supported by admissible evidence will be accepted by the Court as true unless the opposing party cites specific admissible evidence contradicting that statement of material fact.”); see also D. CONN. R. 56; N.D. IND. R. 56.1; D. VT. R. 7.1(c).

¹¹³ N.D. CAL. R. 56-2 (“Unless required by the assigned Judge, no separate statement of undisputed facts or joint statement of undisputed facts shall be submitted.”).

conflicts with Federal Rule 56. They govern the content and mechanics of the briefing process, a realm largely left to the district courts by Rule 83.¹¹⁴ The problem arises when the local rule provides that uncontroverted assertions in the SMF are deemed admitted, therefore potentially absolving the moving party of meeting its required evidentiary showing.

Such provisions are quite common; of the 61 rules requiring SMFs, 51 explicitly provide for all uncontested facts to be deemed admitted.¹¹⁵ What is more, when the local rule does not specify whether a fact is to be deemed admitted,¹¹⁶ courts may nevertheless interpret the local rule to regard unchallenged facts as being admitted.¹¹⁷ Other rules strive to be explicit about the scope of the court's duties; six SMF rules make clear that the court will not search the record for material facts if the non-moving party has failed to submit an SMF, or if the non-moving party has failed to contest a fact in the moving party's SMF.¹¹⁸

Some SMF rules appear to push this problem even further. For instance, the SMF rule in the Central District of Illinois states that summary judgment motions that are uncontested constitute "an admission of the motion."¹¹⁹ "Of" is a perplexing choice of preposition. It has left some courts confused as to what, exactly, the non-responsive

¹¹⁴ See *supra* Part I.B. See 1989 REPORT, *supra* note 26, app. B, 147 (explaining how courts are free to regulate their own practice, so long as it doesn't conflict with the Federal Rules).

¹¹⁵ See S.D. ALA. R. 7.2; E.D. ARK. R. 56.1; W.D. ARK. R. 56.1; C.D. CAL. R. 56.1-56.4; D. CONN. R. 56; D.D.C. R. 7; S.D. FLA. R. 7.5; N.D. FLA. R. 56.1; M.D. GA. R. 56; N.D. GA. R. 56.1; S.D. GA. R. 56; D. HAW. R. 56.1; D. IDAHO R. 7.1; C.D. ILL. R. 7.1; N.D. ILL. R. 56.1; N.D. IND. R. 56.1; S.D. IND. R. 56.1; N.D. IOWA R. 56.1; S.D. IOWA R. 56; D. KAN. R. 56.1; E.D. LA. R. 56; M.D. LA. R. 56; W.D. LA. R. 56; D. ME. R. 56; D. MASS. R. 56.1; E.D. MO. R. 4.01; W.D. MO. R. 56.1; D. NEB. R. 56.1; D.N.H. R. 7.2; D.N.M. R. 56.1; E.D.N.Y. R. 56.1; N.D.N.Y. R. 7.1; S.D.N.Y. R. 56.1; W.D.N.Y. R. 56.1; D.N.D. R. 7.1; E.D. OKLA. R. 56.1; N.D. OKLA. R. 56.1; W.D. OKLA. R. 56.1; D. OR. R. 56.1; M.D. PA. R. 56.1; W.D. PA. R. 56.1; D.P.R. R. 56; D.R.I. R. 56; D.S.D. R. 56.1; M.D. TENN. R. 56.01; E.D. TEX. R. CV-56; D. UTAH R. 56-1; D. VT. R. 7.1; E.D. VA. R. 56; E.D. WASH. R. 56.1; E.D. WIS. R. 56.2.

¹¹⁶ See, e.g., D.N.J. R. 56.1 ("On motions for summary judgment, each side shall furnish a statement which sets forth material facts as to which there exists or does not exist a genuine issue.").

¹¹⁷ See Part II.B *infra* (regarding the District of New Jersey).

¹¹⁸ See, e.g., D. HAW. R. 56.1 ("[T]he court shall have no independent duty to search and consider any part of the court record not otherwise referenced in the separate concise statements of the parties."); see also S.D. IND. R. 56.1; D. ME. R. 56; D. OR. R. 56.1; D.P.R. R. 56; E.D. TEX. R. CV-56.

¹¹⁹ C.D. ILL. R. 7.1(d)(D)(2) ("A failure to respond shall be deemed an admission of the motion."). The Central District's rule is unique in another respect: It explicitly cites to case law to warn parties about the "consequences for failing to comply." *Id.* (discussing *Waldrige v. Am. Hoechst Corp.*, 24 F.3d 918 (7th Cir. 1994)). This rule is also notable for its authoritative and quasi-paternalistic use of bold and caps ("A WORD OF CAUTION: . . . THE REPLY SHALL BE LIMITED TO NEW MATTERS RAISED IN THE RESPONSE AND SHALL NOT RESTATE ARGUMENTS ALREADY RAISED IN THE MOTION." (emphasis in original)). *Id.*; see also N.D.N.Y. R. 7(a)(3) ("The Court shall deem admitted any facts set forth in the Statement of Material Facts that the opposing party does not specifically controvert." (underline in original)).

party is admitting. Although the weight of the precedent indicates that this is to be treated as an admission to the *facts* in the SMF¹²⁰—which is problematic itself, per the theme of this Note—at least some unreported opinions seem to credit it as an acquiescence to *the entire motion*,¹²¹ with one district court case going so far as to call it “an admission to the motion.”¹²² This, of course, breaks with the clear and indisputable import of Rule 56 that summary judgment motions cannot be granted by default.¹²³

Another example is the SMF rule in the Northern District of Georgia, which makes it abundantly clear that the district court will not check the citations, unless prompted by the non-moving party: “The court will deem the movant’s citations supportive of its facts unless the respondent specifically informs the court to the contrary in the response.”¹²⁴ This rule shifts the burden to the non-moving party to point out the facts to which the movant has failed to provide supporting evidence. Thus, the movant could make a false assertion in its SMF, cite to evidence that does not exist (or at least fails to support the SMF assertion), and nevertheless succeed because the court explicitly refuses to check the citation without being prompted by the non-moving party.

Notably, other districts in the Eleventh Circuit¹²⁵ have gone in the opposite direction. In the Southern District of Florida, facts in an uncontroverted SMF will be deemed admitted *only if* “the Court finds that the movant’s statement is supported by evidence in the record.”¹²⁶ The Southern District of Alabama’s SMF Rule includes a similar provision.¹²⁷ In the Middle District of Georgia, these facts will not be deemed admitted if doing so is “otherwise inappropriate”¹²⁸—perhaps

¹²⁰ *Cirilla v. Kankakee County Jail*, 438 F. Supp. 2d 937 (C.D. Ill. 2006) (accepting the undisputed facts as true, but still reviewing whether those facts warrant summary judgment); *see also LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 392 (7th Cir. 1995).

¹²¹ *Cato v. Thompson*, 118 F. App’x 93, 97 (7th Cir. 2004) (referring, in dictum, to “the local rule’s provision that a failure to respond may be interpreted as *acquiescence to the motion* . . .” (emphasis added)).

¹²² *Pierce v. Ill. Dep’t of Health Servs.*, No. 03-3222, 2007 U.S. Dist. LEXIS 10496, at *3 (C.D. Ill. Feb. 14, 2007) (actually *misquoting* the rule: “A failure to respond shall be deemed an admission to the motion.”) (emphasis added). The court then acted upon that misquoted mandate and, in a terse opinion, deemed the “arguments” admitted. *Id.*

¹²³ FED. R. CIV. P. 56(c) (“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.”).

¹²⁴ N.D. GA. R. 56.1(B).

¹²⁵ The Eleventh Circuit includes Alabama, Florida, and Georgia, each of which has three federal districts.

¹²⁶ S.D. FLA. R. 7.5.

¹²⁷ S.D. ALA. R. 7.2 (“Failure to do so will be considered an admission that no material factual dispute exists; *provided, that nothing in this rule shall be construed to require the non-movant to respond in actions where the movant has not borne its burden of establishing that there is no dispute as to any material fact.*” (emphasis added)).

¹²⁸ M.D. GA. R. 56.

suggesting that the court will make sure that the facts as stated in the SMF have fair support in the record. Collectively, these three rules demonstrate that the drafters were at least aware of a potential conflict that could arise if facts as stated in the SMF were simply deemed admitted without ever cracking open the record.

II. THE INTERPRETIVE GLOSS: SEVENTH, THIRD, AND SECOND CIRCUITS

A. *Seventh Circuit: “Deemed Admitted” Means “Deemed Admitted”*

The Seventh Circuit serves as a prime example of a court that erroneously gives local SMF rules such broad force that they are “[in]consistent with”¹²⁹ Rule 56. The judges of the circuit’s courts have never found a conflict between local SMF rules and Rule 56, and will almost always deem uncontested SMF facts admitted, regardless of record support.

Several principles form the pillars of the Seventh Circuit’s position. First, the court points to the adversarial system. In an early case on this question, the court observed that although a party has an ethical obligation, under Rule 11, not to move for summary judgment while citing to facts to do not support their proposition, “judges may let the adversary system take its course” if a fact goes uncontested.¹³⁰ Second, the Seventh Circuit points to the usefulness of the local rules in managing a district court’s docket.¹³¹ Third, the court has recited the district court’s broad discretion in requiring strict compliance with the local rule through application of “deemed admitted” provisions in SMF rules.¹³²

Accordingly, SMF rules that deem facts admitted have repeatedly been held to be proper in the Seventh Circuit.¹³³ Based on this framework, enforcement of the SMF rules in the three districts that permit unsupported assertions to be admitted—the Northern District of Illinois, the Central District of Illinois, and the Eastern District of

¹²⁹ FED. R. CIV. P. 83.

¹³⁰ *Herman v. Chicago*, 870 F.2d 400, 404 (7th Cir. 1989).

¹³¹ *Deere & Co. v. Ohio Gear*, 462 F.3d 701, 706-07 (7th Cir. 2006) (“It is of course true that district courts have broad discretion to manage their dockets and that local procedural rules are important case management tools.”).

¹³² *Koszola v. Bd. of Educ. of Chi.*, 385 F.3d 1104, 1109 (7th Cir. 2004) (“We have emphasized the importance of local rules and have consistently and repeatedly upheld a district court’s discretion to require strict compliance with its local rules governing summary judgment.”) (quoting *Metro. Life Ins. Co. v. Johnson*, 297 F.3d 558, 562 (7th Cir. 2002)).

¹³³ *See, e.g., Doe v. Cunningham*, 30 F.3d 879, 882-83 (7th Cir. 1994) (“Such a rule, however, whether adopted as part of a court’s order or as a Local Rule, is entirely proper.”); *see also Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994) (citing, by 1994, to no fewer than 11 cases in which the court has “repeatedly upheld the strict enforcement of these rules”).

Wisconsin¹³⁴—has been strict.¹³⁵

Oftentimes, the facts that are “deemed admitted” during the summary judgment have been held, through Federal Rule 56(d), to be binding throughout the entire trial.¹³⁶ This approach follows from Circuit Judge Richard Posner’s proclamation that “[a]n admission trumps evidence, rather than vice versa.”¹³⁷ Posner has also noted that strict, literal enforcement of the SMF rule serves to “winnow the wheat from the chaff,” at least in the defense of certain suits that are prone to delay and evasion tactics.¹³⁸ Chief Judge Frank Easterbrook has analogized an SMF rule to Rule 36, which governs requests for admissions and the binding effect that those admissions have.¹³⁹

¹³⁴ C.D. ILL. R. 7.1(d)(2) (“A failure to respond shall be deemed an admission of the motion.”); N.D. ILL. R. 56.1(b)(3)(C) (“All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party.”); E.D. WIS. R. 56.2(e) (“In deciding a motion for summary judgment, the Court must conclude that there is no genuine material issue as to any proposed finding of fact to which no response is set out.”). These three rules account for only three of the seven districts in the Seventh Circuit. Two of the other districts (The Western District of Wisconsin and the Southern District of Illinois) do not have local SMF rules. The remaining two districts have local rules, but their facts will be deemed admitted only if supported by the evidence, thus addressing and resolving the very concern with which this Note is focused. S.D. IND. R. 56.1(e) (“For purposes of deciding the motion for summary judgment, the Court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy”); N.D. IND. R. 56.1(b) (“In determining the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy.”); *see also* *Gazarkiewicz v. Kingsford Heights*, 359 F.3d 933, 947 n.6 (7th Cir. 2004) (requiring, per the wording of the Northern District’s SMF rule, that the SMF be “supported by admissible evidence.”).

¹³⁵ For an excellent summary of the strict enforcement in Northern District of Illinois and the Seventh Circuit, *see* Iain D. Johnston, *Legal Writing: Summary Judgment Motions in the Northern District: The Importance of Local Rules 12M & 12N*, 12 C.B.A. REC. 24, 24-29 (Apr. 1998) (Local rules 12M and 12N in the Northern District were incorporated into the renumbered Rule 56.1). *See, e.g.*, *Hedrich v. Bd. of Regents*, 274 F.3d 1174, 1178 (7th Cir. 2001); *Michas v. Health Cost Controls of Ill., Inc.*, 209 F.3d 687, 689 (7th Cir. 2000); *McGuire v. United Parcel Serv.*, 152 F.3d 673, 674-75 (7th Cir. 1998); *Herman v. Chicago*, 870 F.2d 400, 404 (7th Cir. 1989).

¹³⁶ *See, e.g.*, *Levy v. Versar, Inc.*, 882 F. Supp. 736, 738 (N.D. Ill. 1995) (“The Court finds that these facts are without substantial controversy and will be deemed established at trial, pursuant to Fed. R. Civ. P. 56(d).”); *see also* *Tobey v. Extel/JWP, Inc.*, 985 F.2d 330, 333 (7th Cir. 1993) (“But under a rule of the district court the validity of which she does not and could not question, the failure to contest a party’s statement of uncontested facts is treated as a binding admission of the truth of those facts.”) (internal citation omitted).

¹³⁷ *Tobey*, 985 F.2d at 333.

¹³⁸ *Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101, 1103 (7th Cir. 1990).

¹³⁹ *Huey v. United Parcel Serv., Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999) (“So if Local Rule 6.05(d) equates silence with admission, it has the company of Rule 36(a).”).

B. *Third Circuit: Admissions Regardless of the Local Rule's Language*

The Third Circuit, in particular the Districts of New Jersey and the Virgin Islands, add another wrinkle to the errors of the Seventh Circuit. In its guiding precedent on the matter, *Anchorage Associates v. Virgin Islands Board of Tax Review*,¹⁴⁰ the Third Circuit noted that it was “less comfortable” with the requirement that SMF facts only be accepted as true if shown to have “appropriate record support.”¹⁴¹ Similar to the Seventh Circuit, the *Anchorage* court analogized the SMF admissions to Rule 36 requests for admissions, writing that the two are “entirely compatible.”¹⁴² Although this language was dictum,¹⁴³ it is often invoked in support of admitting undisputed facts in the Western and Central District of Pennsylvania (the only two districts in the circuit with SMF rules providing for facts to be deemed “admitted” regardless of record support).¹⁴⁴

¹⁴⁰ 922 F.2d 168 (3d Cir. 1990). Hearing the case on appeal from the District of the Virgin Islands, the Third Circuit dealt with the predecessor to the current local rule for the district, D.V.I. R. 56(b), which says nothing about facts being deemed “admitted.” This is similar to the District of New Jersey, whose short-and-simple local rule says nothing about admission. D.N.J. R. 56.1 (“On motions for summary judgment, each side shall furnish a statement which sets forth material facts as to which there exists or does not exist a genuine issue.”). Two other districts—the District of Delaware and the Eastern District of Pennsylvania—do not have SMF rules. The remaining two districts—the Middle and Western Districts of Pennsylvania—have rules that deem facts admitted if uncontraverted, without explicitly stating any qualifications or requirements that these facts be supported by the evidence that is cited. M.D. PA. R. 56.1 (“All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.”); W.D. PA. R. 56.1 (“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.”).

¹⁴¹ *Anchorage Assocs. v. V.I. Bd. of Tax Review*, 922 F.2d 168, 174-76 (3d Cir. 1990).

¹⁴² *Id.* at 176 n.7 (“This Court and others have held that ‘deemed admissions’ under Fed. R. Civ. P. 36(a) are sufficient to support orders of summary judgment. While Rule 56 makes specific reference only to pleadings, depositions, answers to interrogatories, admissions, and affidavits, a local rule giving preclusive effect to facts asserted in a motion that remain unchallenged after a stated period of time is entirely compatible with a rule giving preclusive effect to unchallenged allegations contained in a complaint or a demand for admission.”) (internal citations omitted). Note that the new version of Rule 56, effective December 1, 2007, does *not* refer to “admissions,” and instead refers to “discovery and disclosure materials.” FED. R. CIV. P. 56(c).

¹⁴³ *Anchorage Assocs.*, 922 F.2d at 176 (referring to the question of whether unsupported assertions in SMFs are admitted, the court wrote, “We need not resolve that issue here . . .”).

¹⁴⁴ See, e.g., *Miller v. Ashcroft*, 76 F. App’x 457, 462 (3d Cir. 2003); *Loving v. Borough of E. McKeesport*, No. 2:02cv1727, 2005 U.S. Dist. LEXIS 37514, at *3 n.1 (W.D. Pa. Dec. 29, 2005) (“Plaintiffs have not responded to Defendants’ Statement of Undisputed Material Facts Therefore, pursuant to Local Rule 56.1.E, the facts set forth in Defendants’ Statement of Undisputed Material Facts are deemed to be admitted for the purpose of the instant motion.”);

Even more troubling is the way in which the District of New Jersey—whose local SMF says *nothing* about admissions¹⁴⁵—has read the *Anchorage Associates* holding into their rule, and thereby deems facts admitted when uncontroverted.¹⁴⁶ At least one District of New Jersey judge went so far as to say that, when the SMF assertions are uncontroverted, the judge is “bound . . . to accept as true Defendants’ facts as set forth in Defendants’ moving papers.”¹⁴⁷ The District Court for the Virgin Islands, whose SMF rule also fails to say anything about admissions, looks to have followed the District of New Jersey’s lead.¹⁴⁸

The trend should give us serious pause. Notwithstanding this Note’s disagreement with the approach of the Seventh Circuit (among others), at least their local SMF rules put litigants on notice regarding the “deemed admitted” provisions. The same can not be said for litigants in New Jersey and the Virgin Islands, where the application of the local rule reaches well beyond its language.

Smith v. Burrows Corp., No. 00-1972, 2005 U.S. Dist. LEXIS 45662, at *1 (W.D. Pa. Aug. 31, 2005) (“[D]efendant’s statement of material facts [will] be deemed admitted . . .”). Compare Lasko v. Hendershot, No. 3:CV-05-0991, 2006 U.S. Dist. LEXIS 70824, at *5 (M.D. Pa. Sept. 29, 2006) (ignoring the plaintiff’s own Statement of Facts because it did not conform to the requirements of the local SMF rule), with Dreibelbis v. Young, No. 06-CV-2055, 2007 U.S. Dist. LEXIS 90659, at *6-7 (M.D. Pa. Dec. 10, 2007) (deeming facts admitted, at least to the extent that they were not contraverted by Plaintiff’s own Statement of Facts (which was, itself, insufficient under the requirements of the local SMF rule)).

¹⁴⁵ D.N.J. R. 56.1.

¹⁴⁶ See, e.g., Hill v. Algor, 85 F. Supp. 2d 391, 408 n.26 (D.N.J. 2000) (“Under L. Civ. R. 56.1, facts submitted in the statement of material facts which remain uncontested by the opposing party are deemed admitted.”); see also Digiacomo v. Prudential Ins. Co. of Am., 501 F. Supp. 2d 626, 629 n.4 (D.N.J. 2007); White v. Camden City Bd. of Educ., 251 F. Supp. 2d 1242, 1246 n.1 (D.N.J. 2003); S.C. v. Deptford Twp. Bd. of Educ., 248 F. Supp. 2d 368, 374 n.3 (D.N.J. 2003); Smith v. Estate of Smith, 248 F. Supp. 2d 348, 353 n.2 (D.N.J. 2003). But see Martinez v. Scerbo, No. 06-CV-819, 2007 U.S. Dist. LEXIS 70018, at *4 (D.N.J. Sept. 20, 2007) (quoting *Anchorage Associates*, 922 F.2d at 176, for the requirement that only facts “with appropriate” record support be deemed admitted, despite the fact that the *Anchorage Associates* court claimed that it was “less comfortable” with such language).

¹⁴⁷ Goodwin v. Martin, No. 06-2877, 2007 U.S. Dist. LEXIS 76671, at *7 (D.N.J. Oct. 12, 2007) (“As no evidence or documentation has been presented by Plaintiff to rebut Defendants’ argument, and the Court is bound under Local Civil Rule 56.1 and its case law progeny to accept as true Defendants’ statement of facts as set forth in Defendants’ moving papers, the Court is left with no alternative other than to credit Defendants’ argument.”). Although this is a powerful thread running through District of New Jersey case law, it is not the only one. Some cases have required that the facts cited in the SMF not be “contradicted” by the record, see, e.g., Longoria v. New Jersey, 168 F. Supp. 2d 308, 312 n.1 (D.N.J. 2001), while others require that assertions are “backed up by evidence,” see, e.g., Maertin v. Armstrong World Indus., No. 95-2849, 2000 U.S. Dist. LEXIS 5857, at *4 n.1 (D.N.J. May 3, 2000) (“Plaintiffs did not respond to that Statement, and thus those facts, which are backed up by evidence, are deemed admitted.”). These two lines were recently applied and read into Rule 56.1 in *Rosenberg v. JCA Associates*, No. 03-0274, 2007 U.S. Dist. LEXIS 23570, at *30-31 (D.N.J. Mar. 30, 2007), and this approach has since been adopted by other judges in the district. See, e.g., Sampson v. Ctr. for Family Guidance, No. 05-4975, 2007 U.S. Dist. LEXIS 60749, *1-2 n.1 (D.N.J. Aug. 16, 2007).

¹⁴⁸ Matheson v. V.I. Cmty. Bank, Corp., 297 F. Supp. 2d 819, 831 (D.V.I. 2003) (citing Hill v. Algor, 85 F. Supp. 2d 391 (D.N.J. 2000)).

C. *Second Circuit: A Careful Approach to the Conflict*

The Second Circuit has taken an altogether different approach.¹⁴⁹ In two significant cases, the court has been presented with unsupported assertions in the moving party's SMF, to which the opposing party did not directly respond. In both cases, the court has refused to read the local SMF rule in such a way that it conflicts with Rule 56. In the end, the Second Circuit's approach, unlike that of some other circuits, is in harmony with the federal rule.

The court's first brush with the SMF issue came in 2001, when it decided *Holtz v. Rockefeller & Co., Inc.*¹⁵⁰ In this case, the plaintiff alleged sexual harassment, and the defendant moved for summary judgment.¹⁵¹ In its motion, the defendant included an SMF, per the local rule.¹⁵² However, the defendant's SMF included statements that were unsupported by the record.¹⁵³ And, as it happened, the plaintiff did not submit her own SMF to controvert those assertions.¹⁵⁴ Thus, on the plain language of the local rule—which deems all uncontroverted facts “admitted”—the defendant's assertions should have been accepted as true, even where they were contradicted by the record, and thus

¹⁴⁹ The Second Circuit includes the four districts of New York State (Northern, Western, Southern, and Eastern), the District of Connecticut, and the District of Vermont. All of the six district courts in the Second Circuit have local rules which deem uncontested SMF statements to be “admitted.” See D. CONN. R. 56(a)(1); E.D.N.Y. R. 56.1(c); N.D.N.Y. R. 7(a)(3); S.D.N.Y. R. 56.1(c); W.D.N.Y. R. 56.1(c); D. VT. R. 7.1(c)(3). Only one of the districts' SMF rules—District of Connecticut Local Rule 56.1—specifies that facts must be “supported by the evidence” in order to be deemed “admitted,” thereby recognizing and resolving the very concern that this Note addresses. *Id.* (“All material facts set forth in [the movant's SMF] and supported by the evidence will be deemed admitted unless controverted by the [non-movant's SMF].”) (emphasis added). The other five districts' SMF rules feature no such qualifier to their admissions. See S.D.N.Y. R. 56.1(c) (“Each numbered paragraph in the [moving party's SMF] will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.”); E.D.N.Y. R. 56.1(c) (same as the Southern District); N.D.N.Y. R. 7(a)(3) (“The Court shall deem admitted any facts set forth in the Statement of Material Facts that the opposing party does not specifically controvert.” (underline in original)); W.D.N.Y. R. 56.1(c) (“All material facts set forth in the [moving party's SMF] will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.”); D. VT. R. 7.1(c)(3) (“All material facts in the [movant's SMF] are deemed to be admitted unless controverted by the opposing party's statement.”).

¹⁵⁰ 258 F.3d 62 (2d Cir. 2001).

¹⁵¹ *Id.* at 69.

¹⁵² S.D.N.Y. R. 56.1.

¹⁵³ *Holtz*, 258 F.3d at 73. This included key allegations that the accused sexual harasser “never physically touched Holtz’ except on the hand,” and that the harasser “never physically touched Holtz . . . in a sexual or offensive manner.” *Id.* at 72. The court does not specify whether the record didn't support the defendant's citations, or the defendant failed to cite the record altogether.

¹⁵⁴ *Id.* at 72.

might have justified dismissal of the plaintiff's claim.¹⁵⁵

The court, however, was not willing to read the local rule so literally, noting that “a[n] [SMF] is not itself a vehicle for making factual assertions that are otherwise unsupported in the record.”¹⁵⁶ The court thus laid out the law: “Where, as here, the record does not support the assertions in a[n] [SMF], those assertions should be disregarded and the record reviewed independently.”¹⁵⁷ The court recognized that reading the local rule literally would “create tension” between the local rule and Rule 56, observing that Rule 56 only permits summary judgment where it is “appropriate,” and that summary judgment should be granted only where the motion establishes an absence of a genuine issue, and otherwise denied, even if it is uncontested.¹⁵⁸

To be sure, the *Holtz* discussion regarding SMFs was merely detailed dictum.¹⁵⁹ However, any doubts as to *Holtz*'s precedential power would be laid to rest two years later, when the Second Circuit solidified its position in *Giannullo v. City of New York*¹⁶⁰ (the Fourth Amendment claim, the facts of which are discussed in the Introduction, *supra*).

The *Giannullo* court, in a split decision, noted that the district court—following the language of the local rule—did not even check whether the cited evidence actually supported the assertion.¹⁶¹ While acknowledging that the SMF was intended to streamline the summary judgment process, the Second Circuit would not accept that the local rule permitted parties to win on utterly unsupported statements, so long as they are uncontroverted.¹⁶² According to the court, “[s]uch an approach would derogate the truth-finding functions of the judicial process by substituting convenience for facts.”¹⁶³

But the *Giannullo* court went even further—perhaps too far—by holding that the movant, even if she does not bear the burden of persuasion, must nevertheless “provid[e] admissible evidence.”¹⁶⁴ This

¹⁵⁵ *Id.* at 73.

¹⁵⁶ *Id.* at 74.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 74 n.1.

¹⁵⁹ Immediately before the dictum, the court had acknowledged that the District Court judge had actually reviewed the record, overlooking the plaintiff's failure to submit an SMF. Thus, the Circuit Court was obliged to do the same, irrespective of the SMF. *Id.*

¹⁶⁰ 322 F.3d 139 (2d Cir. 2003). In *Giannullo*, the court stated that, in *Holtz*, it had “held” that SMF assertions required record support in order to be deemed “admitted.” *Giannullo*, 322 F.3d at 140. Thus, *Giannullo* turned the *Holtz* dictum into indisputable law in the Second Circuit. The fact that the *Holtz* language was dictum was a factor for the dissenting judge in *Giannullo*. *Id.* at 146.

¹⁶¹ *Id.* at 142 n.5.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 140-41 (emphasis added) (“Of particular relevance here, where the movant fail[s] to fulfill its initial burden of providing admissible evidence of the material facts entitling it to

statement created protest from the dissenting judge, which in turn prompted a footnote from the majority explaining that *Celotex* was “wholly distinguishable” because the defendant in *Giannullo* was “affirmatively asserting” a sequence of events.¹⁶⁵ The Second Circuit is yet to clarify this matter,¹⁶⁶ although *Celotex* is clear in holding that the defendant need not *provide* evidence when moving for summary judgment.¹⁶⁷

summary judgment, summary judgment must be denied, even if no opposing evidentiary matter is presented, for the non-movant is not required to rebut an insufficient showing.” (internal quotation marks and citations omitted)).

¹⁶⁵ *Id.* at 141 n.2. The contrast between the strong language of the *Giannullo* decision and this distinguishing footnote has led to some confusion among the lower courts as to how to deal with situations in which a plaintiff has failed to respond to a moving defendant’s SMF. Some district court judges follow the distinction outlined in the *Giannullo* footnote; that is, when the moving party does not bear the burden of proof on the relevant element of the claim, the movant needs to provide admissible evidence only if it is trying to “affirmatively assert[]” something. *Id.* (“Nothing in *Celotex*, or in Fed. R. Civ. P. 56, would justify a defendant in such a situation in simply asserting the fact of such a sequence, without any supporting evidence whatever, and claim thereby to have shifted the burden to the plaintiff of disproving it.”); *see, e.g.*, *Webster v. City of N.Y.*, 333 F. Supp. 2d 184, 206-07 (S.D.N.Y. 2004).

(“Defendants here have not affirmatively asserted the existence of a particular factual scenario . . . but have, instead, sought to demonstrate that there is an absence of evidence to support Plaintiffs’ claim by outlining the purported flaws in the factual basis for Plaintiffs’ *Monell* claim. Accordingly, they have satisfied their burden on the instant motion . . .”);

Feurtado v. City of N.Y., 337 F. Supp. 2d 593, 599 (S.D.N.Y. 2004) (“While *Giannullo* does contain a broad statement that a motion for summary judgment must be denied if the movant does not meet its burden of providing ‘admissible evidence’ in support of its motion, *Giannullo* did not purport to contradict *Celotex*’s holding that in fact a movant is not required to provide admissible evidence in cases where the movant does not bear the burden of proof on the issue that is the subject of its motion.” (internal citations omitted)).

In contrast, other district court judges—either through reliance on a broad interpretation or out of a fear of reversal—appear to stick to the strong, above-the-line language in *Giannullo* that the movant must always “provid[e] admissible evidence.” *See, e.g.*, *D’Nelson v. Costco Wholesale Corp.*, No. 03-CV-219, 2006 U.S. Dist. LEXIS 16986, at *9 (E.D.N.Y. Mar. 22, 2006) (“If the moving party fails to carry its initial burden of *providing* admissible evidence of facts entitling it to summary judgment, then the summary-judgment motion fails, even if the non-movant has not presented evidence establishing a genuine issue of fact.” (citing *Giannullo*) (emphasis added)); *Derienzo v. Metro. Transp. Auth.*, 404 F. Supp. 2d 555, 560 (S.D.N.Y. 2005) (“[T]he Court will, in an abundance of caution, determine whether the relevant assertions in defendants’ Rule 56.1 Statement cite adequately to admissible evidence. The plain language of Local Rule 56.1(d) and a lack of appellate authority addressing the issue post-*Giannullo* further warrants this decision.”); *Pack v. Artuz*, 348 F. Supp. 2d 63, 78 (S.D.N.Y. 2004) (same as *D’Nelson*).

¹⁶⁶ Later Second Circuit cases citing to *Giannullo*, but failing to further clarify or explain its holding, include *Vermont Teddy Bear Co. v. 1-800-BEARGRAM Co.*, 373 F.3d 241, 244 (2d Cir. 2004), and *24/7 Records, Inc. v. Sony Music Entertainment, Inc.*, 429 F.3d 39, 46 (2d Cir. 2005). In the District of Vermont, the *Giannullo* footnote prevails, and the court distinguishes between motions based on “affirmative assertions” and motions based on the theory that the plaintiff has no evidence. *Martin v. Gold*, No. 1:05-CV-28, 2007 WL 474005, at *8 (D. Vt. Feb. 8, 2007). As noted in note 149, *supra*, the Connecticut Rule is unaffected by the *Giannullo* decision because, on its own terms, the rule already requires that the motion be “supported by the evidence,” and makes no explicit requirement that the defendant “provide” evidence. D. CONN. R. 56(a)(1).

¹⁶⁷ *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (“[T]he burden on the moving party

III. DEEMING FACTS ADMITTED CONFLICTS WITH FEDERAL RULE 56

The Second Circuit has demonstrated a better grasp of the “deemed admitted” issue than some of its sister circuits (notwithstanding its confusing language in *Gianullo* regarding *providing* language). The court has read the rule in such a way as to avoid “creat[ing] tension” with the federal rule.¹⁶⁸ In so doing, the court has demonstrated an understanding that summary judgment, unlike motions to dismiss and Rule 36 requests, is a process concerned with the evidence, and not assertions.¹⁶⁹ In essence, the court refuses to deem assertions admitted without “appropriate record support.”¹⁷⁰

A. *Summary Judgment Deals with Evidence, Not Assertions*

Subsection (c) of Rule 56 specifies that “[t]he 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.”¹⁷¹ As is clear, the rule refers to the *evidence*, not the *moving papers*; specifically, to “the pleadings, the discovery and disclosure materials on file, and any affidavits.”¹⁷² Indeed, this “show me” requirement is precisely what distinguishes a Rule 56 motion from a motion to dismiss under Federal Rule 12(b)(6) or 12(c).¹⁷³

Even to the extent that courts have gone beyond the literal text of

may be discharged by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.”)

¹⁶⁸ *Holtz v. Rockefeller*, 258 F.3d 62, 74 n.1 (2d Cir. 2001).

¹⁶⁹ *Gianullo*, 322 F.3d at 143 (“[Deeming unsupported facts admitted] would derogate the truth-finding functions of the judicial process by substituting convenience for facts.”).

¹⁷⁰ *Jaroma v. Massey*, 873 F.2d 17, 20 (1st Cir. 1989).

¹⁷¹ FED. R. CIV. P. 56(c). This portion of the rule reflects a recent amendment. Prior to December 1, 2007, this portion of the rule read, “. . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any” FED. R. CIV. P. 56(c) (2006). Although the prior version of the rule explicitly referred to “admissions on file,” it was dubious then—as it remains today—to contend that a local summary judgment rule can create an admission out of a failure to respond when the non-movant has failed to extinguish its burden of putting forth a motion that is properly “supported.” FED. R. CIV. P. 56(e) (2006); FED. R. CIV. P. 56(e) (2008). This is part of what distinguishes Rule 56 from Rule 36 requests for admission. See FED. R. CIV. P. 36(a), discussed in greater detail *infra*.

¹⁷² FED. R. CIV. P. 56(c).

¹⁷³ When a motion to dismiss is supplemented by “matters outside the pleadings,” it can no longer be treated as a motion to dismiss, and instead “must be treated” as a Rule 56 motion. FED. R. CIV. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.”).

Rule 56(c) to consider unenumerated materials, these materials must still be “admissible in evidence,”¹⁷⁴ or at least the “kinds of evidentiary materials listed in Rule 56(c),” and they cannot be “the mere pleadings themselves.”¹⁷⁵ SMFs are not of such an evidentiary ilk, and are far more akin to the pleadings: They are signed by the attorney, but they are not based on personal knowledge and not admissible at trial.¹⁷⁶ In fact, the “core purpose” of summary judgment is to “pierce unsupported pleadings.”¹⁷⁷ In this sense, it is odd, and “[in]consistent with” Rule 56,¹⁷⁸ for district courts to establish local rules that *reward* parties for filing unsupported statements to which they have no personal knowledge; the clear import of Rule 56 is to have cases decided on the record, not an attorney’s “listing of material facts,” as the local rule would deem “admitted.”¹⁷⁹

B. *Opposing Party Need Only Respond when the Motion Is Properly Supported*¹⁸⁰

Regarding the opposing party’s obligation to respond,¹⁸¹ Rule 56 specifically states that the non-movant’s obligations arise “[w]hen a motion for summary judgment is properly made and *supported*”¹⁸² The use of the word “when” can only mean one thing: “The nonmovant’s burden of production arises only after the movant has successfully borne his initial burden of production.”¹⁸³ This is reinforced by the Court’s decision in *Celotex Corp. v. Catrett*,¹⁸⁴ part of the 1986

¹⁷⁴ BRUNET ET AL., *supra* note 39, at 108-09.

¹⁷⁵ *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

¹⁷⁶ *See* note 90-92 *supra*.

¹⁷⁷ BRUNET ET AL., *supra* note 39, at 210; *see also* FREEDMAN, *supra* note 44, at 11 (summary judgment exists to “go behind the pleadings” or to “pierce the pleadings”).

¹⁷⁸ FED. R. CIV. P. 83.

¹⁷⁹ *See, e.g.*, E.D. VA. R. 56 (“Court may assume that facts identified by the moving party in its listing of material facts are *admitted*, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.”) (emphasis added).

¹⁸⁰ FED. R. CIV. P. 56(e)(2) (emphasis added) (“(2) *Opposing Party’s Obligation to Respond*. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.”).

¹⁸¹ *Id.*

¹⁸² *Id.* (emphasis added).

¹⁸³ QUARLES ET AL., *supra* note 40, at 115; *see also* BRUNET ET AL., *supra* note 39, at 16-17 (citing *John v. La. (Bd. of Trs. for State Colls. and Univs., et al.)*, 757 F.2d 698, 703 (5th Cir. 1985) (“Under Rule 56, Fed. R. Civ. P., a response to a motion for summary judgment is not required unless the moving party carries the initial burden of demonstrating an absence of material questions of fact.”)).

¹⁸⁴ 477 U.S. 317 (1986).

“trilogy” of cases that gave definition to summary judgment.¹⁸⁵

Celotex was a decision focused almost exclusively on the text of Rule 56.¹⁸⁶ All nine justices agreed on how the mechanics of summary judgment were supposed to operate.¹⁸⁷ The Court adhered the two-step method for summary judgment, referring to the movant’s “initial responsibility of informing the district court of the basis for its motion, and identifying those portions [of the record] which it believes demonstrate the absence of a genuine issue of material fact.”¹⁸⁸ This implies that the initial burden of production cannot be met via citations in an SMF that “identify[] the portions”¹⁸⁹ of the record which simply do not support (or, even more, contradict) the assertion in the SMF. Yet on their face, that is what local SMF rules that deem unsupported assertions “admitted,” regardless of record support, would purport to do.¹⁹⁰

Further support can be found in the last sentence of subsection (e): If the non-movant does not respond, summary judgment can still only be entered “if appropriate.”¹⁹¹ What makes a motion “appropriate” is determined by the rest of the rule,¹⁹² which requires that a movant’s motion be properly “supported” before the non-movant is obligated to respond.¹⁹³ This portion of the rule clearly anticipates an exercise of judgment by the district court. This, in turn, assumes that the judge will look at the evidence, and not rely on an unsupported assertion made in the movant’s SMF.

In light of this well-defined burden-shifting process, the Seventh Circuit’s reliance on the adversarial process to uphold local SMF rules that conflict with Rule 56 is misplaced. To suggest that the opposing

¹⁸⁵ The other cases in the “trilogy” were *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

¹⁸⁶ *Celotex*, 477 U.S. at 322-26.

¹⁸⁷ The 5-4 split decision was a reflection of the justices’ disagreement about the application of the rule to the facts of the case. *Id.* at 334 (Brennan, J., dissenting) (“I do not read the Court’s opinion to say anything inconsistent with or different than the preceding discussion.”); 10A WRIGHT ET AL., *supra* note 52, § 2727 (explaining the utility of Part I of Justice Brennan’s dissent, in that “he elaborated more fully on the way in which the burden shifts between the parties to the action . . .”).

¹⁸⁸ *Celotex*, 477 U.S. at 323.

¹⁸⁹ *Id.*

¹⁹⁰ *See, e.g.*, E.D. VA. R. 56. (“[T]he Court may assume that facts identified by the moving party in its listing of material facts are admitted . . .”).

¹⁹¹ FED. R. CIV. P. 56(e)(2) (“If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.”).

¹⁹² *See, e.g.*, *Deal v. United States*, 508 U.S. 129, 132 (1993) (observing that it is a “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”); *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991) (referring to “the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.” (internal citations omitted)).

¹⁹³ FED. R. CIV. P. 56(e)(2).

party “needs to do its job” ignores the fact that the non-movant’s “job” does not exist until the moving party has done *its* “job.”¹⁹⁴ Just as the district judge should not step in to save the drowning non-movant, the judge should also not aid the movant by enforcing local rules in such a way as to abrogate the movant’s duties under Rule 56 and its guiding precedent.¹⁹⁵ As the Second Circuit has observed, “[a]llowing a[n SMF] to substitute for the admissibility requirement set forth in Fed.R.Civ.P. 56(e) would be tantamount to the tail wagging the dog.”¹⁹⁶

C. Rule 56 Is Not Rule 36

As noted above, Judge Easterbrook has equated local SMF rules to Federal Rule 36.¹⁹⁷ Under Rule 36, either party can send a “request for admissions” to its adversary, whereby “[a] matter is admitted unless . . . the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.”¹⁹⁸

Certainly, both rules are concerned with disposing of issues that are not in dispute.¹⁹⁹ But Rule 56 is more nuanced. As the Supreme Court observed in *Celotex*, “[o]ne of the principal purposes of the summary judgment rule” is “to isolate and dispose of *factually unsupported* claims or defenses.”²⁰⁰ This ties in with subsection (e)(2) of Rule 56, which asks whether the movant’s motion was properly “made and *supported*.”²⁰¹ Support is not a concern of Rule 36; the word

¹⁹⁴ See BRUNET ET AL., *supra* note 39, at 16-17.

¹⁹⁵ *Giannullo v. City of N.Y.*, 322 F.3d 139, 141 n.2 (2d Cir. 2003) (“Nothing in *Celotex*, or in Fed. R. Civ. P. 56, would justify a defendant in such a situation in simply asserting the fact of such a sequence, without any supporting evidence whatever, and claim thereby to have shifted the burden to the plaintiff of disproving it.”).

¹⁹⁶ *Holtz v. Rockefeller*, 258 F.3d 62, 74, n.1 (2d Cir. 2001) (quoting *Rivera v. Nat’l R.R. Passenger Corp.*, 152 F.R.D. 479, 484 (S.D.N.Y.1993)).

¹⁹⁷ *Huey v. United Parcel Serv., Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999) (“So if Local Rule 6.05(d) equates silence with admission, it has the company of Rule 36(a).”).

¹⁹⁸ FED. R. CIV. P. 36(a)(3). The rule reads, in relevant part:

(3) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

Id.

¹⁹⁹ *Compare* *Flynn v. Sandahl*, 58 F.3d 283, 288 (7th Cir. 1995) (“The purpose of a summary judgment motion . . . is to eliminate useless trials on undisputed issues of fact.”), *with* *Syracuse Broad. Corp. v. Newhouse*, 271 F.2d 910, 917 (2d Cir. 1959) (“Rule 36 was designed to eliminate the necessity of proving essentially undisputed and peripheral issues of fact.”).

²⁰⁰ *Celotex*, 477 U.S. at 323-24 (1986) (emphasis added).

²⁰¹ FED. R. CIV. P. 56(e)(2).

“support” does not appear in the rule.²⁰² Rule 36 is not affected by what the evidence actually shows, which is unlike summary judgment.²⁰³ Local SMF rules that regard unsupported assertions as true run counter the district court’s directive, on summary judgment, to determine whether the claims are “factually []supported.”²⁰⁴

Further, with Rule 36, the request and the response embody the entire process (except for requests for vouchers of authenticity); if and when these discovery materials are presented to the court, the court need not dig deeper.²⁰⁵ However, as addressed above, Rule 56 directs the court’s attention to “the pleadings, the discovery and disclosure materials on file, and any affidavits” to determine whether a genuine issue of material fact exists.²⁰⁶ SMF rules that deem uncontested facts “admitted” effectively give binding authority to the statements made by attorneys in their moving papers; statements which are not within the attorney’s personal knowledge, and clearly not the object of the Rule 56 evaluation.²⁰⁷

D. *Other Concerns: Judicial Efficiency and Judicial Discretion*

As the foregoing illustrates, summary judgment is concerned with more than simple judicial economy; this is clear from Rule 56, its guiding precedents, and literature on the subject. Nevertheless, circuit courts have observed, in the context of local SMF rules, that “district courts have broad discretion to manage their dockets and . . . local procedural rules are important case management tools.”²⁰⁸

Certainly, this is all true. Yet there are other concerns at play. With regards to docket management, summary judgment is not a mechanism that is to be used lightly. It “cuts off a party’s right to present his case to the jury.”²⁰⁹ When “deemed admitted” provisions of local SMF rules are seen as important docket clearing tools, this further pushes against the Seventh Amendment concern articulated *supra*, and noted by Judge Jack B. Weinstein of the Eastern District of New York:

²⁰² FED. R. CIV. P. 36.

²⁰³ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (The “purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” (internal citations and quotation marks omitted)).

²⁰⁴ *Id.* at 324 (“[A]nd we think [Rule 56] should be interpreted in a way that allows it to accomplish this purpose.”).

²⁰⁵ FED. R. CIV. P. 36.

²⁰⁶ FED. R. CIV. P. 56(c).

²⁰⁷ See 1989 REPORT, *supra* note 26, app. B, 147.

²⁰⁸ *Deere & Co. v. Ohio Gear*, 462 F.3d 701, 706-07 (7th Cir. 2006).

²⁰⁹ *Egelston v. State Univ. Coll. at Geneseo*, 535 F.2d 752, 754 (2d Cir. 1976) (“[S]ummary judgment must be used sparingly since its prophylactic function, when exercised, cuts off a party’s right to present his case to the jury.” (internal quotation marks and citation omitted)).

“The increasing use of . . . summary judgments . . . to limit jury fact finding and set aside verdicts poses a threat to the continued viability of the Seventh Amendment jury trial.”²¹⁰ Summary judgment should be cautiously granted,²¹¹ and this caution is heightened when dealing with local rules that deem facts “admitted” regardless of evidentiary support.

And, to be sure, district courts maintain discretion to manage their affairs through local rules. With 5,575 local rules, and counting, the courts seem keenly aware of their authority in this arena.²¹² Nevertheless, this discretion is expressly curtailed by Rule 83, which mandates that the rules be “consistent with” the federal rules.²¹³

E. *The Federal Judicial Conference Has Spoken*

In February of 1988, the “Local Rules Project” submitted its report to the Committee on Rules of Practice and Procedure.²¹⁴ This project was a “major undertaking,”²¹⁵ that performed the first complete review of all local civil rules since the Knox Committee in 1940.²¹⁶

With regards to SMF rules, the project specifically found that these rules “conflict,” for the reasons stated above, and “should, therefore, be rescinded.”²¹⁷ The committee acknowledged that there is nothing *per se* wrong with rules that require SMF.²¹⁸ What makes them problematic, however, is the fact that they often include provisions that facts “shall be deemed admitted unless controverted.”²¹⁹ Unlike the various evidentiary documents enumerated in Rule 56(c), the assertions by an attorney in an SMF “are not verified, and they need not be made on personal knowledge.”²²⁰ The committee seemed particularly disturbed by the possibility of a party filing a valid affidavit establishing a factual dispute, but nevertheless losing because the attorney failed to

²¹⁰ *In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 263 (E.D.N.Y. 2007).

²¹¹ *Exxon Corp. v. Nat'l Foodline Corp.*, 579 F.2d 1244, 1246 (C.C.P.A. 1978) (“We recognize that summary judgment is to be granted cautiously in order to preserve substantive rights; nonetheless, it is entirely proper where, after following the FRCP procedures, no genuine issue of material fact remains.”); *see also* FREEDMAN, *supra* note 44, at 12 (“Such a summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts.” (quoting *Corwin v. L.A. Newspaper Serv. Bureau, Inc.*, 484 P.2d 953, 958-59 (Cal. 1971))).

²¹² Comm. on Practice and Procedure, *supra* note 80, at 12.

²¹³ FED. R. CIV. P. 83.

²¹⁴ 1989 REPORT, *supra* note 26.

²¹⁵ *Id.* The Conference enlisted “approximately thirty nation-wide experts on federal rulemaking,” at least one half of which were members of the judiciary. *Id.* at 1-3.

²¹⁶ *Id.* at 28. *See also* KNOX REPORT, *supra* note 74.

²¹⁷ *Id.* app. B, 146.

²¹⁸ *Id.* app. B, 147.

²¹⁹ *Id.*

²²⁰ *Id.*

controvert, in its SMF, the assertion of the moving party.²²¹ Deciding the case based on attorneys' statements and not the content of the record and supporting affidavits "is clearly not the intent of Rule 56."²²²

Despite this stern rebuke from a committee sanctioned by the very Conference responsible for making the local rules, courts in the Seventh Circuit, among others, continue to read their local SMF rules in such a way so as to conflict with Rule 56.²²³

IV. RECOMMENDATION TO COURTS: GO BEYOND THE NAKED ASSERTIONS, BUT DON'T "SCOUR THE RECORD," EITHER

Save amending their local rules, judges should make every effort to verify that assertions in an SMF are adequately supported. The mere fact that the attorney has placed a citation after the assertion is not enough; the evidence to which the attorney has cited must support the assertion.²²⁴

This does not mean that the judge needs to "scour the record."²²⁵ The judge simply needs to make sure that the evidence that is cited supports, and does not contradict, the assertion in the SMF.²²⁶ Essentially, district and circuit court judges should interpret "deemed admitted" provisions in SMF rules to mean "deemed admitted, if set forth *with appropriate record support*."²²⁷ This phrase was been adopted in a First Circuit case, *Jaroma v. Massey*,²²⁸ and it is similar to the approach taken by the Second, Eleventh, and D.C. Circuits.²²⁹ Requiring "appropriate record support" reads the local rule in such a way that it does not present a conflict with Federal Rule 56.

²²¹ *Id.*

²²² *Id.*

²²³ One could be that this is considered "just *arguably* inconsistent," in which case attendees at the 1987 Local Rules Conference urged caution with regards to rescinding such local rules. *Id.* at 4. However, the committee did not specifically classify this particular conflict as "arguable," and the conflict has been distinct enough to be noticed by other commentators. *See, e.g.,* BRUNET ET AL., *supra* note 39, at 15.

²²⁴ *Giannullo v. City of N.Y.*, 322 F.3d 139, 141 n.2 (2d Cir. 2003) ("Nothing in *Celotex*, or in Fed. R. Civ. P. 56, would justify a defendant in such a situation in simply asserting the fact of such a sequence, without any supporting evidence whatever, and claim thereby to have shifted the burden to the plaintiff of disproving it.").

²²⁵ *Waldrige v. Am. Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994).

²²⁶ *Giannullo*, 322 F.3d at 143 n.5 (Challenging the dissent's position that the district court is absolved of the duty of checking whether the citation supports the assertion, for "[s]uch an approach would derogate the truth-finding functions of the judicial process by substituting convenience for facts.>").

²²⁷ *Jaroma v. Massey*, 873 F.2d 17, 21 (1st Cir. 1989) ("The court will accept as true all material facts set forth by the moving party with appropriate record support.>").

²²⁸ *Id.*

²²⁹ *See supra* note 36.

This does not force parties to come forward with affidavits when they otherwise have no obligation to do so. If the movant does not bear the burden of proof at trial, then the movant can still simply point to the record, per *Celotex*, and identify the deficiencies in the non-movant's case.²³⁰ But just because the movant is "pointing" to the absence of evidence rather than providing evidence does not entitle the movant to lie (or at least be mistaken) about what she is pointing to, and win.²³¹ Such a situation is no different from making a blanket assertion that the plaintiff does not have any evidence, a method that was rejected in *Celotex* as being "no burden at all."²³²

CONCLUSION

This Note's recommendation flows inevitably from the language, case law, and purpose of Rule 56. SMF rules that deem uncontested facts to be admitted, regardless of record support, conflict with Federal Rule 56, and federal courts should hesitate to ignore this conflict in the name of judicial efficiency; Rule 56 already embodies concerns for both efficiency and having one's case heard on its merits. Summary judgment sits in the shadow of the Seventh Amendment's guarantee to a jury trial, and district courts cannot disturb its careful balancing act by promulgating local rules that conflict with a Federal Rule, as Federal Rule 83 mandates.

²³⁰ *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) ("[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.").

²³¹ *Giannullo*, 322 F.3d at 143 n.5.

²³² *Celotex*, 477 U.S. at 332 (Brennan, J., dissenting); *Id.* at 328 (White, J., concurring) ("But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.").