MEMORANDUM

DATE: February 19, 2008, as supplemented January 25, 2009

TO: Judge Mark Kravitz

FROM: Andrea Kuperman

CC: Judge Lee H. Rosenthal
Judge Michael Baylson
Professor Edward Cooper

SUBJECT: Discretion to Deny Summary Judgment

This memorandum addresses research about Federal Rule of Civil Procedure 56 and whether there is a circuit split regarding discretion to deny a motion for summary judgment when the movant meets the requisite standard in Rule 56.

I. Summary of Research

There is conflicting language in the case law as to whether courts have discretion to deny a motion for summary judgment once the movant meets the standard in Rule 56. While some courts use language implying that granting summary judgment is mandatory when the movant meets the standard in the Rule, other courts have expressly found that there are some rare occasions where a district court may deny a properly supported motion for summary judgment even in the absence of a dispute as to a material fact. A review of the facts underlying the cases on each side of the debate reveals that many of those cases containing the mandatory language use that language in the legal standards portion of the opinion and do not necessarily apply that mandatory language to the facts of the case. For example, most of the cases using that language at the appellate level do not actually involve an appeal of a denial of summary judgment, and most of those at the district court level do not clearly involve a grant of a summary judgment motion despite the court's desire to deny summary

judgment based on efficiency, fairness, or other concerns. The research only turned up one appellate court case that expressly disapproved of the exercise of discretion to deny summary judgment, and that case involved a defense of qualified immunity. Because qualified immunity is a unique area of substantive law with an underlying policy favoring early resolution, the appellate case disapproving of discretionary denials in that context may not mean that district courts lack discretion to deny summary judgment in other contexts.

In contrast to the cases using mandatory language, there are many examples of cases expressly finding and applying discretion to deny summary judgment. At the appellate level there are examples of circuit courts reviewing district court decisions to deny summary judgment and expressly approving of the exercise of discretion in denying summary judgment, as well as cases stating that denial of summary judgment is reviewed for abuse of discretion.[1] At the district court level, there are examples of cases where courts have found that the movant has met her burden of proof under Rule 56, but that the motion should nonetheless be denied because of efficiency or fairness concerns, such as where the issues involved in a motion for partial summary judgment are intertwined with issues proceeding to trial or where the issues are particularly complex.

II. Professor Friedenthal and Mr. Gardner's Analysis of Discretion to Deny Summary Judgment

A law review article from 2002 evaluated some of the case law regarding discretion to deny summary judgment. *See* Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny*

[1] A denial of summary judgment is ordinarily an interlocutory order and not immediately appealable. As a result, many denials of summary judgment are never reviewed because the case goes forward to trial and any appeal usually challenges the trial result rather than the denial of summary judgment. A denial could be reviewed immediately if an interlocutory appeal is certified under 28 U.S.C. § 1292(b). However, there are examples of appellate cases reviewing denials of summary judgment in other contexts, such as where the district court decides cross-motions for summary judgment and the party whose motion was denied appeals, or where the party whose motion was denied appeals the denial after a trial on the merits.

Summary Judgment in the Era of Managerial Judging, 31 HOFSTRA L. REV. 91 (2002). In the article, the authors state that "the notion of judicial discretion to deny an otherwise appropriate summary judgment motion has been evidenced in judicial opinion since the earliest decisions regarding summary judgment under the Federal Rules." *Id.* at 96. The article notes that federal courts are split over whether judges are required to grant summary judgment if it is technically appropriate. *Id.* at 104. According to the article, "[t]he majority of federal courts have held that judges have discretion to deny a motion for summary judgment, even if the parties' submissions would justify granting the motion. The First, Fourth, Fifth, Eighth, and Federal Circuits have each adopted this view. Moreover, various district courts in these and other circuits also have accepted this position." *Id.* The article points to several circumstances in which courts have found it appropriate to exercise discretion to deny a properly supported motion for summary judgment, including complex cases "just not ripe for summary relief," *id.* at 104–05 (citing *John Blair & Co. v. Walton*, 47 F.R.D. 196, 198 (D. Del. 1969) ("facts were complicated and the court was faced with 'lengthy affidavits,' numerous documents and 'voluminous depositions'"); *Fine v. City of New York*, 71 F.R.D. 374 (S.D.N.Y. 1976) ("issues were complex and involved a legal issue of first impression")); cases where "the issues presented in the motion were intertwined with issues not proper for summary adjudication," *id.* at 105–06 (citing *Flores v. Kelley*, 61 F.R.D. 442, 445–47 (N.D. Ind. 1973)); cases where pragmatic considerations of efficiency and fairness counseled against granting summary judgment, *id.* at 106–08 (citing *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 210, 223 (E.D.N.Y. 1979) ("'slight unfairness'" in denial of summary judgment was "'more than overbalanced by advantages to all of the other litigants and the court system itself in more expeditious

and fairer disposition of the whole dispute'");[2] *Toyoshima Corp. of Cal. v. Gen. Footwear, Inc.*, 88 F.R.D. 559, 560 (S.D.N.Y. 1980) (denying summary judgment, and noting that "'on the basis of the cold record, a considerable expenditure of judicial time and effort will be required 'to sift out and piece together the undisputed facts essential to a summary judgment'"); *Forest Hills Early Learning Ctr., Inc. v. Lukhard*, 728 F.2d 230, 233, 245 (4th Cir. 1984) (upholding denial of summary judgment because although summary judgment could have been granted, there were "'critical inadequacies' in the record" and it was appropriate to allow intervention of other interested parties before deciding summary judgment)); and cases where consideration of further pleadings may be warranted, *id.* at

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[2] Professor Friedenthal and Mr. Gardner note that the *Franklin National Bank* court relied on the following factors:

> (1) summary judgment would not shorten the trial because although the issues presented for summary judgment would likely be decided in favor of the movant, other unresolved issues were so closely tied to the summary judgment issues that the movant would still be a party to the case; (2) keeping the movant in the suit would provide a fuller and fairer development of the evidence; (3) because the movant [was] the Government, the cost of staying the litigation [was] not burdensome; (4) because of inconsistency within the circuit it [was] uncertain whether the court would be overturned if it granted summary judgment, and the length of the trial (six months) would increase tremendously if the grant of summary judgment went up on appeal; (5) key witnesses had not yet been deposed; and (6) the probability of settlement would be enhanced if the government remained in the suit, as it was a necessary party for a realistic appraisal of the various claims in the case.

Friedenthal & Gardner, *supra*, at 106 n.96 (citing *Franklin Nat'l Bank*, 478 F. Supp. at 223–24). However, Professor Friedenthal and Mr. Gardner also note:

> [A]t least part of the reasoning in *Franklin* appears to have been rejected by the [Supreme Court's summary judgment] trilogy. The court's concern that a grant of summary judgment likely would be overturned based on the uncertainty within its circuit as to the application of summary judgment seems unjustified after the trilogy. . . . [I]f the trilogy did anything, it made clear to the lower courts that summary judgment is an important tool to dispose of meritless or baseless claims. Yet given that the other factors the *Franklin* court considered would likely still be legitimate after the trilogy, the outcome probably would be the same today.

Id.

108–09 (citing *First Am. Bank, N.A. v. United Equity Corp.*, 89 F.R.D 81, 87 (D.D.C. 1981) (defendants had not yet answered the complaint)).[3]

III. *Anderson v. Liberty Lobby, Inc.*

The confusion about the discretion to deny summary judgment may stem from a key Supreme Court case regarding summary judgment, in which the Court used conflicting language to describe the discretion given to trial court judges in considering motions for summary judgment. *See generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In parts of the majority's opinion, the Court implied that there is little or no discretion to deny a motion for summary judgment if the movant has met his burden. For example, the Court stated that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248 (citing 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2725, at 93–95 (1983)). This language implies that a district court may not deny a properly supported summary judgment motion unless the court finds a material factual dispute. The Court also noted "Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth

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[3] Professor Friedenthal and Mr. Gardner propose that Rule 56 be amended to "rectify [the] conflict between the text of Rule 56 and federal court practice . . . [by] modify[ing] the text of Rule 56 to reflect the majority of the judiciary's understanding concerning summary judgment," which "may be achieved simply by substituting the word 'shall' for the word 'may.'" Friedenthal & Gardner, *supra*, at 125–26. They also propose that Rule 56 provide a nonexclusive list of factors to be considered in deciding whether to deny summary judgment and that the rule require judges to provide a written reason for denying summary judgment. *Id.* at 126. Among the factors that Professor Friedenthal and Mr. Gardner believe are relevant to discretionary denials are "whether the cost upon the nonmovant in meeting a Rule 56 motion would be too high to justify granting summary judgment," *id.*, "whether the matter concerns questions of motive, intent, or credibility," *id.* at 126–27, and "the complexity of the [case] before them and whether issues ripe for summary judgment are intertwined with issues not proper for summary adjudication," *id.* at 129.

specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968)) (additional internal quotation marks omitted). Further, the Court found that after the opponent to a motion for summary judgment sets forth facts showing that there is a genuine issue for trial, "the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law." *Id.* at 250. The Court analogized to a motion for directed verdict in the criminal context, noting with approval that it has been held that upon a motion for directed verdict of acquittal, if the judge "'concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted.'" *Id.* at 253 (quoting *Curley v. United States*, 160 F.2d 229, 232–33 (D.C. Cir. 1947)). All of this language taken together seems to imply that a district court does not have discretion to deny a motion for summary judgment if the requisite standard is met—rather, the judge must grant the motion upon the proper showing by the movant.[4]

However, the *Anderson* Court later suggested just the opposite: "Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course

[4] The language implying a lack of discretion to deny a motion for summary judgment is consistent with statements made by the Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), decided the same day as *Anderson*. *See* Friedenthal & Gardner, *supra*, at 101–02. In *Celotex*, the Court stated: "'[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Id.* at 102 (quoting *Celotex*, 477 U.S. at 322). In their article, Professor Friedenthal and Mr. Gardner note that after *Celotex*, "[t]he Court's apparent position limiting judicial discretion would thus seem crystal clear were it not for another case in the trilogy, *Anderson v. Liberty Lobby Inc.*, decided on the same day as *Celotex*, that included language completely contrary to that quoted above." *Id.*

would be to proceed to a full trial." *Id.* at 255 (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948)). Indeed, *Anderson* has been cited both for the proposition that district courts have discretion to deny summary judgment, *see, e.g.*, *United States v. Certain Real Estate and Personal Prop. Belonging to Hayes*, 943 F.2d 1292, 1297 (11th Cir. 1991), as well as for the proposition that they do not, *see Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam), *aff'd on other grounds*, 515 U.S. 304 (1995). Thus, there is language in some cases showing potential disagreement as to whether there is discretion to deny a well-supported motion for summary judgment. The arguably conflicting language regarding discretion to deny summary judgment is discussed in more detail below. Overall, it may be that the circuits are generally in agreement that a court should grant a summary judgment motion if the movant has met his burden, but that there are some rare instances in which it would be appropriate for the court to deny even a well-supported motion.

IV. Cases Recognizing Discretion to Deny Motions for Summary Judgment

A. Circuit Court Opinions

1. Cases Discussing Discretion

Most of the circuits examining this issue have concluded that there is discretion to deny summary judgment.[5] *See, e.g.*, *Lacks Indus., Inc. v. McKechnie Vehicle Components USA, Inc.*, No. 2008-1167, 2008 WL 4962687, at *2, *5 (Fed. Cir. Nov. 21, 2008) (unpublished) (affirming a denial of the plaintiff's motion for summary judgment on patent validity, noting that it would not "'disturb a trial court's denial of summary judgment unless [it found] that the court [had] indeed abused its

[5] Many of the circuits have issued opinions that state in their boilerplate language regarding the legal standards for analyzing summary judgment motions that the motion must be granted upon the proper showing. However, in cases where the discretion issue truly arises and is substantively evaluated, such as where a circuit court is reviewing a district court's denial of a summary judgment motion, most circuits have leaned towards finding that there is discretion to deny.

discretion,'" and that "the trial court has discretion to deny a motion for summary judgment")[6] (quoting *Little Six, Inc. v. United States*, 280 F.3d 1371, 1373 (Fed. Cir. 2002)); *Enwonwu v. Fulton-Dekalb Hosp. Auth.*, 286 F. App'x 586, 595 (11th Cir. 2008) (unpublished) (per curiam) ("The [district] court's decision to deny [the plaintiff's] motions [for partial summary judgment and for leave to file a renewed motion for summary judgment], because the motions were untimely and because *adjudication was more efficient*, was within a range of reasonable choices and was not influenced by any mistake of law.")[7] (emphasis added); *Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1285–86 (11th Cir. 2001) (holding that denial of a motion for summary judgment is not reviewable after a trial on the merits, and noting that the Supreme Court has held that "'even in the absence of a factual dispute, a district court has the power to 'deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.'"")[8] (quoting *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994) (quoting *Anderson*, 447 U.S. at 255), and

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[6] The appeal arose after the district court decided cross-motions on validity of the patent. The district court denied the plaintiff's motion for summary on validity and granted summary judgment in favor of the defendant on invalidity. *Lacks*, 2008 WL 4962687, at *1. The appellate court concluded that the district court had improperly granted summary judgment in favor of the defendants because there were genuine issues as to material facts. *Id.* at *5. The court summarily dismissed the plaintiff's contention that the district court incorrectly denied its motion for summary judgment, noting that "the trial court has discretion to deny a motion for summary judgment," and that the plaintiff did not argue, and the appellate court did not find, any abuse of discretion. *Id.* It could be argued that the district court's denial of the plaintiff's request for summary judgment was not discretionary, but based on the fact that it had concluded that the defendant's motion for summary judgment should be granted. However, the Federal Circuit did not make this distinction and expressly recognized discretion to deny summary judgment.

[7] The appeal arose after the district court granted the defendant's motion for judgment as a matter of law. *Enwonwu*, 286 F. App'x at 591. On appeal, the plaintiff argued that the granting of that motion was improper and that the district court erred in denying "practically all" of the plaintiff's pretrial motions, including her motion for partial summary judgment. *Id.* at 591–92.

[8] In *Lind*, the district court denied cross-motions for summary judgment, and after a bench trial, entered judgment for the defendant. 254 F.3d at 1283. The plaintiff then appealed the denial of her summary judgment motion. *Id.* The Eleventh Circuit found it improper to review the denial of summary judgment after a trial on the merits and noted that discretion to deny summary judgment exists, but also noted that even if it were to review the denial of summary judgment, it would conclude that summary judgment was properly denied because a genuine issue of material fact existed. *Id.* at 1285–86, 1286 n.5.

citing *United States v. Certain Real and Personal Prop. Belonging to Hayes*, 943 F.2d 1292 (11th Cir. 1991)); *Kunin v. Feofanov*, 69 F.3d 59, 62 (5th Cir. 1995) (per curiam) (affirming and attaching the district court's opinion, which stated: "even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that 'a better course would be to proceed to a full trial'")[9] (quoting *Anderson*, 477 U.S. at 255–56); *United States v. Certain Real and Personal Prop. Belonging to Hayes*, 943 F.2d 1292, 1297 (11th Cir. 1991) ("A trial court is permitted, in its discretion, to deny even a well-supported motion for summary judgment, if it believes the case would benefit from a full hearing. Trial courts may 'deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.' A trial court's discretion to *deny* summary judgment is reviewed only for an abuse of discretion.")[10] (internal citations omitted); *Veillon v. Exploration Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989) (finding no error in refusal to grant a motion for summary judgment because "[a] district judge has discretion to deny a Rule 56 motion even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial")[11] (citing *Marcus v. St.*

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[9] The district court granted the plaintiff's motion for summary judgment and denied the defendant's motion for summary judgment, and the defendant appealed. Although the court noted discretion to deny summary judgment motions, it does not appear that the district court actually exercised discretion in the case because the judgment turned on an issue of law.

[10] The appeal arose because the district court denied the claimant's motion for summary judgment, and "[a]t the ensuing trial, the claimant elected not to present any evidence on her behalf, deciding instead to allow judgment to be entered against her and to appeal the denial of summary judgment." *Hayes*, 943 F.2d at 1294. The Eleventh Circuit dismissed the appeal for lack of *in rem* jurisdiction, *id.*, but concluded that even if it had jurisdiction, the denial of summary judgment was proper, *id.* at 1296. The court found that the claimant had "failed to show there was no issue of fact as to her innocent owner status," and also noted that a trial court has discretion to deny even a well-supported motion for summary judgment, and that there was no reversible error in the denial. *Id.* at 1297.

[11] In *Veillon*, the defendant/intervenor insurer was dismissed and then reinstated in the case. 876 F.2d at 1198–99. After reinstatement, the insurer moved for reconsideration of the reinstatement, or in the alternative, for summary judgment. *Id.* at 1199. The district court refused to consider the motion at a status conference, despite the fact that the plaintiff had not filed an opposition. *Id.* Although the plaintiff and the insurer later reached an agreement that the insurer's motion for reconsideration or summary judgment could be entered in exchange for the insurer's

Paul Fire and Marine Ins. Co., 651 F.2d 379, 382 (5th Cir. 1981); 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2728 (1983)); *Franklin v. Lockhart*, 769 F.2d 509, 510 (8th Cir. 1985) (per curiam) ("This Court has previously noted that even if the district court 'is convinced that the moving party is entitled to [summary] judgment[,] the exercise of sound discretion may dictate that the motion should be *denied*, and the case fully developed.'")[12] (quoting *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979)); *Forest Hills Early Learning Ctr., Inc. v. Lukhard*, 728 F.2d 230, 245 (4th Cir. 1984) ("Even where summary judgment is appropriate on the record so far made in a case, a court may properly decline, for a variety of reasons, to grant it. We think this is such a case . . . .")[13] (citing 10A CHARLES A. WRIGHT,

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agreement not to oppose a later motion by the plaintiff to withdraw funds from the court's registry, the district court dismissed the insurer instead of granting the insurer's summary judgment motion. *See id.* The plaintiff's claims against the remaining defendants proceeded to trial, and following trial, the court entered its final judgment on the pre-trial dismissal of the insurer and post-trial dismissal of the other defendants. *Id.* at 1199–1200. The insurer then appealed the denial of its unopposed motion for reconsideration, as well as a later motion to withdraw funds from the court's registry and the court's imposition of sanctions under Rule 11. *Id.* at 1200. The Fifth Circuit rejected the insurer's contention that the district court erred in refusing to entertain the unopposed motion for reconsideration or summary judgment, explaining that a district court has discretion to deny summary judgment even if the movant carries its burden of proof, and finding that there was no abuse of discretion. *Veillon*, 876 F.2d at 1200.

[12] *Franklin* involved a *pro se* civil rights complaint filed by an inmate under 42 U.S.C. § 1983. 769 F.2d at 509. The plaintiff moved for judgment on the pleadings, and the defendants "moved for summary judgment on the basis that their motion and affidavit resolved all factual issues and that 'the facts although true do not rise to the level of a constitutional violation * * *.'" *Id.* at 510. Instead of responding to the motion for summary judgment, the plaintiff requested counsel, and the magistrate judge recommended dismissal of the complaint. *Id.* The plaintiff objected to the magistrate judge's recommendation on the basis that a hearing was never held, but the district court granted the defendants' motion for summary judgment. *Id.* The Eighth Circuit found that there was a genuine issue of material fact as to the constitutionality of one of the alleged prison practices. *Id.* The court noted that the district court could not properly grant summary judgment based solely on the lack of a response because the movant must show entitlement to judgment, and noted that even if a party has shown entitlement to judgment, discretion may require denial. *See id.*

[13] In *Forest Hills*, the plaintiffs, a group of nonsectarian child care centers, challenged the constitutionality of a Virginia statutory exemption of religiously affiliated child care centers from certain licensing requirements. 728 F.2d at 233. The parties filed cross-motions for summary judgment, and the district court granted the defendant's motion. *Id.* The plaintiffs appealed, and the Fourth Circuit concluded that the challenged exemption was facially overbroad and that summary judgment was improperly granted to the defendant. *Id.* The court concluded that "summary judgment might properly be granted to the nonsectarian plaintiffs on the present record," but held that "because of critical inadequacies in that record and the absence as parties of the sectarian center operators, such a disposition would be inconclusive of the underlying, conflicting constitutional claims of the sectarian and nonsectarian

ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2728 (1983)); *Marcus v. St. Paul Fire and Marine Ins. Co.*, 651 F.2d 379, 382 (5th Cir. 1981) ("Even if St. Paul were entitled to summary judgment, the sound exercise of judicial discretion dictates that the motion should be denied to give the parties an opportunity to fully develop the case. This is particularly true in light of the posture of the entire litigation. A district court can perform this 'negative discretionary function' and deny a Rule 56 motion that may be justifiable under the rule, if policy considerations counsel caution.")[14] (citing *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979), *after remand*, 637 F.2d 1159 (8th Cir. 1980)); *McLain*, 612 F.2d at 356 ("The court has no discretion to Grant a motion for summary judgment, but even if the court is convinced that the moving party is entitled to such a judgment[,] the exercise of sound judicial discretion may dictate that the motion should be Denied, and the case fully developed.");[15] *Safe Flight Instrument Corp. v. McDonnell-Douglas Corp.*, 482

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operators in respect of the state's regulatory scheme." *Id.* The court therefore vacated and remanded to allow the sectarian operators to intervene, but ordered that if the sectarian operators failed to intervene, summary judgment would be granted in favor the plaintiffs. *Id.*

[14] In *Marcus*, the plaintiff, John H. Marcus, appealed after the district court granted summary judgment in favor of the defendant. 651 F.2d at 380. Marcus had filed suit alleging that his insurer had failed to defend suits filed against him in state court. *Id.* at 380–81. Judgments were entered against Marcus in the state court suits, but because Marcus could not pay the judgments, the plaintiffs in those suits initiated parallel proceedings against the insurer. *Id.* at 381. The insurer was granted summary judgment in the state court actions. *Id.* Marcus then sued the insurer in federal court, and the court granted the insurer's summary judgment motion "on grounds of 'stare decisis and collateral estoppel, if not res judicata,'" but gave Marcus the right to refile his suit if the state supreme court reversed and found that the policy covered the suits at issue. *Id.* Marcus then sought reconsideration of the judgment in the district court, but the district court affirmed the estoppel ruling and also found that the actions were not within the policy coverage as a matter of law. *Id.* The Fifth Circuit explained that summary judgment is "a harsh remedy which should be granted only when the result is clear," and that it should not have been granted because there was "substantial evidence . . . in support of the plaintiff's complaint." *Id.* at 382. The court further explained that even if the defendant was entitled to summary judgment, "the sound exercise of judicial discretion dictate[d] that the motion should be denied to give the parties an opportunity to fully develop the case." *Marcus*, 651 F.2d at 382. The court stated: "Without implying that summary judgment was proper under the federal standard, we note that the motion should nevertheless be denied for policy reasons." *Id.*

[15] In *McLain*, the court dismissed the case under Rule 12(b)(6), but the Eighth Circuit noted that because the district court had considered material outside the complaint, it should have been treated as a motion under Rule 56, and that the district court must have found that the case presented no issue of material fact. 612 F.2d at 351. The plaintiff appealed the dismissal. *Id.* The Eighth Circuit explained the "negative discretionary function" that a district

F.2d 1086, 1093 (9th Cir. 1973) (finding no error in the district court's denial of a motion for partial summary judgment, and noting that "[t]he district court did not deny the motion because it was convinced that the motion was without merit, but because the issue presented was so complicated the court did not wish to dispose of it on a motion for partial summary judgment");[16] *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 35 (1st Cir. 1970) (vacating a grant of summary judgment and noting that "a court has discretion to deny an otherwise justified motion for summary judgment if the arguments of the parties have failed to clarify the underlying facts, or if the motion is tainted with procedural unfairness.")[17] (internal citation omitted); *see also Buenrostro v.*

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court performs when deciding a motion for summary judgment, and noted that a court may deny a motion in its discretion even if the court is convinced that the moving party is entitled to judgment. *Id.* at 356. However, the court determined that the validity of the statutes at issue was "at least suspect," and that the district court erred in granting summary judgment on the record presented. *Id.* Because the court reviewed a grant of summary judgment and determined that the challenged statutes were "at least suspect," its statements regarding discretion to deny summary judgment may not have been necessary to the ultimate holding.

[16] *Safe Flight Instrument Corp.* was a patent infringement suit in which the defendants asserted various defenses, including patent invalidity. 482 F.2d at 1087. One of the defendants moved for partial summary judgment dismissing one of the infringement counts of the complaint, and the plaintiff filed a cross-motion for partial summary judgment on that count. *Id.* at 1087–88. Both motions were denied, and a trial resulted in a judgment of invalidity, and an alternative judgment of non-infringement. *See id.* at 1088. The plaintiff appealed. Although the count that was at issue in the summary judgment motions was not involved in the trial and no judgment was entered at the close of trial on that count, the plaintiff argued that the trial court erred in denying its motion for partial summary judgment. *Id.* at 1092. The Ninth Circuit recognized that ordinarily denial of summary judgment is not appealable, but found that an order denying summary judgment "would be appealable if the effect of the order was to deny a petition for a preliminary injunction," and concluded that because the plaintiff sought injunctive relief in its motion for partial summary judgment, the order denying the motion could be reviewed on appeal. *Id.* at 1093 (citing 28 U.S.C. § 1292(a)). The court concluded that the factual premises of the motion were highly complex, and noted that the district court denied the motion not because it lacked merit, but because the issues were too complicated to resolve on summary judgment. *Id.* The court found that "[i]n effect, the denial was without prejudice," and that the denial was "a judicious way to deal with the matter." *Safe Flight Instrument Corp.*, 482 F.2d at 1093.

[17] The court found that with respect to the plaintiff's claim of illegal tying, on the basis of the "scanty record," the defendant had failed to "conclusively [dispel] the possibility of an illegal condition or understanding." *George R. Witten, Jr., Inc.*, 424 F.2d at 36. The court also noted that there was "considerable confusion about what [the defendant] conceded for purposes of its motion for summary judgment." *Id.* As a result, the court found that while "such misunderstandings [would not necessarily] bar summary judgment in every case," in the pending case the court had "already decided that there must be a remand to consider Whitten's charges of conspiracy and attempt to monopolize." *Id.* The court found that "[b]oth these allegations and the charges of illegal tying arrangements seem to turn on essentially the same facts," and that "sensible judicial administration requires that we give the parties additional opportunity to develop the facts relevant to the alleged tying arrangements." *Id.*

Collazo, 973 F.2d 39, 42 n.2 (1st Cir. 1992) (affirming a denial of summary judgment because the defendants were not entitled to qualified immunity, but separately noting that "in some relatively rare instances in which Rule 56 motions might technically be granted, the district courts occasionally exercise a negative discretion in order to permit a potentially deserving case to be more fully developed.");[18] *Madyun v. Thompson*, 657 F.2d 868, 877 & n.1 (7th Cir. 1981) (holding that the district court erred in granting summary judgment in favor of the defendants, and against *pro se* plaintiffs, "without first alerting plaintiffs to the need for counter-affidavits under Rule 56(e)," and noting that "'[t]he court may, however, exercise a sound discretion in denying a motion for summary judgment although on the record the movant has made out a case therefor.'").[19]

2. Cases Discussing Review for Abuse of Discretion

In addition to circuit court cases expressly discussing discretion to deny summary judgment, several circuit courts have explained that an order denying a motion for summary judgment is reviewed only for abuse of discretion, implying approval of the proposition that a district court has discretion to deny a motion for summary judgment. *See SunTiger, Inc. v. Sci. Research Funding*

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[18] *Buenrostro* involved a suit against police officers under 42 U.S.C. § 1983. The district court denied the defendants' motion for summary judgment on qualified immunity grounds. 973 F.2d at 41. The First Circuit noted that it would not ordinarily "entertain an immediate appeal from a denial of summary judgment," but held that "the denial of a government actor's dispositive pretrial motion premised on qualified immunity falls within a narrow exception to the finality principle and is, therefore, immediately appealable." *Id.* (citations omitted). The First Circuit noted that generally "[d]istrict court orders granting or denying brevis disposition are subject to plenary review," but that there are rare instances when district courts exercise negative discretion to deny a motion for summary judgment despite the fact that the motion could technically be granted. *Id.* at 42 & n.2. The court "express[ed] no opinion on whether this negative discretion can flower in a case that turns on qualified immunity," and did not "speculate about what standard of review might then obtain." *Id.* The court seemed to recognize that summary judgment motions based on qualified immunity are unique and that summary judgment decisions in that context may not necessarily reflect the approach that would be used in other types of cases.

[19] The court explained that "Plaintiffs filed no opposing affidavits [in response to the defendants' affidavits submitted on summary judgment,] as required by Rule 56(e) . . . ," *Madyun*, 657 F.2d at 876, and that "[a]s the district court noted, a straightforward application of Rule 56(e) would require that summary judgment be granted in the instant case," *id.*, but later noted that "[t]echnical rigor in dealing with summary judgment procedure is inappropriate where unrepresented and uninformed prisoners are involved," *id.* at 877.

Group, 189 F.3d 1327, 1333 (Fed. Cir. 1999);[20] *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995) ("This court reviews a district court's decision to *deny* a motion for summary judgment for an abuse of discretion.")[21] (citing *Southward v. S. Cent. Ready Mix Supply Corp.*, 7 F.3d 487, 492 (6th Cir. 1993); *Pinney Dock & Trans. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988)); *see also NMT Med., Inc. v. Cardia, Inc.*, 239 F. App'x 593, 600 (Fed. Cir. 2007) (unpublished) ("This court defers to the district court's denial of summary judgment.")[22] (citing *SunTiger, Inc.*, 189 F.3d at 1333). In *SunTiger*, the court rejected the argument that the district court had erred by denying summary judgment of patent invalidity, explaining:

> When a district court *grants* summary judgment, we review without deference to the trial court whether there are disputed material facts, and we review independently whether the prevailing party is entitled to judgment as a matter of law. By contrast, when a district court *denies* summary judgment, we review that decision with considerable deference to the court.

SunTiger, 189 F.3d at 1333 (internal citations omitted) (emphasis in original). The court continued:

> "The trial court has the right to exercise its discretion to deny a motion for summary judgment, even if it determines that a party is entitled to it if in the court's opinion, the case would benefit from a full hearing. The court can perform this 'negative discretionary function' and deny summary judgment if policy considerations so

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[20] The denial of summary judgment arose on appeal because the district court granted summary judgment of non-infringement in favor of the defendant, and denied the defendant's motion for summary judgment on invalidity. *See Sun Tiger*, 189 F.3d at 1332. The plaintiff appealed the non-infringement judgment, and in response to the appeal, the defendant argued that even if the plaintiff could prove infringement, the patent was invalid and the district court erred in denying the defendant's motion for summary judgment on invalidity. *Id.*

[21] The denial of summary judgment arose on appeal because the parties had filed cross-motions for summary judgment and the plaintiff appealed the district court's grant of the defendant's motion and denial of the plaintiff's motion.

[22] The appeal in *NMT* arose after the district court granted the defendant's motion for summary judgment on non-infringement of the patent-in-suit. 239 F. App'x at 594. The Federal Circuit determined that the district court had erred in granting summary judgment in favor of the defendants, but also denied the plaintiff's request that the Federal Circuit award it summary judgment of infringement, finding that it was proper to defer to the district court's denial of summary judgment. *Id.* at 600–01.

> warrant; absent a finding of abuse, the court's discretion will not be disturbed."

Id. (quoting 12 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 56.41[3][d] (3d ed. 1999)). The court also held that "[t]o disturb the decision by the trial court, we would have to find that the facts were so clear that the denial of summary judgment was an unquestioned abuse of discretion." *Id.* at 1334. Judge Lourie dissented in *SunTiger*, noting that "[t]he rule of deference [to the trial court's denial of summary judgment] is a good one, soundly based. However, the rule is not absolute." *Id.* at 1337 (Lourie, J., dissenting). Judge Lourie thought the patent at issue should have been held invalid in light of the fact that validity is a question of law for the court and that the facts were clear that denial of summary judgment was an abuse of discretion. *Id.* at 1337–38.

Thus, at least the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and Federal Circuits have recognized discretion to deny a motion for summary judgment by expressing approval of discretionary denials or by expressing that denials should be reviewed only for abuse of discretion.

B. District Court Opinions

District courts have also explained that they have discretion to deny motions for summary judgment even if the standard in Rule 56 is met. For example, in *Martin Ice Cream Co. v. Chipwich, Inc.*, 554 F. Supp. 933 (S.D.N.Y. 1983), the court stated:

> Were this [claim of price discrimination] the only claim before the Court, we would undoubtedly grant summary judgment. However, in this case, in which the other antitrust claims are to go forward and the discovery required to develop them is virtually the same as that which would be required to develop the price discrimination claim, granting summary judgment at this point would serve no purpose. Such a disposition would save the defendants no costs in time, effort, or money and would deprive the plaintiff of whatever opportunity it may otherwise have to build a foundation under the claim, which has at least been adequately pled. Since the facts are exclusively in the possession of the moving party and discovery has barely begun, it

> appears desirable for the Court to exercise its discretion and deny the motion with leave to renew when discovery is complete.

Martin Ice Cream, 554 F. Supp. at 944 (citing *Schoenbaum v. Firstbrook*, 405 F.2d 215, 218 (2d Cir. 1968); 10A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2728, at 557 & n.56 (1973 and Supp. 1982)).

Likewise, the Eastern District of Pennsylvania has described the discretion to deny summary judgment motions:

> Despite this seemingly compulsory language [of FED. R. CIV. P. 56(c)], the Supreme Court has recognized a district court's discretion to deny a summary judgment motion whenever there is "reason to believe that the better course would be to proceed to full trial." This discretion remains "even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial." Moreover, although the Third Circuit has not ruled on this question, most other Courts of Appeals have refused to review denials of summary judgment, finding that a district court judgment after a full trial on the merits supersedes earlier summary judgment proceedings.

Payne v. Equicredit Corp. of Am., No. CIV.A. 00-6442, 2002 WL 1018969, at *1 (E.D. Pa. May 20, 2002) (internal citations omitted), *aff'd on other grounds*, 71 F. App'x 131 (3d Cir. 2003) (unpublished) (per curiam);[23] *see also Lyons v. Bilco Co.*, No. 3:01CV1106(RNC), 2003 WL

[23] In *Payne*, the parties filed motions for summary judgment on February 27, 2002, and the court conducted a full trial on March 11, 2002, while the summary judgment motions remained pending. *See Payne*, 2002 WL 1018969, at *1. The court had deferred ruling on the motions until after the trial "[b]ecause of the large number of disputed factual issues and in order to benefit from trial testimony and argument by counsel," and then denied the motions as moot after trial. *Id.* One of the defendants moved for reconsideration of its motion for summary judgment. *Id.* The court explained that there is discretion to deny even a well-supported motion for summary judgment, and noted that most courts of appeals refuse to review denials of summary judgment because "a district court judgment after a full trial on the merits supersedes earlier proceedings." *Id.* (citations omitted). The court noted that there are some exceptions allowing for immediate appeal of interlocutory determinations, including "(1) determinations of a party's immunity from suit as a public official, (2) when the district court has granted the opposing party's summary judgment motion, (3) when the specific claim underlying the denial of summary judgment was not tried and thus was not a part of the final judgment terminating the action, or (4) the issue appealed concerned, not which facts the parties might be able to prove, but whether certain facts showed a violation of clearly established law." *Id.* at *2 (citations omitted). Finding that none of the exceptions applied, the court held that the trial had superseded the motion for summary judgment and that the motion to reconsider the summary judgment motion should be denied.

22682333, at *1 (D. Conn. Sept. 30, 2003) ("Judicial discretion to deny summary judgment in favor of a full trial has been approved by most courts of appeals.")[24] (citing Friedenthal & Gardner, *supra*, at 104; Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003)).

The Eastern District of Arkansas also recently explained that courts have discretion to deny summary judgment if a claim on which the movant has met its burden is interrelated with a claim that must proceed to trial. *See Pearson v. City of Sherwood*, No. 4:07CV00163 JLH, 2007 WL 4591566, at *7 (E.D. Ark. Dec. 28, 2007). *Pearson* involved claims of racial discrimination and hostile work environment. *Id.* at *1. The court found that there was "a genuine issue of material fact as to whether race was a factor in Pearson's termination," and that the defendant's motion for summary judgment on the racial discrimination claim had to be denied. *Id.* at *7. With respect to the hostile work environment claim, the court found that the evidence was "likely insufficient to satisfy the demanding standards established by the Supreme Court 'to ensure that Title VII does not become a 'general civility code,'" *id.* (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)),

[24] In *Lyons*, the parties had filed cross-motions for summary judgment. The court noted that "[s]ummary judgment is a 'drastic procedural weapon because 'its prophylactic function, when exercised, cuts off a party's right to present his case to the jury,'" and that "[b]ecause summary judgment has this effect, trial courts must act with caution in granting it and may deny it in the exercise of their discretion when 'there is reason to believe that the better course would be to proceed to a full trial.'" 2003 WL 2268233, at *1 (citations omitted). The court cited *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948), noting that the Supreme Court had "recognized that summary judgment may not be the most appropriate way to resolve complex matters, even if the motion for summary judgment technically satisfies the requirements of Rule 56." *Id.* at *1 n.1. The court noted discretion to deny summary judgment and denied the cross-motions because both involved "intensely factual matters." *Id.* at *1. The court explained that "[r]esolving these issues requires credibility determinations, weighing of evidence, and drawing of legitimate inferences, functions that should be performed not by a judge acting on the basis of a limited paper record[,] but by a jury after a complete, live trial, where the witnesses' credibility and the weight to be given to their testimony can be full explored and reliably determined." *Id.* Although the court discussed discretion to deny summary judgment, the court focused on the highly factual nature of the issues in the motions and thus seemed to deny summary judgment on the basis of factual disputes rather than discretion.

but found that "the evidence Pearson would present on his claim for hostile work environment is strongly interrelated with the evidence on his claim for disparate treatment," *id.* The court then noted:

> "[A] district court in passing on a Rule 56 motion [for summary judgment] performs what amounts to what may be called a negative discretionary function. The court has no discretion to *grant* a motion for summary judgment, but even if the court is convinced that the moving party is entitled to such a judgment[,] the exercise of sound judicial discretion may dictate that the motion should be *denied*, and the case fully developed."

Id. (quoting *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979), and citing 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2728, at 525–26 (3d ed. 1998)). The court concluded that "[b]ecause the evidence for both claims overlaps to a large extent, the City of Sherwood's motion for summary judgment on Pearson's claim for hostile work environment is denied, and Pearson will be allowed to proceed on both claims at trial." *Id.*

Similarly, in *Converdyn v. Blue*, No. 06-cv-00848-REB-CBS, 2007 WL 4570556, at *5 (D. Colo. Dec. 26, 2007), the court recognized discretion to deny summary judgment where the issues are complex and intertwined with claims proceeding to trial. *Converdyn* involved, among others, claims under the Racketeer Influenced and Corrupt Organizations Act and under the Colorado Organized Crime Control Act. *Id.* at *2. The court granted summary judgment in favor of defendants on some of the claims. *See id.* at *5. The court then noted that summary judgment could be granted "where a 'separate claim' is presented, a 'separate claim' being defined as that which is entirely distinct from other claims involved in an action which arises from a different occurrence or transaction which form the basis of separate units of judicial action." *Id.* (citing *Triangle Ink & Color*

Co. v. Sherwin-Williams Co., 64 F.R.D. 536 (N.D. Ill. 1974)). The court explained that "[e]ven when there are no material disputed issues of fact as to some issues or claims, a trial court in exercising its discretion to shape the case for trial may deny summary judgment as to ripe portions of the case to achieve a more orderly or expeditious handling of the entire litigation." *Id.* (citing *Powell v. Radkins*, 506 F.2d 763 (5th Cir. 1975)). The court concluded that it could, in its discretion, deny summary judgment:

> Considering the remaining claims in this case, I conclude that there are a variety of contested genuine issues of material fact relating to the case as a whole. On the current record, some of the plaintiff's remaining claims appear to be thin at best. Assuming *arguendo* that the parties are correct in their contention that with respect to some issues and claims there are no material disputed issues of fact, it is not mandatory that I grant partial summary judgment on all such issues. This is a complex case with intricately intertwined theories of liability, presenting concatenated issues of fact and law. The piecemeal resolution of some of the remaining issues raised by the parties will not simplify or extenuate significantly the evidence at trial. Therefore, the defendants' motion for summary judgment will be denied [other than for the claims for which it was determined that summary judgment was appropriate], and the plaintiff's motion for partial summary judgment will be denied.

Id. (internal citation omitted).

Discretion to deny summary judgment has also recently been recognized as appropriate if the case involves particularly complicated facts that the court determines would be better resolved on a full record at trial. *See United States v. Honeywell Int'l, Inc.*, 542 F. Supp. 2d 1188, 1202 (E.D. Cal. 2008). In *Honeywell*, the court rejected the theory that it "must" grant summary judgment on the third-party plaintiffs' claim for damages in an action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) because the third-party defendant failed to adequately respond to a motion for summary judgment. *Id.* at 1202. The court explained:

> Rule 56 grants the courts more discretion than the Third-Party Plaintiffs suggest:
>
> > "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 dispute as to any material fact and that the movant is entitled to judgment as a matter of law . . . If the opposing party does not . . . respond [, by affidavits or as otherwise provided in this rule, by setting out specific facts showing a genuine issue for trial,] summary judgment *should, if appropriate*, be entered against that party."

Id. (quoting FED. R. CIV. P. 56(c), (e)(2)) (emphasis added by *Honeywell* court). The court noted that it was not permitted to grant summary judgment as a sanction for an improper response, and that the moving party had failed to make the required showing. The court recognized that even if summary judgment was the proper means of resolving the damages issue under the equitable allocation procedure called for by CERCLA, "this Court may elect not to [resolve the damages issue on summary judgment] if it determines that a trial is necessary to the adequate resolution of an issue." *Id.* at 1202–03. The court explained that "[i]n *Anderson*, the Supreme Court stated that it '[did not] suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.'" *Id.* at 1203 (quoting *Anderson*, 477 U.S. at 255, and citing *Anderson v. Hodel*, 899 F.2d 766, 771–72 (9th Cir. 1990); *Safe Flight Instrument Corp.*, 482 F.2d at 1093). The court found that resolving equitable allocation under CERCLA would be inappropriate at the summary judgment stage due to the complex nature of the allocation determination:

> The allocation issue here is complicated, involving the application of multiple established factors and/or those additional considerations the

> Court deems just. This is not a case of a relatively simple "yes" or "no" answer to a question of liability fault, or statutory interpretation. Rather, the Court is being asked to equitably resolve a matter in an instance when it has the discretion and the responsibility to evaluate infinite alternatives prior to reaching its decisions. The Court will not embark on this undertaking on less than a complete record.

Id.[25]

Other district courts in various circuits have described their discretion to deny summary judgment in certain circumstances. *See, e.g.*, *Colorado Cas. Ins. Co. v. Kirby Co.*, No. 2:05cv178-CSC, 2008 WL 440824, at *1 (M.D. Ala. Feb. 14, 2008) (noting that the court had previously denied the plaintiff's motion for summary judgment based on disputed issues of material fact, and had explained that "[e]ven in the absence of a factual dispute, a district court has the power to deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial") (quoting *Anderson*, 477 U.S. at 255, and citing *United States v. Certain Real & Personal Prop. Belonging to Hayes*, 943 F.2d 1292 (11th Cir. 1991) (additional internal quotation marks omitted)); *Lister v. Prison Health Servs., Inc.*, No. 8:04-cv-2663-T-26MAP, 2007 WL 624284, at *2 (M.D. Fla. Feb. 23, 2007) (denying summary judgment because of lack of clarity regarding material factual disputes, and noting that the court was exercising "its discretion to deny summary judgment, *even assuming the absence of a factual dispute* . . . .") (emphasis added); *Taylor v. Truman Med. Ctr.*, No. 03-00001-CV-W-HFS, 2006 WL 2796389, at *3 (W.D. Mo. Sept. 25, 2006) (denying a motion for summary judgment with respect to a claim for which the court "would not be comfortable in ringing down the curtain . . .," and for which the court found the exercise of

[25] The court determined that there were genuine issues of material fact as to the equitable allocation of response costs and that it was not appropriate to resolve the issue on a motion for summary judgment. *Honeywell*, 542 F. Supp. 2d at 1203. As a result, the court appeared to rest its denial of summary judgment on both the existence of disputed facts and on its discretion to deny summary judgment on complex issues.

its "negative discretion" to deny summary judgment when the record is inconclusive to be appropriate) (citing *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979)); *Propps v. 9008 Group, Inc.*, No. 03-71166, 2006 WL 2124242, at *1 (E.D. Mich. July 27, 2006) (holding that in light of the voluminous record and the complexity of the proposed facts, the effort necessary to determine whether genuine issues of fact existed was "not a productive use of [the court's] time," that even if the movants had carried their burden, the court doubted the wisdom of terminating the case prior to trial, and that a court has discretion to deny a motion for summary judgment); *Geter v. Greater Bridgeport Adolescent Pregnancy Program*, No. 3:02CV00540, 2004 WL 513771, at *3 (D. Conn. Mar. 12, 2004) (denying summary judgment even though "[p]laintiff's age discrimination claim may not fair well at trial," because it had "some evidentiary support, and it [was] based on essentially the same sequence of events as his retaliation claim, which survives summary judgment"); *United States v. T.J. Manalo, Inc.*, 240 F. Supp. 2d 1255, 1261 (Ct. Int'l Trade 2002) (declining to grant summary judgment despite the fact that there was no dispute as to any material fact because it was less clear that the government was entitled to judgment as a matter of law and because "even where a movant has met its burden, a court retains the discretion to deny summary judgment notwithstanding the seemingly mandatory language of Rule 56(c) . . . . Rule 56 is thus 'far less mandatory' than the language of the rule would indicate.") (citation omitted);[26] *New York v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 219 (N.D.N.Y. 2002) (denying summary judgment on certain claims because of the poor factual record and the necessity of difficult scientific evidence on the CERCLA claim, and noting that the exercise of discretion to deny was appropriate) (citing *Anderson*, 477 U.S. at 255–56); *Butler*

[26] The court also noted that "'[t]here is long-established doctrine holding that a court may deny summary judgment if it believes further pretrial activity or trial adjudication will sharpen the facts and law at issue and lead to a more accurate or just decision, or where further development of the facts may enhance the court's legal analysis.'" *T.J. Manalo, Inc.*, 240 F. Supp. 2d at 1261 (quoting 11 MOORE'S FEDERAL PRACTICE § 56.32[6]).

v. CMC Miss., Inc., No. CIV.A. 1:96CV349-D-D, 1998 WL 173233, at *7 (N.D. Miss. March 18, 1998) (denying summary judgment because a fact issue existed, but noting that the court "has the discretion to deny motions for summary judgment and allow parties to proceed to trial and more fully develop the record for the trier of fact") (citing *Kunin v. Feofanov*, 69 F.3d 59, 61 (5th Cir. 1995); *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994); *Veillon v. Exploration Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989)); *Morris v. VCW, Inc.*, No. 95-0737-CV-W-3-6, 1996 WL 429014, at *1 (W.D. Mo. July 24, 1996) (denying summary judgment because of "necessarily limited consideration and the need for a quick ruling," noting that "[c]aution is the rule of judicial practice in . . . cases [seeking summary judgment late in the case]" and that "there is a 'negative discretion' to deny summary judgment even when 'technically' justifiable, when the ends of justice appear to favor full development of the facts at trial, in order that a fact-finder may acquire a sound 'feel' for the issues") (citing *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979)); *McDarren v. Marvel Entm't Group, Inc.*, No. 94 CV. 0910 (LMM), 1995 WL 214482, at *5 (S.D.N.Y. April 11, 1995) (denying a motion for summary judgment on a breach of contract claim on the basis that an interpretation of the "best efforts" contract clause in light of the circumstances had to be made by the fact finder, but also noting that "[w]here an issue is closely intertwined with an issue to be tried, a court has discretion to deny summary judgment even if the issue is 'ripe' for summary judgment") (citing *Citibank v. Real Coffee Trade Co.*, 566 F. Supp. 1158, 1165 (S.D.N.Y. 1983); *Berman v. Royal Knitting Mills, Inc.*, 86 F.R.D. 124, 126 (S.D.N.Y. 1980)); *Wilson v. Studebaker-Worthington, Inc.*, 699 F. Supp. 711, 718–19 (S.D. Ind. 1987) (denying summary judgment and stating, "It has been repeatedly held that despite all that may be shown, the Court always has the power to deny summary judgment if, in its sound judgment, it

believes for any reason that the fair and just course is to proceed to trial rather than to resolve the case on a motion. Thus, an appraisal of the legal issues may lead the Court to exercise its discretion and deny summary judgment motions in order to obtain the fuller factual foundation afforded by a plenary trial.")[27] (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948); *Flores v. Kelley*, 61 F.R.D. 442 (D. Ind. 1973); *Western Chain Co. v. Am. Mut. Liab. Ins. Co.*, 527 F.2d 986 (7th Cir. 1975)); *Toyoshima Corp. of Cal. v. Gen. Footwear, Inc.*, 88 F.R.D. 559, 561 (S.D.N.Y. 1980) (denying motion for partial summary judgment because court declined to "determine defendants' liability for such a substantial sum on the basis of affidavit and deposition testimony," "[a] favorable ruling for plaintiff on [the] motion [would] not relieve the parties from appearing at and participating in the trial," no prejudice would result from the delay, and "should the Court find at trial that facts with respect to certain issues [were] not in dispute[,] it [could] grant a motion either for a directed verdict or for judgment notwithstanding the verdict"); *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 210, 223 (E.D.N.Y. 1979) ("In spite of . . . persuasive arguments for granting the Government's motion for summary judgment, more practical considerations, looking to the posture of this complex multidistrict litigation, require that the motion be denied. Although Rule 56 of the Federal Rules of Civil Procedure states that summary [judgment] 'shall' be rendered when the stated

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[27] The court held: "[I]n the interest of sound judicial administration, the Court must withhold decision of the ultimate questions involved in this case until it is presented with a more solid basis of findings based upon litigation or upon a comprehensive statement of agreed facts." *Wilson*, 699 F. Supp. at 719 (citing *Kennedy*, 334 U.S. at 257).

The *Wilson* court's description of discretion to deny is seemingly at odds with the later Seventh Circuit opinion in *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam), where the Seventh Circuit held that "[s]ummary judgment is not a discretionary remedy." While the *Wilson* case has not been expressly overturned, the subsequent decision in *Jones* may call *Wilson*'s language regarding discretion to deny summary judgment motions into question. However, it is also possible that the holding in *Jones* was not as broad as it may seem. The appellate court in *Jones* reviewed the denial of the summary judgment motion on an interlocutory appeal regarding the defense of qualified immunity. The Seventh Circuit commented that immunity claims ought to be resolved as early in the case as possible, *id.*, and it may be that the reason for the court's statement regarding lack of discretion was that the appeal related to a defense that needed to be resolved immediately.

conditions are met, the rule is not mandatory in operation: 'a motion for summary judgment is always addressed to the discretion of the court.'")[28] (quoting *Perma Research & Dev. Co. v. Singer Co.*, 308 F. Supp. 743, 750 (S.D.N.Y. 1970)) (additional citations omitted); *Fine v. City of New York*, 71 F.R.D. 374, 375 (S.D.N.Y. 1976) (denying summary judgment without prejudice to consideration at trial, and noting that exercising discretion to deny summary judgment even where the movant has met the standard in Rule 56 "is particularly desirable where, as here, the case presents two questions which are complex, one of which may be of first impression," and that "[s]uch matters ought to be resolved on a full plenary trial record, to assure a just result and facilitate appellate review"); *cf. Robertson v. Detention Ctr. Claiborne Parish*, No. 07-0529, 2008 WL 4937568, at *2 (W.D. La. Nov. 17, 2008) (adopting the recommendation of the magistrate judge that the plaintiff's motion for

[28] The court noted that "[s]atisfying the basic requirements of the rule does not guarantee that the motion will be granted: 'Even in cases where the movant has technically discharged his burden, the trial court in the exercise of a sound discretion may decline to grant summary judgment.'" *In re Franklin Nat'l Bank*, 478 F. Supp. at 223 (quoting *Nat'l Screen Serv. Corp. v. Poster Exchange, Inc.*, 305 F.2d 647, 651 (5th Cir. 1962)) (additional citations omitted). The court found that summary judgment might properly be granted in favor of the defendant, explaining that there was "little doubt that there is no claim for relief against the United States under the Federal Tort Claims Act . . . ," but found that denial was appropriate based on practical considerations. *See id.* at 221–24. The court found authority to deny summary judgment based on practical considerations in previous case law as well as in "Rule 1's declaration that the Federal Rules of Civil Procedure 'shall be construed to secure the just, speedy, and inexpensive determination of every action.'" *Id.* at 223 (quoting FED. R. CIV. P. 1). The court explained that it "must remain cognizant of the fact that it is an entire series of related disputes it is seeking to resolve," and that "[t]he slight unfairness to one litigant of denying its motion for summary judgment may be more than overbalanced by advantages to all of the other litigants and the court system itself in more expeditious and fairer disposition of the whole dispute." *Id.*

The court found the following factors relevant to the decision to deny summary judgment: (1) "Even though these claims against the Government [were] highly unlikely ultimately to prevail, the evidence relevant to these claims [was] also relevant to many other basic issues in this litigation . . . . All of these issues [would] be tried regardless of the disposition of the claims against the Government. Summary judgment [would] not shorten the trial. The continued presence of the Government in the litigation [would] insure a more full and fair development of the evidence."; (2) If the court granted the motion at the time, there was a high probability of reversal under the standard used by some panels of the Second Circuit; (3) "While it [was] improbable to the vanishing point that anything crucial to the issues of summary judgment [would] be turned up by further discovery or by trial, key witnesses [had] yet to be deposed."; and (4) "[T]he probabilities of settlement [would] be enhanced if the motion for summary judgment [was] not granted at [the] time." *Id.* at 223–24. The court also noted that "[w]ere the moving party an individual who might find the costs of the litigation burdensome, this would be a weighty factor tilting towards granting of the motion," but that "[c]ost of the litigation is not a substantial factor where the Government is involved . . . ." *Id.* at 224.

summary judgment be denied without hearing an opposition from the defendant because the plaintiff had not shown entitlement to judgment, and that had also noted that "even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that denial would be a better course") (citing *Kunin*, 69 F.3d at 62); *Telles-Hernandez ex rel. Hernandez v. Sutter Med. Ctr. of Santa Rosa*, No. C 06-03350 SBA, 2008 WL 2156987, at *9 (N.D. Cal. May 20, 2008) ("Rule 56(d)(1) is phrased in terms of what a court 'should' do, because a court may grant partial summary judgment under Rule 56(d)(1), in its discretion. Further, the purpose of exercising this discretion is to expedite litigation by streamlining matters for trial.") (internal citations omitted);[29] *Freeland v. Iridium World Commc'ns, Ltd.*, 545 F. Supp. 2d 59, 71 (D.D.C. 2008) (denying a motion for partial summary judgment based on collateral estoppel, "in its discretion," for several reasons, including that "it [was] somewhat unfair, at [the] late stage of the litigation, to spring collateral estoppel on Motorola");[30] *Mainland Drilling Ltd. P'ship v. Colony Ins. Co.*, 546 F. Supp. 2d 432,

[29] The court found that in the case before it, "even were partial summary adjudication available, the Court is unpersuaded exercising its discretion would yield any benefit." *Telles-Hernandez*, 2008 WL 2156987, at *9. The court noted that when the motion for partial summary judgment was set for hearing, discovery was still open and expert depositions had not yet been taken, and that "in a relatively straightforward medical malpractice case, with only one defendant left, it is unclear what efficiencies would result from such a hearing." *Id.* The court also disapproved of any attempt by the defendant "to 'lock in' some of Cruz's experts' opinions," because "this would deprive the Court of in-court examination on these issues, which might prove more valuable, than merely considering static reports." *Id.* (footnote omitted). The court concluded that "[w]hile there may be cases with *distinct* multiple claims, damage categories, or causal paths, where it might be efficient for a defendant to seek partial summary judgment, to negate its liability for the acts of other defendants, this is not one of them. Thus, under the circumstances presented here, the Court is unpersuaded that it should exercise its discretion to grant partial summary judgment." *Id.*

[30] The court noted that "[a]pplication of this doctrine [of collateral estoppel] is within the Court's discretion." *Freeland*, 545 F. Supp. 2d at 70. Thus, the court's decision to exercise discretion to deny summary judgment may have been based on the fact that it viewed the decision of whether to apply collateral estoppel as discretionary, not on the view that denying summary judgment is discretionary. However, this case provides an example of when discretion to deny summary judgment may be needed. Imposing a mandatory standard for granting summary judgment when the movant meets the required standard could create confusion where the motion is based on a discretionary doctrine, such as collateral estoppel. In such a situation, it could be argued that the court must retain discretion to deny summary judgment. On the other hand, it could be argued that in the case where the motion for summary judgment is based on collateral estoppel, if the judge exercises discretion to determine that applying collateral estoppel is inappropriate, then the movant has not shown entitlement to judgment as a matter of law.

435, 436 (W.D. Tex. 2008) (noting in boilerplate language that "even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that it would be prudent to proceed to trial," but granting the defendant's motion for summary judgment); *Looney v. United States*, 544 F. Supp. 2d 574, 577–78, 583 (S.D. Tex. 2008) (noting in boilerplate language that "[e]ven if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that 'the better course would be to proceed to a full trial,'" but denying the plaintiff's motion for partial summary judgment because the plaintiff had not shown entitlement to judgment as a matter of law) (quoting *Anderson*, 106 S. Ct. at 2513); *Caine v. Duke Commc'ns Int'l*, No. CV-95-0792 JMI (MCX), 1995 WL 608523, at *2 (C.D. Cal. Oct. 3, 1995) (granting a motion for summary judgment, but stating in boilerplate language that "[t]here is no absolute right to a summary judgment in any case. The court has discretion to deny summary judgment wherever it determines that justice and fairness require a trial on the merits.") (citing *Anderson*, 477 U.S. at 249–55); *Bank of Kilmichael v. Neal* (*In re Neal*), Nos. 08-10136-DWH, 08-1078-DWH, 2008 WL 4905478, at *2, *3 (Bankr. N.D. Miss. Oct. 28, 2008) (noting in boilerplate language that "[t]he court . . . has the discretion to deny motions for summary judgment and allow parties to proceed to trial so that the record might be more fully developed for the trier of fact," but denying summary judgment because it found disputes as to material facts) (citing *Kunin*, 69 F.3d at 61; *Black*, 22 F.3d at 572; *Veillon*, 876 F.2d at 1200).

C. The Effects of the 2007 Style Amendments

After the effective date of the 2007 style amendments that changed "shall" to "should" in Rule 56(c), several cases have noted that the change was stylistic and that the case law interpreting the previous version of the Rule is still applicable. *See Carpenter v. Regis Corp.*, No. 3:07-CV-501-

WKW, 2008 WL 4911198, at *3 n.5 (M.D. Ala. Nov. 13, 2008) ("[A]lthough Rule 56 underwent stylistic changes, its substance remains the same and therefore, all cases citing the prior rule remain equally applicable to the current rule."); *Phillips v. Beck*, No. 06-00628 SOM/KSC, 2007 WL 4392019, at *1 (D. Haw. Dec. 17, 2007) ("As the [December 1, 2007] amendments to the rules in issue here[, including Rule 56,] were stylistic only, the court relies on authorities construing the previous version of the applicable rules.");[31] *but cf. Paloian v. Greenfield* (*In re Restaurant Dev. Group, Inc.*), 396 B.R. 717, 723 n.3 (Bankr. N.D. Ill. Nov. 7, 2008) (noting that Rule 56(c) was amended effective December 1, 2007 to say "should" instead of "shall," but that the prior version applied to an adversary proceeding filed before the effective date);[32] *Martino v. Lakefront Corner, Inc. (In re Swanson*), Nos. 07-08912, 07-00918, 2008 WL 895666, at *2 n.1 (Bankr. N.D. Ill. Mar. 31, 2008) (noting that Rule 56(c) was amended effective December 1, 2007 to say "should" instead of "shall," but that the previous version applied because the adversary proceeding was filed before the effective date, and noting that the changes "were made to conform with the Supreme Court's opinion in *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256–57 . . . (1948), finding that there is discretion to deny summary judgment even when it appears that there is no genuine issue as to any

[31] Despite recognizing the changes to the Rules made by the 2007 amendments, the court then stated that summary judgment "shall" be granted when the standard in Rule 56(c) is met and that "[s]ummary judgment must be granted against a party that fails to demonstrate facts to establish an essential element at trial." *Phillips*, 2007 WL 4392019, at *2.

[32] In denying summary judgment, the court noted that the issue of whether the debtor received reasonably equivalent value for transferred assets was a triable issue and that it was related to the remaining adversary accounts. *Paloian*, 396 B.R. at 729. The court concluded that "[i]t would be inappropriate to make a factual finding, based on this record, that could bind the determination of those remaining issues." *Id.* The court determined that the issues would "be decided in the context of trial through the evidence and development of a complete record." *Id.* Although the court did not discuss the discretion to deny summary judgment and ultimately found that disputed issues of fact existed, its discussion of the intertwined issues at least implies that there may be discretion to deny summary judgment if a particular issue is intertwined with issues remaining for trial.

material fact").[33]

Other courts do not seem to acknowledge the change from "shall" to "should" in the 2007 amendments. *See, e.g.*, *Manelski v. Tinicum Twp.*, No. 07-1487, 2008 WL 5250691, at *1 (E.D. Pa. Dec. 17, 2008) ("FED. R. CIV. P. 56 provides that a court *must grant a motion for summary judgment* when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'") (emphasis added) (quoting FED. R. CIV. P. 56(c)); *In 't Veld v. Dep't of Homeland Sec.*, --- F. Supp. 2d ---, No. 08-1151 (RMC), 2008 WL 5205684, at *2 (D.D.C. Dec. 15, 2008) ("Under Rule 56 of the Federal Rules of Civil Procedure, *summary judgment must be granted* when [the Rule 56(c) standard is met].") (emphasis added); *Wilson v. Gilbert*, No. 1:05-cv-1640-DFH-DML, 2008 WL 5111355, at *1 (S.D. Ind. Dec. 2, 2008) ("A motion for summary judgment must be granted pursuant to Rule 56(c) of the Federal Rules of Civil Procedure [if the Rule 56(c) standard is met].") ; *Belflowers v. Wal-Mart Stores East, L.P.*, No. 3:08cv250-CSC, 2008 WL 4767527, at *2 (M.D. Ala. Oct. 30, 2008) (noting in boilerplate language that "[a]fter the nonmoving party has responded to the motion for summary judgment, the court *must grant summary judgment* if there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law") (emphasis added) (citing FED. R. CIV. P. 56(c)); *Carolina Buggy Tours, LLC v. Gay*, No. 9:06-cv-3435-CWH, 2008 WL 2690237, at *1 (D.S.C. July 1, 2008) (stating that summary judgment "shall be rendered" if the standard in Rule 56(c) is met).[34]

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[33] The court denied summary judgment because it found a material issue of fact for trial. *Martino*, 2008 WL 895666, at *5.

[34] The court quoted the language from Rule 56(c) for the standard for granting summary judgment, but stated outside of the quotation that "the judgment sought shall be rendered" if that standard is met. *Carolina Buggy Tours*, 2008 WL 2690237, at *1. The court later quoted *Celotex* for the proposition that "'[r]egardless of whether the moving

V. Cases Limiting Discretion to Deny Motions for Summary Judgment

A. Circuit Court Opinions

Despite the existence of the circuit opinions clearly stating that there is discretion to deny a motion for summary judgment, other circuit opinions have consistently repeated language that implies that there is little or no discretion to deny. *See, e.g.*, *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) ("A motion for summary judgment *must be granted* when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'") (quoting FED. R. CIV. P. 56(c)) (emphasis added); *Rease v. Harvey*, 238 F. App'x 492, 494 (11th Cir. 2007) (unpublished) (per curiam) (same); *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 994 (6th Cir. 2007) (same), *cert. denied*, 128 S. Ct. 1125 (2008); *Guilbert v. Gardner*, 480 F.3d 140, 145 (2d Cir. 2007) (same); *Loggins v. Nortel Networks, Inc.*, 206 F. App'x 329, 331 (5th Cir. 2006) (unpublished) (per curiam) (same); *Mambo v. Vehar*, 185 F. App'x 763, 765 (10th Cir. 2006) (unpublished) ("The familiar standard *requires that summary judgment be granted* . . ." if the Rule 56(c) standard is met.) (emphasis added); *Warner-Lambert Co. v. Teva Pharms. USA, Inc.*, 418 F.3d 1326, 1335 (Fed. Cir. 2005) ("Summary judgment *must be granted* . . ." if the Rule 56(c) standard is met) (emphasis added); *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 854 (3d Cir. 2000) ("[S]ummary judgment *is to be entered* if the evidence is such that a reasonable fact finder could find only for the moving party.")[35] (citing *Anderson*, 477 U.S. at 248;

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party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c) is satisfied.'" *Id.* at *2 (quoting *Celotex*, 477 U.S. at 322).

[35] The court also noted that "[a] party's failure to make a showing that is 'sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial' *mandates*

Doherty v. Teamsters Pension Trust Fund, 16 F.3d 1386, 1389 (3d Cir. 1994)) (emphasis added); *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam) ("Summary judgment *is not a discretionary remedy*. If the plaintiff lacks enough evidence, *summary judgment must be granted*.") (citing *Anderson*, 477 U.S. at 249–51; *Celotex*, 477 U.S. 317) (emphasis added), *aff'd on other grounds*, 515 U.S. 304 (1995); *Real Estate Fin. v. Resolution Trust Corp.*, 950 F.2d 1540, 1543 (11th Cir. 1992) (per curiam) ("A district court must grant summary judgment if the moving party shows that there is no genuine dispute regarding any material fact and it is entitled to judgment as a matter of law.") (citing *Celotex*, 477 U.S. at 322); *cf. Ayres v. Gen. Motors Corp.*, 234 F.3d 514, 520 (11th Cir. 2000) ("The district court's denial of summary judgment is reviewed de novo with all facts and reasonable inferences therefrom reviewed in the light most favorable to the nonmoving parties.").[36]

In sum, at least the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and Federal Circuits have issued opinions that contain language seeming to mandate the entry of summary

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the entry of summary judgment." *Watson*, 235 F.3d at 857–58 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)) (emphasis added).

[36] Professor Friedenthal and Mr. Gardner argue that "if district courts do not have discretion to deny an otherwise appropriate motion for summary judgment, then the de novo standard of review appears equally appropriate for denials as it is for grants." Friedenthal & Gardner, *supra*, at 113. They note that "somewhat confusingly, even those appellate courts that purport to sanction district court discretion in denying an otherwise appropriate motion for summary judgment flatly state that they review a denial de novo without distinguishing cases in which the denial may be based all or in part on the judge's exercise of discretion," *id.* at 114, but point out that "[i]n a number of these cases, the statements are dicta and have less force because the appeal is actually from a grant of summary judgment rather than a denial," *id.*, and that "even in [the cases where the appeal involved review of a denial of summary judgment], the courts did not actually face the issue because a careful review of the facts reveals that the decisions were not the product of the judge's exercise of discretion . . . [but] turned on a precise question of law," *id.* at 114–15. Professor Friedenthal and Mr. Gardner also argue that "trial courts must recognize the need to reveal the basis for their decisions whenever the exercise of discretion plays a part in the denial of summary judgment" because "[o]therwise, the appellate court may not know that discretion played a role in the decision below or may not have sufficient information to assess whether or not the discretion was abused." *Id.* at 115. This point would be addressed by the proposed amendment to Rule 56(a) that would state: "The court should state on the record the reasons for granting or denying the motion [for summary judgment]."

judgment if the movant shows entitlement to judgment. However, most of the cases containing this language have the language in the boilerplate section reciting the legal standard for review of summary judgment orders. Very few of the cases with this language appear to actually apply the standard to an order denying summary judgment.[37] Of the cases cited in the previous paragraph, for example, only one of them definitively applied the rule that motions must be granted if the Rule 56(c) standard is met. *See Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam) (finding that the district court was mistaken in determining that "because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim should also be tried"), *aff'd on other grounds*, 515 U.S. 304 (1995). The remainder of the cases cited in the previous paragraph (other than *Ayres*)[38] involved review of a grant of summary judgment, and thus the courts did not have occasion to apply the standard used for review of a denial of summary judgment, despite discussion of that standard in the "legal standards" portion of the opinions.

B. District Court Opinions

Various district court cases also contain statements that summary judgment is mandatory if the movant has shown entitlement to summary judgment. *See, e.g.*, *Starns v. Health Prof'ls, Ltd.*, No. 04-1143, 2008 WL 268590, at *1 (C.D. Ill. Jan. 29, 2008) ("'Summary [judgment] is not a discretionary remedy. If the plaintiff lacks enough evidence, summary [judgment] must be granted.'")

[37] Finding appellate cases actually disapproving of a discretionary denial has proven to be difficult, perhaps because denials of summary judgment are rarely appealable. Most of the appellate cases substantively reviewing a denial of summary judgment have concluded that discretion to deny exists.

[38] *Ayres* involved an interlocutory appeal of a denial of summary judgment, but the court did not specifically address whether there was discretion to deny summary judgment. The court stated that review of a denial was *de novo*, which is arguably inconsistent with discretion to deny, but the court did not specifically address whether such discretion exists. In addition, the reversal on appeal appeared to deal with a legal error, not with any exercise of discretion. *See Ayres*, 234 F.3d at 525 ("[T]he district court erred in concluding that the duty to notify found in the Safety Act was such that its breach constituted mail and wire fraud, and the Plaintiffs have not otherwise established that Defendants violated the mail or wire fraud statutes.").

(quoting *Jones*, 26 F.3d at 728);[39] *Levine v. Children's Museum of Indianapolis, Inc.*, No. IP00-0715-C-H/G, 2002 WL 1800254, at *1 (S.D. Ind. July 1, 2002) (granting summary judgment where the plaintiff had failed to come forward with sufficient evidence, and stating in the section describing the legal standards that "[s]ummary judgment is not discretionary; if a party shows it is entitled to summary judgment, judgment must be granted") (citing *Jones*, 26 F.3d at 728), *aff'd*, 61 F. App'x 298 (7th Cir. 2003) (unpublished); *In re Lawrence W. Inlow Accident Litig.*, No. IP 99-0830-C H/K, 2002 WL 970403, at *3 (S.D. Ind. April 16, 2002) ("Summary judgment is not a discretionary remedy. If a party shows it is entitled to summary judgment, the court must grant it.") (citing *Tangwall v. Stuckey*, 135 F.3d 510, 514 (7th Cir. 1998)[40]), *aff'd sub nom. First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp.*, 378 F.3d 682 (7th Cir. 2004); *Gates v. L.R. Green Co.*, No. IP 00-1239-C H/G, 2002 WL 826394, at *1 (S.D. Ind. Mar. 20, 2002) ("Summary judgment is not a discretionary procedure, though. When the moving party has shown it is entitled to summary judgment, the court must grant it. To do otherwise would be to condemn the parties, witnesses, and

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[39] As of December 30, 2008, a Westlaw search revealed that the *Jones* case has been cited in other cases 117 times for the proposition that summary judgment is not a discretionary remedy. All of these citations have been by district courts within the Seventh Circuit. I have surveyed a selection of these cases, and they appear to generally use this language as boilerplate language in the legal standards section of the opinion. Within the sampling of cases I reviewed, I did not see any cases where the district court expressed a desire to deny the motion but felt compelled to grant it in view of a standard that granting summary judgment is mandatory if the movant has shown entitlement.

[40] *Tangwall* arose in the context of a qualified immunity defense, and thus language in that case regarding the mandatory nature of summary judgment may not have the same application in other contexts. The Seventh Circuit found jurisdiction to review the denial of the defendant's summary judgment motion under 28 U.S.C. § 1291, explaining that "[a] district court's denial of a claim of qualified immunity is [an] appealable 'final decision,' notwithstanding the absence of a final judgment, to the extent that 'the issue on appeal is limited to 'whether or not certain facts show[ ] a violation of clearly established' law.'" *Tangwall*, 135 F.3d at 515 (quoting *Rambo v. Daley*, 68 F.3d 203, 205 (7th Cir. 1995) (quoting *Johnson v. Jones*, 515 U.S. 304, 311 (1995))). Notably, in stating the standard of review, the court quoted another Seventh Circuit case that had found that *grants* of summary judgment are reviewed *de novo*, but *Tangwall* extended the language to apply to denials of summary judgment. *See id.* at 514 ("'[w]e review a district court's [denial] of summary judgment and it determination [whether] the defendant[ ] [is] entitled to qualified immunity *de novo*.'") (quoting *Jones v. Watson*, 106 F.3d 774, 777 (7th Cir. 1997)) (modification of quotation by *Tangwall* court).

jurors to spend time, money, and energy on a trial that could have only one just result."); *Acceptance Assocs. of Am., Inc. v. Various Underwriters of Lloyds of London*, CIV. A. No. 88-6816, 1989 WL 25146, at *2 (E.D. Pa. Mar. 16, 1989) (granting summary judgment after finding no genuine issue of material fact and citing 18A COUCH ON INS. 2d § 77:16 (Rev'd ed. 1983) for the proposition that "when undisputed documents show that the insurer is entitled to summary judgment, the court must grant the motion regardless of other facts in the record that may be in dispute"), *aff'd*, 884 F.2d 1382 (3d Cir. 1989); *Martinez v. Ribicoff*, 200 F. Supp. 191, 192 (D.P.R. 1961) ("It, therefore, follows that there is no genuine issue as to any material fact and that defendant's motion for summary judgment must be granted, defendant being entitled to judgment as a matter of law.").

Most of the district court cases I reviewed that state that summary judgment must be entered if the movant is entitled state this standard in the "legal standards" section of the opinion, and it is not clear if the court ultimately granted the summary judgment because it had no choice if the movant met its burden or because the court felt no need to exercise discretion to deny the motion under the facts of the case.[41] The *Acceptance Associates of America* and *Martinez* cases use the mandatory language within the analysis portion of the opinions, as opposed to in a separate section describing legal standards, but even in those cases, it is not clear whether the court felt compelled to grant summary judgment simply because it was mandatory if the movant met its burden or if the court granted the summary judgment because it viewed granting as the best option after the movant had met its burden.

[41] A search in Westlaw for cases stating that summary judgment is mandatory or must be granted if the standard is met turns up many cases. However, a review of a sampling of these cases reveals that few of them actually apply the proposition that summary judgment is mandatory if the standard is met, and merely contain language to that effect in the "legal standards" portion of the opinion. Finding district court cases granting summary judgment based on an alleged lack of discretion to deny once the standard is met has proven difficult, possibly because courts may not express a desire to deny the motion at the same time the court is granting the motion.

C. Letter Asserting Lack of Discretion to Deny Summary Judgment

A January 10, 2008 letter from Lawyers for Civil Justice and the U.S. Chamber Institute for Legal Reform (the "Letter") asserts that the current standard is that summary judgment is mandatory when a litigant has met the burden of demonstrating the absence of a genuine issue of material fact. However, most of the cases cited in the Letter for this proposition do not actually evaluate the denial of a motion for summary judgment, making any boilerplate language that summary judgment is required less persuasive than the Letter indicates.

The Seventh Circuit *Jones* case cited in the letter may be an anomaly with its strict language stating that "[s]ummary judgment is not a discretionary remedy. If the plaintiff lacks enough evidence, summary judgment must be granted." *Jones*, 26 F.3d at 728. Notably, the *Jones* court emphasized that the issue on summary judgment involved a defense of immunity, stating that "[i]mmunity claims should be resolved as early in the case as possible—and by the court rather than the jury." *Id.* (citing *Elder v. Holloway*, 510 U.S. 510, 114 S. Ct. 1019, 1023 (1994); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Elliot v. Thomas*, 937 F.2d 338, 344–45 (7th Cir. 1991)). In *Jones*, the defendants filed an interlocutory appeal asserting a defense of qualified immunity. *Id.* at 727. The district court had denied the defendants' summary judgment motion both with respect to the plaintiff's false arrest claim and with respect to the plaintiff's excessive force claim. With respect to the excessive force claim, the Seventh Circuit held that it had no appellate jurisdiction because the district court had found that an issue of fact existed as to whether the defendants beat the plaintiff while he was in custody, an issue that had to be "resolved in the district court before it could be reviewed on appeal." *See id.* at 727–28. With respect to the false arrest claim, the district court had held that "because the excessive force claim had to be tried, and because the plaintiff might come up

with more evidence before trial, the false arrest claim also should be tried." *Id.* at 728. The Seventh Circuit rejected that conclusion, finding that summary judgment should have been granted in favor of the defendants with respect to the false arrest claim because there was no genuine issue of fact and summary judgment is not a discretionary remedy. *Id.*

One could argue that *Jones* creates a circuit split as to whether there is discretion to deny summary judgment. However, despite its broad language disapproving of discretion to deny, the *Jones* court may have been particularly focused on the importance of resolving immunity claims early in the litigation.[42] A persuasive argument can be made that the need to resolve immunity issues played a strong role in the court's opinion, particularly given the absence of discussion distinguishing other cases that had recognized the existence of discretion to deny fully-supported summary judgment motions.[43]

Other than the *Jones* case, the cases cited in the Letter do not substantively evaluate the discretion to deny summary judgment motions, despite having language stating that summary judgment is mandatory. For example, the Letter cites *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 857–58 (3d Cir. 2000), for the proposition that "[a] party's failure to make a showing that is 'sufficient to establish the existence of an element essential to that party's case, and on which that

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[42] The Seventh Circuit has repeated the language regarding the mandatory nature of granting summary judgment if the movant meets his burden. *See Anderson v. P.A. Radocy & Sons, Inc.*, 67 F.3d 619, 621 (7th Cir. 1995) ("Summary judgment is not a remedy to be exercised at the court's option; it must be granted when there is no genuine dispute over a material fact.") (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). However, in *Anderson v. P.A. Radocy & Sons*, the Seventh Circuit reviewed a grant of summary judgment rather than a denial.

[43] The possibility that the *Jones* holding may be limited to the context of qualified immunity is supported by the fact that there is at least one earlier Seventh Circuit case recognizing discretion to deny summary judgment. *See Madyun*, 657 F.2d at 877 n.18. Although *Madyun* involved review of a grant of summary judgment rather than a denial, the court found that the circumstances in the case, which included *pro se* plaintiffs who were unaware of the requirement of filing opposing affidavits in response to a summary judgment motion, should have prevented granting summary judgment, even though the lack of opposing affidavits would have technically made granting the defendants' motion proper. *See id.* at 877.

party will bear the burden of [proof at] trial' mandates the entry of summary judgment." However, in *Watson*, the court affirmed a grant of summary judgment where the non-movant failed to make the required evidentiary showing. Because the Third Circuit affirmed a grant of summary judgment on the basis that the requisite showing was not made and because the case did not involve review of a denial of summary judgment (or of a grant of summary judgment where the court felt compelled to grant the motion despite wanting to deny it), the language stating that summary judgment is mandatory does not carry as much weight as suggested by the Letter.

Similarly, the Letter cites *Real Estate Financing v. Resolution Trust Corp.*, 950 F.2d 1540, 1543 (11th Cir. 1992) (per curiam), for the proposition that "[a] district court must grant summary judgment if the moving party shows that there is no genuine dispute regarding any material fact and it is entitled to judgment as a matter of law." However, the cited language appears in the section of the opinion entitled "The Standards Governing Summary Judgment," and is not applied to the merits because the case involved review of a grant of summary judgment, rather than a denial. The court affirmed part of the grant of summary judgment, but found that the non-movant had presented sufficient evidence to avoid summary judgment on one of the claims. Thus, the court had no reason to address whether there would have been discretion to deny summary judgment if there had not been sufficient evidence. Notably, a subsequent Eleventh Circuit decision involving an attempted appeal of a denial of summary judgment found that a denial could not be reviewed after a trial on the merits and recognized discretion to deny summary judgment motions. *See Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1285 (11th Cir. 2001).[44]

[44] The court in *Lind* noted that even if it could review a denial of summary judgment, a dispute of material fact would have precluded summary judgment, but the court's discussion of discretion to deny summary judgment was used to support its holding that denials of summary judgment are not reviewable after trial on the merits.

The Letter argues that the version of Rule 56 effective prior to the Style Amendments, containing the statement that "the judgment sought shall be rendered . . .," has language commanding mandatory action. However, the cases simply have not always interpreted the language that way. *See, e.g.*, *Payne v. Equicredit Corp. of Am.*, No. CIV.A. 00-6442, 2002 WL 1018969, at *1 (E.D. Pa. May 20, 2002) ("Despite this seemingly compulsory language [of FED. R. CIV. P. 56(c)], the Supreme Court has recognized a district court's discretion to deny a summary judgment motion whenever there is 'reason to believe that the better course would be to proceed to full trial.'"), *aff'd on other grounds*, 71 F. App'x 131 (3d Cir. 2003) (unpublished) (per curiam); *see also* EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE, COMMITTEE ON RULES OF PRACTICE & PROCEDURE 10 (2006), http://www.uscourts.gov/rules/supct1106/Excerpt_JC_Report_CV_0906.pdf (stating that the restyled rules "minimize the use of inherently ambiguous words," such as "shall," which "can mean 'must,' 'may,' or 'should,' depending on context"); FED. R. CIV. P. 56 Advisory Committee's Note (2007 Amendment) (stating that "shall" is changed to "should" in light of case law establishing that "there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact").

The assertion in the Letter that discretion to deny summary judgment would "run[] headlong into the concern expressed in *Anderson v. Creighton*, 483 U.S. 635, 643 (1987)[,] that conscientious public officials would lose the 'assurance of protection that [] is the object' of summary judgment," is misplaced. The quotation is taken slightly out of context because it omits the beginning of the sentence, which reveals that the quoted language was used in the case to describe the purpose of the doctrine of qualified immunity.[45] Nonetheless, it follows that requiring summary judgment regarding

[45] The full sentence reads: "An immunity that has as many variants as there are modes of official action and

qualified immunity defenses would also further the assurance of protection that qualified immunity is intended to provide. However, even if courts may have less discretion to deny summary judgment in certain contexts, such as qualified immunity, *see Jones*, 26 F.3d at 728, it does not necessarily follow that it is mandatory in all circumstances in which the Rule 56 standard is met.

D. Professor Shannon's Arguments Regarding Discretion to Deny Summary Judgment

In a recently published article, one commentator argues that the 2007 amendments should not have changed the language in Rule 56 regarding granting summary judgment from "shall" to "should." *See generally* Bradley Scott Shannon, Should *Summary Judgment Be Granted?*, 58 AM. U. L. REV. 85 (2008). As the Letter argued, Professor Shannon also asserts that "shall" means "must," and cites to a Supreme Court case that reached that conclusion in the context of Rule 25(a). *See id.* at 90 (citing *Anderson v. Yungkau*, 329 U.S. 482 (1947)). Professor Shannon cites to two additional cases that have found that "shall" is a mandatory term, *id.* at 90 n.26 (citing *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)), but also notes that another case "rejected the notion that the inclusion of 'shall' in a restraining order 'made enforcement of restraining orders [by law enforcement officers] *mandatory*,'" *id.* (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005)). It may not be disputed that the word "shall" is frequently viewed as having a mandatory meaning, but that does not mean that it has that meaning in every context or that it has that meaning in the context of Rule 56. As discussed above, at least some courts have concluded that the previous use of the term "shall" in Rule 56 did not always mandate the entry of summary judgment.

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types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide." *Anderson*, 483 U.S. at 643.

Professor Shannon also argues that the case cited in the 2007 Advisory Committee Note as support for discretion to deny summary judgment—*Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948)—does not support exercising discretion. *Id.* at 97–98. Professor Shannon contends that "[t]he *Kennedy* Court . . . held only that it considered it unwise to decide issues of great importance based on a scant district court record," and that "[i]t did not hold that a district court has discretion to deny a motion for summary judgment in the absence of a genuine issue of material fact." *Id.* However, the *Kennedy* court at least implied that discretion to deny exists where the issue could be resolved, but the issue is important and would be better resolved on a full record. *See Kennedy*, 334 U.S. at 257 ("*While we might be able, on the present record, to reach a conclusion* that would decide the case, it might well be found later to be lacking the thoroughness that should precede judgment of this importance and which is the purpose of the judicial process to provide.") (emphasis added); *see also Lyons*, 2003 WL 22682333, at *1 n.1 ("In *Kennedy*, the Court recognized that summary judgment may not be the most appropriate way to resolve complex matters, even if the motion for summary judgment technically satisfies the requirements of Rule 56.").

Professor Shannon also notes that some might argue that discretion to deny summary judgment is supported by the language in *Anderson v. Liberty Lobby* stating that a district court may deny a motion for summary judgment "when it has 'reason to believe that the better course would be to proceed to a full trial,'" but argues that it is unclear whether the *Anderson* court really approved of discretion because the statement to this effect was dicta and contrary to other language in the case suggesting a lack of discretion. Shannon, *supra*, at 98. Professor Shannon also asserts that the Advisory Committee's citation to the Federal Practice and Procedure treatise for the many lower court cases collected there that discuss discretion to deny does not support changing "shall" to

"should" because other federal courts have held to the contrary.[46] *Id.* at 99. However, there are a variety of examples of cases where courts actually rely on discretion to deny motions for summary judgment that meet the requisite standard. *See, e.g.*, *Veillon*, 876 F.2d at 1200 (finding no abuse of discretion in district court's refusal to consider the defendant's unopposed motion for reconsideration of reinstatement, or alternative motion for summary judgment, because "[a] district court has the discretion to deny a Rule 56 motion even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial"); *Forest Hills Early Learning Ctr.*, 728 F.2d at 245–46 (finding it appropriate to deny "summary adjudication of unconstitutionality for overbreadth that we find justified on the present record," and remanding to allow intervention of other parties, because a court may properly decline to grant summary judgment even if appropriate on the record presented, "[a] declaration for overbreadth would not finally conclude the underlying, conflicting claims of the primary parties in interest in this litigation," and "summary adjudication on so limited a basis of issue and party preclusion and on so inadequate a factual record is likely to be inconclusive of the underlying rights in issue, including those of the prevailing plaintiffs") (internal citation omitted); *Safe Flight Instrument Corp.*, 482 F.2d at 1093 (finding "judicious" the district court's decision to deny the motion for summary judgment not "because it was convinced that the motion was without merit, but because the issue presented was

[46] Professor Shannon also argues that Rule 56(f) will often accommodate the scenario where the nonmovant needs additional time to present facts, and that "[r]easonable requests for postponing the resolution of a motion for summary judgment not covered by Rule 56(f) presumably may be accommodated by continuing the hearing on that motion." Shannon, *supra*, at 102. Professor Shannon questions whether there is "any legitimate reason for denying (even temporarily) a proper motion for summary judgment that is not covered by these procedures," *id.*, but acknowledges that "[o]thers have attempted to formulate arguments along that line . . . ," *id.* at 102 n.87. One possible response may be the point raised by Professor Friedenthal and Mr. Gardner that Rule 56(f) does not cover certain instances where courts have recognized that discretion to deny is necessary to accommodate efficiency concerns, which "are at the heart of summary adjudication." *See* Friedenthal & Gardner, *supra*, at 111 (citing *Franklin Nat'l Bank*, 478 F. Supp. 210 (E.D.N.Y. 1979); *Toyoshima*, 88 F.R.D. 559 (S.D.N.Y. 1980)).

so complicated the court did not wish to dispose of it on a motion for partial summary judgment"); *Pearson*, 2007 WL 4591566, at *7 (finding that the plaintiff's evidence on his hostile work environment claim was likely insufficient, but finding it appropriate to exercise discretion to deny summary judgment on that claim because it was strongly interrelated with the claim for disparate treatment); *Converdyn*, 2007 WL 4570556, at *5 (denying summary judgment on certain claims even though some of the claims appeared "to be thin at best" because "[t]he piecemeal resolution of some of the remaining issues raised by the parties will not simplify or extenuate significantly the evidence at trial"); *Propps*, 2006 WL 2124242, at *1 ("Given the volume of papers in the record and the complexity of the proposed facts as highlighted by the parties' recent filings, the Court is satisfied that the effort necessary to make the determination whether there are genuine issues of material fact requiring trial is not a productive use of its time."); *T.J. Manalo*, 240 F. Supp. 2d at 1261 (denying summary judgment even though "it appear[ed] that there [was] no dispute as to any material fact," because "it [was] less clear whether the Government [was] 'entitled to . . . judgment as a matter of law," and "even where a movant has met its burden, a court retains discretion to deny summary judgment notwithstanding the seemingly mandatory language of Rule 56(c) . . . "); *Martin Ice Cream*, 554 F. Supp. at 944 (denying summary judgment on a claim of price discrimination while noting that "[w]ere this the only claim before the Court, we would undoubtedly grant summary judgment," but finding that because "the other antitrust claims are to go forward and the discovery required to develop them is virtually the same as that which would be required to develop the price discrimination claim, granting summary judgment at this point would serve no purpose"). In contrast, there are very few examples of cases where a circuit court disapproves of a discretionary denial of summary judgment or where a district court expresses a desire to deny summary judgment despite the absence

of disputed facts, but feels constrained to grant the motion because of a mandatory requirement to grant summary judgment if there are no disputed issues of material fact. *See Jones*, 26 F.3d at 728.

VI. Conclusion

Most of the case law substantively evaluating whether there is discretion to deny a motion for summary judgment has determined that discretion to deny summary judgment exists even when the movant has made the proper showing. The discretionary power of a court to deny a properly-supported motion for summary judgment has been summarized as follows:

> Although the court's discretion plays no role in the granting of summary judgment, since the granting of summary judgment under FED. R. CIV. P. 56 must be proper or the action is subject to reversal on appeal, the court may deny summary judgment as a matter of discretion even where the criteria for granting judgment are technically satisfied. Denial of summary judgment is appropriate where the court has doubts about the wisdom of terminating the case before a full trial or believes that the case should be fully developed before decision.
>
> For example, denial of summary judgment may be appropriate where—
> — the court has received inadequate guidance from the parties.
> — further inquiry into the facts is deemed desirable by the court to clarify the application of the law.
> — the motion is tainted with procedural unfairness.
> — the case involves complex issues of fact or law.
> — the case involves a question of first impression.
> — summary judgment would be on such a limited basis or on such limited facts that it would be likely to be inconclusive of the underlying issues.
>
> In a case involving multiple claims, the court may exercise its discretion to deny summary judgment where it finds it better, as a matter of judicial administration, to dispose of all the claims and counterclaims at trial rather than to attempt piecemeal disposition, or where part of the action may be ripe for summary judgment but is intertwined with another claim that must be tried.

27A TRACY B. FARRELL ET AL., FEDERAL PROCEDURE, LAWYERS EDITION § 62:625 (Francis M.

Dougherty et al. eds. 2008) (footnotes omitted).

Although there is plenty of case law with boilerplate language stating that a court must grant summary judgment if the Rule 56 standard is met, most of those cases at the appellate level do not involve review of a denial of a motion for summary judgment. Likewise, a review of a selection of some of those at the district court level reveals that most do not express that a motion is granted simply because of mandatory language in the rule when the court believes that the motion should be denied for administrative or other reasons. The one case the research uncovered that substantively involved review of a denial of summary judgment and that disapproved of that denial arguably may have limited application because it involved a request for summary judgment on qualified immunity grounds. While the court's language was broad, it also emphasized that immunity claims ought to be resolved early in the case, perhaps giving a stronger reason to remove discretion to deny a motion in that case than in the case of other summary judgment motions.