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SUMMARY JUDGMENT BEFORE THE COMPLETION OF DISCOVERY: A PROPOSED REVISION OF FEDERAL RULE OF CIVIL PROCEDURE 56(F)

John F. Lapham*

In 1986, the Supreme Court handed down a trio of opinions that significantly altered the playing field of summary judgment adjudication in the federal courts.¹ In short, the Court reduced the moving party’s burden and made it possible for defendants to challenge the factual sufficiency of plaintiffs’ claims without introducing any affirmative evidence of their own.² In response to a deluge of summary judgment motions, plaintiffs with insufficient evidence to support their claims have increasingly³ sought the protection of rule 56(f) of the Federal Rules of Civil Procedure, which provides trial judges with discretionary authority to grant continuances of summary judgment motions for further discovery.⁴ As a result, a rule

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² See, e.g., Celotex, 477 U.S. at 323.
³ A Westlaw search (“Rule/1 56(f) & DA(19XX)”) conducted on March 22, 1991 in the “ALLFEDS” directory for cases mentioning rule 56(f) revealed the following trend:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Cases</th>
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<td>95</td>
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<tr>
<td>1990</td>
<td>102</td>
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Although this data reflects only the small percentage of cases in which rule 56(f) has been mentioned in an opinion published on Westlaw, it at least suggests an increase in the use of this rule since the Supreme Court’s opinions in 1986.

⁴ FED. R. CIV. P. 56(f) provides:

When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present
that once was rarely used now has become the subject of substantial litigation.

In its current form, rule 56(f) provides little guidance as to what a party must show to obtain a continuance. The judge is granted wide discretion. The rule provides simply that where a party opposing a summary judgment motion shows by affidavit that she is unable to present facts essential to the party's opposition, the judge may deny the motion at that time or grant a continuance for further discovery. As a result, lower courts have applied rule 56(f) inconsistently and generally have granted continuances if they believed further discovery would be fruitful.

This application of rule 56(f) has undermined the basic purpose of the summary judgment procedure. By failing to place any limits on judicial discretion, the rule has failed to assure that factually groundless claims are disposed of as

5. In June 1989, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States issued a "Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure." See 110 S. Ct. LIX, LXXX (1989). Among its proposed amendments, the committee suggested a major rewriting of rule 56. Id. at LXXXV. One of the express purposes of this revision is to "assure a party opposing summary action of reasonable opportunity for discovery." Fed. R. Civ. P. 56(d) (proposed June 12, 1989), advisory committee notes, reprinted in 110 S. Ct. at CXCIX. To achieve this purpose, the committee proposed that the following language replace current rule 56(f): "Opportunity for Discovery. No summary judgment shall be rendered with respect to any claim, counterclaim, cross-claim, or third party claim, nor shall any fact be summarily established, until any opposing parties have had a reasonable time to discover evidence bearing on any fact sought to be established." Fed. R. Civ. P. 56(d) (proposed June 12, 1989), reprinted in 110 S. Ct. at CXCIX.

The committee concluded correctly that rule 56 as it stands does not guarantee parties an adequate opportunity for discovery, because the current rule gives "discretion to the district court to grant a continuance to a party opposing summary judgment when pertinent affidavits or evidence [are] not yet available." Id., advisory committee notes, reprinted in 110 S. Ct. at CCVII. Though the proposed amendment will alleviate some uncertainty from the current rule by limiting "the discretion of the district court to withhold the opportunity for discovery," id., it fails to provide district courts with any guidance about what a party must show to prove that it has not had "a reasonable time to discover evidence bearing on any fact sought to be established." Fed. R. Civ. P. 56(d) (proposed June 12, 1989), reprinted in 110 S. Ct. at CXCIX.

Indeed, if anything, the proposed rule will allow courts to be too permissive of further discovery because it requires courts to allow a reasonable time for discovery but grants them discretion in determining when a reasonable time has elapsed.


7. See infra Part II.
efficiently as justice will allow. In effect, it has given plaintiffs a shield to protect frivolous claims from early dismissals, thus allowing them to use the threat of discovery as a bargaining chip for a favorable settlement. Rather than allowing the efficient disposition of factually baseless claims, rule 56(f) has provided plaintiffs with a screen behind which they can hide such claims.

This Note proposes that rule 56(f) be tightened to facilitate the use of summary judgment motions to challenge the factual sufficiency of claims before and throughout discovery. The rule it proposes would require plaintiffs to present some factual support for their claims and to show that discovery is reasonably likely to raise a genuine issue of material fact. At the same time, it would require courts to grant continuances to plaintiffs who can make these showings.

Part I of this Note discusses the purpose of summary judgment in a regime of notice pleading. Part II examines how the federal courts have interpreted and applied rule 56(f). Part III suggests that rule 56(f) be modified to require a more significant factual showing before a court may grant a continuance for further discovery. In addition, Part III examines the policy considerations that support a more stringent rule. Finally, Part IV provides a hypothetical example illustrating the benefits of this proposal.

I. THE PURPOSE OF SUMMARY JUDGMENT IN A REGIME OF NOTICE PLEADING

A. The Origins of Notice Pleading

Before the adoption of the Federal Rules of Civil Procedure (the "Federal Rules") and its state equivalents, pleading was governed by a series of arcane rules and stylized forms. Courts dismissed the claims of parties who did not comply with these rules, regardless of the claims' underlying merits. Dissatisfaction with this system led to many efforts at re-
form,\textsuperscript{10} eventually culminating in the establishment of the Federal Rules in 1938.\textsuperscript{11}

The drafters of the Federal Rules sought to remedy the shortcomings of previous pleadings systems by crafting rules that would not result in technical dismissals of meritorious claims.\textsuperscript{12} Consequently, rule 8(a)(2) merely requires "a short and plain statement of the claim showing that the pleader is entitled to relief."\textsuperscript{13} The drafters intended this rule to express a preference for dispositions of cases on the merits, after full disclosure through discovery, over dispositions based on technical pleading failures.\textsuperscript{14} The drafters reinforced this purpose by proposing a rule that would allow pleadings to be

\begin{itemize}
  \item \textsuperscript{10} David Dudley Field, drafter of the 1948 New York Code, led the primary reform movement. See Act of April 12, 1848, ch. 379, 1848 N.Y. Laws 497. The Field Codes attempted to reduce the possibility of dispositions based on technicalities by replacing the stylized forms of pleading with a general rule requiring a clear and concise statement of the facts constituting the claim. Id. § 120(2); see also Marcus, supra note 8, at 438.
  \item The Field Codes failed, however, to eliminate technical dismissals. Courts continued to dismiss claims on the ground that the pleadings did not assert the necessary "ultimate facts," but only evidence of the claim or conclusions of law. See, e.g., Neukirch v. McHugh, 165 A.D. 406, 409, 150 N.Y.S. 1032, 1035 (1914) (finding that an allegation that a promise had been made in exchange for valuable consideration was a mere conclusion of law); Fulton v. Varney, 117 A.D. 572, 575, 102 N.Y.S. 608, 611 (N.Y. App. Div. 1907) (same); cf. Leach v. Rhodes, 49 Ind. 291, 292 (1874) (same). Unfortunately, because many legal concepts mix historical fact and legal conclusion, courts were unable to develop coherent standards to distinguish ultimate facts from conclusions of law. Consequently, courts continued to throw out a good number of meritorious claims on the basis of technical pleading failures. See, e.g., cases cited supra.
  \item Charles Clark served as the Reporter of the Supreme Court's Committee on the Rules of Civil Procedure, the committee that drafted the Federal Rules of Civil Procedure. See Marcus, supra note 8, at 433. According to Clark, the drafters of the Federal Rules set out to create a system that would favor dispositions of cases on their merits. Clark, The Handmaid of Justice, 23 WASH. U.L.Q. 297, 318-19 (1938).
  \item FED. R. CIV. P. 8(a)(2).
  \item Clark, supra note 12, at 318-19.
\end{itemize}
amended liberally. 15 Although something akin to fact pleading has been required in certain circumstances, 16 for the most part the Federal Rules have achieved their liberal purpose, and pleadings need do no more than give bare notice of the claim to the opponent. 17

B. The Purpose of Summary Judgment

Under the Federal Rules of Civil Procedure, pleadings serve the simple purpose of providing notice of a claim or defense to the opposing party. 18 Consequently, they need not include specific facts. Nor can a claim be dismissed for factual insufficiency; the motion to dismiss under the Federal Rules tests only the legal sufficiency of a claim. 19 To challenge the factual sufficiency of a claim under the Federal Rules, therefore, a party must move for summary judgment under rule 56. 20

Because the Federal Rules do not require pleadings to establish their own factual sufficiency, courts and commentators have noted that summary judgment is now the main vehicle for disposing of frivolous claims. 21 The advisory

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15. FED. R. CIV. P. 15.
16. Marcus identifies three categories of cases in which courts have required plaintiffs to plead detailed facts: securities fraud cases, civil rights cases, and cases involving conspiracy allegations. See Marcus, supra note 8, at 447-50. For example, see United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980) (civil rights); Ross v. A.H. Robins Co., 607 F.2d 545 (2d Cir. 1979) (securities fraud), cert. denied, 446 U.S. 946 (1980); Heart Disease Found. v. General Motors Corp., 463 F.2d 98 (2d Cir. 1972) (conspiracy); see also, e.g., FED. R. CIV. P. 9(b) (stating that parties must plead fraud with particularity).
17. See, e.g., Hickman v. Taylor, 329 U.S. 495, 501 (1947) ("The new rules, however, restrict the pleadings to the task of general notice-giving . . . ."); see generally Marcus, supra note 8, at 439-40.
18. See sources cited supra note 17.
20. FED. R. CIV. P. 12(b) provides:
   If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .
21. See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("But with the advent of 'notice pleading,' the motion to dismiss seldom fulfills this function [of disposing of factually frivolous claims] any more, and its place has been taken by the motion for summary judgment."); Fontenot v. Upjohn Co., 780 F.2d 1190, 1196 (5th Cir. 1986) ("The function of intercepting factually insufficient claims is now assigned to the summary judgment."); Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d
committee's note to the original rule states succinctly that "[s]ummary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact." In spite of this straightforward directive, at least one court held that a party could resist a properly supported motion for summary judgment by relying on the averments of her pleadings, at least if the averments were "well-pleaded" and not conclusory. The advisory committee noted that the rules were amended in 1963 to prevent this result. Thus, the rule now specifically provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The accompanying notes made the advisory committee's purpose for this change quite clear: "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Therefore, if a party can adduce no facts suggesting a genuine dispute about her claim, the court should grant the opposing party's motion for summary judgment.

Only by forcing parties facing summary judgment motions to show a reasonable factual basis for their claims can courts insure that judicial resources are allocated appropriately. If a reasonable jury could find only for the party moving for summary judgment, trial would be a pointless exercise, entailing unnecessary expenses for the judicial system and the parties.

1137, 1141 (D.C. Cir. 1970) (noting that rule 56 serves "admirably to eliminate . . . frivolous lawsuits"); 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2712, at 579 (2d ed. 1983) (claiming that summary judgment "is well adapted to expose sham claims and defenses").
22. FED. R. CIV. P. 56, advisory committee's note to original rule.
24. See FED. R. CIV. P. 56(e), advisory committee's note to 1963 amendment.
25. FED. R. CIV. P. 56(e).
26. FED. R. CIV. P. 56, advisory committee's note to 1963 amendment.
Although the drafters of the Federal Rules anticipated the importance of summary judgment in disposing of frivolous claims, they probably did not foresee the increased significance of discovery in modern litigation. Indeed, in many cases today, discovery is the most costly aspect of the case. Discovery abuse, moreover, has become a major weapon in the arsenals of many less-than-scrupulous litigants. Given the heightened importance and spiraling costs of discovery in modern litigation, courts should require parties seeking further discovery in the face of a summary judgment motion to demonstrate that they are seeking that discovery in good faith and not merely to prolong the case in the hope that a favorable settlement might be gained.

The purpose of summary judgment is to prevent the wasting of judicial resources on useless trials. Few cases, however, will ever get to trial even if they survive motions for summary judgment. In these cases, the bulk of legal resources will be spent conducting and supervising discovery. Courts should not hesitate, therefore, to use summary judgment to prevent the waste of resources not only on useless trials but also on useless discovery.

27. See generally R. MARCUS & E. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 499-518 (1985); Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 VAND. L. REV. 1295, 1296 (1978). Some commentators have asserted that the costs of discovery have been overblown. See Felstiner, Grossman, Kritzer, Sarat & Trubek, The Costs of Ordinary Litigation, 31 UCLA L. REV. 72, 89-91 (1983). Their study revealed that "relatively little discovery occurs in the ordinary lawsuit." Id. at 90. Their data also indicated, however, that discovery occupies more attorney time (16.7%) than any other activity. Id. at 91. Such findings suggest that although many cases involve almost no discovery at all, discovery consumes more time than any other aspect of those cases that do require it. Id. at 90-91. Professor Friedenthal contends that discovery is probably not a problem in most cases, but acknowledges that in some cases discovery costs are well out of proportion to the dispute. See Friedenthal, A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure, 69 CALIF. L. REV. 806, 816-17 (1981).

28. A recent Harris poll revealed that a significant number of federal judges (47% of those surveyed) agree that discovery abuse is a major cause of delays in litigation, and only a handful (7% of those surveyed) believe that it is not a cause of delay at all. Louis Harris & Assocs., Inc., Judges’ Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases, 69 B.U.L. REV. 731, 735 (1989) [hereinafter Harris Poll]. Seventy-three percent of federal judges surveyed also believe that the “use of discovery as an adversarial tool to intimidate or raise the stakes for their opponents” is a major cause of excessive litigation costs in their courts. Id. at 752.

29. A 1983 survey found that only 5.4% of cases filed in federal district court ever reach trial. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1983 ANNUAL REPORT OF THE DIRECTOR 142 (table 29) (1983).

The general purpose of the Federal Rules, to afford every action a "just, speedy, and inexpensive determination," supports applying the rules in a way that disposes of factually baseless claims as quickly as justice will allow. Devoting scarce resources to frivolous suits deprives meritorious suits of those resources and denies justice to deserving plaintiffs by delaying the resolution of their claims. To allow discovery on the basis of speculation undermines the essential goal of the Federal Rules to prevent the wasting of resources on frivolous claims. If a party knows that she can force discovery, even if her claim is purely speculative, she may well bring an action in the hope that the threat of discovery will be sufficient to extract a favorable settlement from the defendant. Through the proper use of the summary judgment procedure, courts can prevent this result.

Courts should not, of course, expect parties to have fully developed factual support for their claims before discovery begins. The Federal Rules, however, should require a party

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31. FED. R. CIV. P. 1.
32. The recent Harris Poll indicates that a significant number of federal judges believe that filing frivolous suits and making frivolous defenses cause serious delays in the federal courts. Twenty-one percent of those surveyed thought frivolous suits and defenses were a major cause of delay, while 70% believed they were a minor cause. Harris Poll, supra note 28, at 735.
33. Benjamin R. Civiletti, former Attorney General of the United States, concludes:

The judicial expansion of liability without regard to fault, the threat of monumental awards, and the inordinate delays clearly provide incentives to settle. Unfortunately, this may lead to the filing of more and more frivolous suits in hopes of a settlement. As settlements become more probable, it is likely, absent some controls, that more frivolous suits will be filed; and thus the cycle continues. The continual filing and settling of such cases unnecessarily wastes our limited judicial resources, delays or impedes the trial or disposition of all other legitimate cases, and adds to the costs.

Civiletti, Zeroing in on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs, 46 MD. L. REV. 40, 47 (1986). This danger is especially great when the potential damages from the action and the potential costs of discovery are large. See, e.g., Paul Kadair, Inc. v. Sony Corp. of Am., 694 F.2d 1017, 1031 (5th Cir. 1983) ("[T]he expensive and time consuming nature of antitrust litigation along with the statutory treble damage remedy, may particularly inspire vexatious litigation, an evil which summary judgment may guard against."); In re Commonwealth Oil/Tesoro Petroleum Corp. Sec. Litigation, 467 F. Supp. 227, 250 (W.D. Tex. 1979) (warning that courts should not give plaintiffs “unchecked access to the in terrorem [sic] power of the federal discovery mechanism”).

34. This is especially true in light of the recent Supreme Court decisions on summary judgment. See infra notes 43-66 and accompanying text. Others agree. In a concurring opinion in J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 617 (3d Cir. 1987), Judge Becker suggested that the timing of summary judgment motions is now crucial. Most plaintiffs, he noted, are unlikely to have sufficient
seeking the expenditure of judicial resources on discovery to establish some minimal factual predicate to support his claim.\textsuperscript{35} Rule 11 places a duty on a party to determine, after reasonable inquiry, that his claim is well grounded in fact.\textsuperscript{36} As a result, courts should presume a claim is well grounded until the opposing party demonstrates that no genuine issue of material fact exists—until, in other words, the opposing party makes a properly supported motion for summary judgment under rule 56(c).\textsuperscript{37} Once such a motion is made, the burden shifts to the party opposing summary judgment to make two showings: first, that he has a factual basis supporting his claim; and second, that this basis is, in light of the offering made by the moving party, either sufficient to create a genuine issue or sufficient to support a conclusion that further discovery is reasonably likely to create a genuine issue.\textsuperscript{38}

Even if the court determines that summary judgment is not appropriate at the time of the motion, it should use the procedure to narrow the scope of discovery. Parties with legitimate claims may be tempted to use the liberal discovery rules to prolong the litigation in an attempt to garner a favorable settlement.\textsuperscript{39} Under the existing rule 56(f), the evidence to raise a genuine issue on every element when the complaint is filed, but these claims should not be dismissed before plaintiffs have had any opportunity to develop the facts. \textit{Id.}

\textsuperscript{35} There is some dispute over this issue. Professor Friedenthal argues: “The very purpose of permitting pleadings based upon good faith speculation must be to permit plaintiffs to employ the discovery provisions to determine whether a valid case in fact exists.” Friedenthal, supra note 27, at 816. He is particularly concerned with cases in which crucial facts “are to be found only in the files and minds of opposing parties.” \textit{Id.} at 817. Others disagree. \textit{See, e.g.,} Kirkham, \textit{Complex Civil Litigation—Have Good Intentions Gone Awry?}, 70 F.R.D. 199, 202 (1976) (“When notice pleading dumps into the lap of a court an enormous controversy without the slightest guide to what the court is asked to decide; when discovery—totally unlimited because no issue is framed—mulls over millions of papers . . . we should, I think, consider whether noble experiments have gone awry.”); Rifkind, \textit{Are We Asking Too Much of Our Courts?}, 70 F.R.D. 96, 106-07 (1976) (suggesting that, to prevent claims based on the mere hope that discovery will uncover facts supporting the claim, discovery should not be allowed until a party has shown the probable merit of his claim); Rosenberg, \textit{Federal Rules of Civil Procedure in Action: Assessing Their Impact}, 137 U. Pa. L. Rev. 2197, 2206 (1989) (arguing that the “purpose of discovery is not to find out whether the pleader has any supportable claim or defense of whatever kind” but rather “to develop support for a position that at the time of pleading already has some tenable basis in fact and law”).
court can prevent such an abuse of discovery by initially limiting discovery to that which is reasonably likely to produce information that will create a genuine issue of material fact. For this reason, if a summary judgment motion can be properly supported, it is a good strategy even if the moving party believes that the court is likely to grant additional time. If it accomplishes nothing else, such a motion will force the opposing party to reveal her factual predicate and justify her requests for discovery.

C. Recent Developments in the Law of Summary Judgment

In a series of cases decided in 1986, the Supreme Court sent a message to the lower federal courts that summary judgment is an important part of the Federal Rules mandate "to secure the just, speedy, and inexpensive determination of every action." Those cases encouraged greater use and acceptance of summary judgment motions and decreased the moving party's burden on issues where the opposing party bears the burden of proof. Thus, the Supreme Court has

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40. See First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 265 (1968) (noting that rule 56(f) "provides for comparatively limited discovery for the purpose of showing facts sufficient to withstand a summary judgment motion, rather than Rule 26, which provides for broad pretrial discovery"); New Am. Shipbuilders, Inc. v. United States, 871 F.2d 1077, 1081 (Fed. Cir. 1989) (upholding a stay of discovery and noting that "[o]ne important advantage sought by the rules from the summary judgment procedure is to save the parties and the court the time and cost that may be wasted in pursuit of irrelevant facts by discovery").

41. FED. R. CIV. P. 1; see supra note 1 and accompanying text.

shifted the battleground of summary judgment, asking not whether the moving party has demonstrated beyond reasonable inferences that no genuine issue of material fact exists, but whether the nonmoving party should be allowed to pursue further discovery.

This shift reflects a change in the substantive law and the Supreme Court's attitude toward the use of summary judgment. In *Celotex Corp. v. Catrett*, for example, the Court upheld summary judgment for the defendant in an asbestos product liability suit. After a year of discovery, the plaintiff had failed to produce any evidence showing the decedent's exposure to defendant's products. Nonetheless, the D.C. Circuit had held that summary judgment was inappropriate because the defendant had not supported its motion with evidence negating the allegation of exposure.

The Supreme Court rejected this reasoning. The Court rested its decision in part on the language of rule 56(c), which provides that a motion shall be granted if the pleadings and depositions, together with any affidavits, reveal no genuine issue of material fact, and rules 56(a) and (b), which provide that parties may move for summary judgment "with or without supporting affidavits." Focusing on the language that makes affidavits optional, the Court concluded that the moving party does not have to produce evidence showing the absence of a genuine issue. Instead, the moving party can discharge his initial burden simply by showing that the nonmoving party has not produced any evidence in support of an element on which the movant will bear the burden of proof at trial. Once the movant shows that no evidence has been produced, the burden then shifts to the nonmoving party to produce evidence suggesting he will be able to carry his burden at trial.

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44. Id. at 319.


46. Celotex, 477 U.S. at 323; FED R. CIV. P. 56(a)-(c).


48. Id. at 322-23.
In reaching this decision, the Court noted specifically that this standard would not expose plaintiffs to premature summary judgments because rule 56(f) insures that each party has an adequate opportunity to conduct discovery. The Court also noted, however, that courts should not hesitate to grant summary judgment in appropriate circumstances. Indeed, the Court emphasized that the interests of parties facing factually baseless claims should not be sacrificed in an all-out effort to prevent the premature disposition of legitimate claims:

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

This recognition of the rights of moving parties constitutes a significant shift in the Court's attitude toward summary judgment, a shift that favors more frequent use of summary judgments to dispose of frivolous claims.

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the district court granted summary judgment to over twenty antitrust defendants, finding that an inference of predatory pricing and attempted monopolization was unreasonable. The Court of Appeals for the Third Circuit reversed, concluding that there was sufficient evidence to allow an inference of concerted action. The Supreme Court, in

49. *Id.* at 326.
50. *Id.* at 327.
51. *Id.*
54. *Id.* at 519.
turn, reversed the Third Circuit and remanded the case, ordering that summary judgment be reinstated.\(^{56}\)

The Court characterized the nonmoving plaintiff's duty as something more than raising some doubt as to the material facts: "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."\(^{57}\) Indeed, the Court indicated that the proper standard for determining a summary judgment motion is similar to the standard used for the trial motion for directed verdicts:

"Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'"\(^{58}\) The issue, therefore, is not whether the evidence is sufficient to raise an inference to be resolved at trial, but whether it is sufficient to support a verdict for the nonmoving party.

In practical terms, this means that a plaintiff must do more than provide sufficient evidence to raise an inference that would support a verdict in her favor. She must supply enough evidence so that a rational trier of fact could reach that inference rather than a competing one.\(^{59}\) Before \textit{Matsushita}, courts could have held that competing inferences precluded summary judgment.\(^{60}\) Under the standard established in \textit{Matsushita}, if a party moving for summary judgment can show that the inference supporting its position is the only "reasonable" inference, then summary judgment is proper.\(^{61}\)

Finally, in \textit{Anderson v. Liberty Lobby, Inc.},\(^{62}\) a libel case, the Court held that summary judgments, like directed verdicts, must meet the substantive standard of proof required at trial.\(^{63}\) Using the trial standard meant that the plaintiff, to defeat a motion for summary judgment, had to provide enough evidence that a rational trier of fact could find actual malice by clear and convincing evidence.\(^{64}\)

Again, as in the prior two cases, the Court used language that favors summary judgment where the opponent's evidence

\(^{56}\) \textit{Matsushita,} 475 U.S. at 578-80.
\(^{57}\) \textit{Id.} at 586 (footnote omitted).
\(^{58}\) \textit{Id.} at 587.
\(^{59}\) \textit{Id.} at 588.
\(^{60}\) \textit{Childress, supra} note 42, at 187.
\(^{61}\) \textit{Id.; see also Matsushita,} 475 U.S. at 588.
\(^{63}\) \textit{Id.} at 254.
\(^{64}\) \textit{Id.}
“is merely colorable” or “is not significantly probative.” In *Anderson*, the Court carried this standard to its logical conclusion. To determine if the opponent’s evidence is sufficiently probative, the trial judge “must bear in mind the actual quantum and quality of proof necessary to support liability.” Thus, where a party will face a higher burden of proof at trial, it will have to produce more probative evidence to defeat a motion for summary judgment.

As a result of these cases, summary judgment motions now possess considerably more bite. Indeed, the summary judgment motion has taken on the character of a factual-sufficiency motion. Although some scholars have strongly criticized this result, it is consistent with the philosophy behind notice pleading. Because pleadings need only provide notice and cannot be challenged for lack of factual sufficiency, using a summary judgment motion to challenge the factual sufficiency of a claim is sensible. The greatest danger posed by this use of summary judgment motions is that potentially legitimate claims will be dismissed prematurely. The drafters anticipated this problem and sought to alleviate it by providing trial judges with discretion to grant continuances of summary judgment motions for further discovery. Now that the Supreme Court has reduced the burden of a party moving for summary judgment, that rule has become the new battleground for summary judgment motions.

65. *Id.* at 249-50.
66. *Id.* at 254.
67. By factual-sufficiency motion, I mean a motion that tests the factual basis of a nonmoving party’s claim to see if it has sufficient factual support so that a rational trier of fact could find in favor of the nonmoving party at trial.
68. The most thorough critique is Stempel, *supra* note 42. Stempel criticizes the Supreme Court’s trio of 1986 decisions on several different levels. He argues that making summary judgments easier to obtain will shift power from plaintiffs to defendants. Such a shift, he adds, will only further skew an already unbalanced adversarial system that favors large and wealthy litigants over small and poor litigants. *Id.* at 159-60. Moreover, he contends that increased availability of summary judgment will diminish the role and the authority of the civil jury and therefore will decrease the community’s confidence in the reliability of judgments. *Id.* at 162-70. He also suggests that the decisions will have no substantial effect on judicial efficiency, because the costs of litigating summary judgment motions are nearly as high as the costs of conducting trials. *Id.* at 171-72. Finally, he contends that “making summary judgment too easy adversely reduces the accuracy of court decisions.” *Id.* at 173. Some commentators, on the other hand, have criticized the trilogy for making it too difficult to obtain summary judgment. *See* Mullenix, *supra* note 42, at 474-75; Nelken, *supra* note 42, at 75, 83.
69. *See supra* notes 21-26 and accompanying text.
70. FED. R. CIV. P. 56(f).
II. JUDICIAL INTERPRETATION
AND APPLICATION OF RULE 56(f)

Even before the trilogy of 1986 opinions, many parties appealed summary judgments on the ground that the district court should have granted them a continuance under rule 56(f).\(^7\) Now that the Court has altered the burdens of the parties on a summary judgment motion in a way that favors moving parties, an increasing number of opponents have sought, and undoubtedly will continue to seek, the protection of rule 56(f).\(^7\) A good deal of this litigation has reached the appellate level, and the courts of appeals have often applied conflicting standards in resolving these disputes.

Among other things, courts have considered the type of filing necessary to invoke the rule,\(^7\) what must be shown to obtain its protection,\(^7\) whether summary judgment is appropriate before any discovery,\(^7\) and whether a continuance may be obtained without any factual showing supporting the party’s claim.\(^7\) I will now examine each of these factors.

A. What Kind of Filing is Necessary
to Invoke the Protection of Rule 56(f)?

As a preliminary matter, I should emphasize that if a motion for summary judgment is supported properly and the adverse party does not set forth specific facts showing a genuine issue for trial, summary judgment must be entered; it is not a matter of judicial discretion.\(^7\) Rule 56(f) softens the harshness of this rule by giving the judge discretion under certain limited circumstances:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated

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\(^7\) See infra notes 79, 82, 94.
\(^7\) See supra notes 2-3 and accompanying text.
\(^7\) See infra Part II.A.
\(^7\) See infra Part II.B.
\(^7\) See infra Part II.C.
\(^7\) See infra Part II.D.
\(^7\) See infra Part II.D.
\(^7\) See infra Part II.D.
\(^7\) FED. R. CIV. P. 56(c).
present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. 78

Although the rule provides that a judge may avoid granting summary judgment only when it appears from the affidavits that the party cannot present facts essential to justify the party’s opposition, courts have not always required affidavits before exercising their discretion. Some courts of appeals have gone so far as to overturn judgments where a district court refused to grant a continuance because the opponent failed to comply with the affidavit requirement. 79 “Form,” according to these appellate courts, “is not to be exalted over fair procedures.” 80 Another court, however, suggested that the failure to file an affidavit should be considered in determining “whether the district court abused its discretion by ruling on the motion when it did.” 81 Other courts have upheld rulings that filing an affidavit is necessary to obtain the protection of rule 56(f). 82

78. **Fed. R. Civ. P. 56(f).** Rule 56(e) provides that “affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” **Fed. R. Civ. P. 56(e).** Thus, any submission under rule 56(f) would have to meet these requirements to constitute an affidavit under rule 56(e).

79. See First Chicago Int’l v. United Exch. Co., 836 F.2d 1375, 1380 (D.C. Cir. 1988) (finding that outstanding interrogatories and document requests together with plaintiff’s “Statement of a [sic] Material Facts as to Which There Is a Genuine Dispute” “sufficed to alert the district court of the need for further discovery and thus served as the functional equivalent of an affidavit”); Garrett v. City & County of San Francisco, 818 F.2d 1515, 1518 (9th Cir. 1987) (finding that plaintiff’s pending discovery motion satisfied the requirements of rule 56(f)); Cowan v. J.C. Penney Co., 790 F.2d 1529, 1532 (11th Cir. 1986) (holding that failure to file rule 56(f) affidavit did not justify entry of summary judgment while discovery requests were still outstanding); Sames v. Gable, 732 F.2d 49, 52 n.3 (3d Cir. 1984) (stating that failure to file rule 56(f) affidavit was not “sufficiently egregious to warrant a non-merits resolution of [plaintiffs]’ claims”); Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1145-46 (5th Cir.) (en banc) (finding that a docketed letter signed by plaintiff’s attorney satisfied the spirit of rule 56(f)), cert. denied, 414 U.S. 1116 (1973).

80. **Littlejohn,** 483 F.2d at 1146.


82. See Dreiling v. Peugeot Motors of Am., Inc., 850 F.2d 1373, 1376 (10th Cir. 1988) (noting that rule 56(f) “protection arises only if the nonmoving party files an affidavit explaining why he or she cannot present facts to oppose the motion”); Chicago Florsheim Shoe Store Co. v. Cluett, Peabody & Co., 826 F.2d 725, 727 (7th Cir. 1987) (finding that because plaintiff failed to submit a rule 56(f) affidavit or move
Courts that allow some deviation from the strict letter of rule 56(f) have the stronger argument. The intent of the drafters to infuse the Federal Rules with a spirit of procedural liberality is evident throughout the rules themselves as well as the advisory committee’s notes. Indeed, one of the goals behind drafting the rules was to minimize dismissals based on technical failings of procedure. To grant summary judgment where discovery seems likely to create a genuine issue for trial, simply because a party failed to file the proper affidavit, runs counter to the general spirit of the rules.

Although a flexible application of rule 56(f) may sometimes be necessary to avoid injustice, an approach that ignores the limits placed on judicial discretion would undermine the
language of the rule that summary judgment be mandatory when appropriate. Strict compliance with the affidavit requirement, therefore, should not always be necessary for the court to exercise its discretion, but when the opponent has not filed an affidavit, the court should demand a close substitute that satisfies the rule's purpose for requiring affidavits. As the Court of Appeals for the D.C. Circuit noted, "[t]he purpose of the affidavit is to ensure that the nonmoving party is invoking the protections of Rule 56(f) in good faith by affirmatively demonstrating why he cannot respond to the summary judgment motion." By requiring an affidavit, the court ensures good faith because it subjects the maker of the affidavit to the sanctions of rule 56(g) if the affidavit is presented in bad faith.

Courts, therefore, should only accept alternatives to affidavits if the maker can be subjected to sanctions for any bad-faith statements. Unfortunately, most courts either have approached alternative proffers in a haphazard manner, allowing them whenever the result appears just, or have not allowed them at all. The First Circuit, however, recently articulated some helpful guidelines:

When a departure occurs, the alternative proffer must simulate the rule in important ways. It should be made in written form and in a timely manner (that is, served with the response to the motion or filed with the court at the earliest practicable date thereafter). The statement must be made, if not by affidavit, then in

86. Hotel & Restaurant Employees Union, Local 25 v. Attorney Gen. of the United States, 804 F.2d 1256, 1289 (D.C. Cir. 1986), vacated on other grounds, 808 F.2d 847 (D.C. Cir. 1987); see also 846 F.2d 1499, 1501, 1513 (D.C. Cir. 1988) (en banc) (recognizing other grounds for vacating the opinion).

87. Rule 56(g) provides that if affidavits are filed in bad faith, "the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt." FED. R. CIV. P. 56(g).

88. An example of an alternative that would fail this test is an argument made by an attorney either in a brief opposing summary judgment or during a hearing before the court. The Third Circuit explained the inadequacy of an attorney's arguments in a recent decision:

We cannot diminish the value of an affidavit by permitting an attorney's unsworn statement to replace it. The adversary system recognizes the right and practice of attorneys to take adversarial license with evidence and argue it as fact. It does not recognize argument as a surrogate for either evidence or fact. Thus, the statement is lacking both in substance, and in any indicia of evidentiary reliability contemplated by the requirements of Rule 56.


89. See supra notes 79-82 and accompanying text.
some authoritative manner—say, by the party under penalty of perjury or by written representations of counsel subject to the strictures of Fed.R.Civ.P. 11—and filed with the court.90

These guidelines preserve the purpose of the affidavit requirement and uphold an identifiable limit on judicial discretion, yet prevent the dismissal of potentially valid claims on procedural technicalities.

B. What Must a Party Show to Obtain a Continuance for Further Discovery?

Rule 56(f) allows courts to deny or delay summary judgments when the party opposing the motion states by affidavit the reasons why he cannot “present by affidavit facts essential to justify [his] opposition.”91 Generally, courts have interpreted this rule to require a party desiring a continuance to show:

1) the nature of the uncompleted discovery, i.e., what facts are sought and how they are to be obtained;
2) how those facts are reasonably expected to create a genuine issue of material fact;
3) what efforts the affiant has made to obtain those facts; and
4) why those efforts were unsuccessful.92

In almost every case where a court of appeals has upheld a denial of a continuance, the nonmoving party failed to establish one or more of these elements.93

By far the most frequent reason that courts deny requests for continuances is that the requests do not identify with sufficient specificity the facts to be discovered.94 A

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91. FED. R. CIV. P. 56(f).
93. See infra notes 94-108 and accompanying text.
94. See Mackey v. Pioneer Nat'l Bank, 867 F.2d 520, 523-24 (9th Cir. 1989); Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc., 840 F.2d 1394, 1400 (9th Cir. 1987), cert. dismissed, 487 U.S. 1247 (1989); Hancock Indus. v. Schaeffer, 811 F.2d 225, 230 (3d Cir. 1987); Otto
conclusory statement asserting merely that discovery will yield essential, but unspecified, facts will almost certainly fail to convince a court to order a continuance. In a trademark registration case, for example, the U.S. Court of Appeals for the Federal Circuit found that the following affidavit did not satisfy rule 56(f):

Answers to Opposer's pending requests for discovery, and possibly affidavits, depositions, or other discovery will be required to respond to Applicant's Motion for Summary Judgment. There is certain information regarding Applicant's use of its mark, channels of trade and other evidence necessary to prepare a response that is solely in the possession of the Applicant.\textsuperscript{95}

The court denied the continuance, reasoning that "[i]f all one had to do to obtain a grant of a Rule 56(f) motion were to allege possession by movant of 'certain information' and 'other evidence,' every summary judgment decision would have to be delayed while the non-movant goes fishing in the movant's files."\textsuperscript{96}

A rule 56(f) motion should specifically identify the facts to be discovered because the court needs to know whether the facts, if found, will create a genuine issue. If they will not, then the court need not waste judicial resources trying to uncover them. Similarly, there is no reason to pursue discovery that will only produce inadmissible evidence. For example, in a case where a party sought a continuance to discover parol evidence to rebut a written agreement, the court denied the request because the evidence, even if uncovered, would not have been admissible at trial.\textsuperscript{97}

\textsuperscript{95} Keebler Co. v. Murray Bakery Prods., 866 F.2d 1386, 1387 (Fed. Cir. 1989).  
\textsuperscript{96} Id. at 1389.  
\textsuperscript{97} United States ex rel. Small Business Admin. v. Light, 766 F.2d 394, 396 (8th Cir. 1985) (per curiam).
Once a party has identified specific facts he seeks to uncover through discovery, he must demonstrate some plausible basis for his belief that these facts exist and also must demonstrate a realistic prospect that they can be obtained within a reasonable amount of additional time. He must also establish that such facts are reasonably likely to create a genuine issue. If the additional facts will be merely cumulative, immaterial, or not sufficiently probative to support a verdict for the nonmoving party at trial, the court should deny the request for a continuance and grant summary judgment.

Finally, a party seeking a continuance under rule 56(f) must describe efforts she has already made to obtain the needed information and why those efforts have been unsuccessful. Generally, a party can satisfy this requirement by showing that the party moving for summary judgment has exclusive control over the specific information needed and has not responded to discovery requests. Indeed, one court

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99. See, e.g., id.
100. See Patty Precision v. Brown & Sharpe Mfg., 742 F.2d 1260, 1264-65 (10th Cir. 1984); see also, e.g., Shipes v. Hanover Ins. Co., 884 F.2d 1357, 1361-62 (11th Cir. 1989) (finding that where the district court had determined that defendant had established its good faith as a matter of law, further discovery on that issue was immaterial and summary judgment was appropriate); Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 422 (2d Cir. 1989) (affirming summary judgment for the Navy where plaintiff's claim depended on existence of official Navy statements because any official statements would have been matters of public record and thus, requested discovery would reveal nothing new). It is important to note, however, that although these standards appear stringent, courts usually apply them liberally in favor of the nonmoving party because of the severity of granting summary judgment. See Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 136 (5th Cir. 1987) (“The continuance is a safe harbor built into the rules so that summary judgment is not granted prematurely... Given the precautionary nature of the rule, these requests ordinarily are treated and reviewed liberally. Technical, rigid scrutiny of a Rule 56(f) motion is inappropriate.”); Patty Precision, 742 F.2d at 1264 (noting that an affidavit under rule 56(f) should be treated liberally). The lenient application of this vague rule, however, is one of the chief causes of inconsistent results. Because liberality is probably appropriate in some circumstances, a precise rule on continuances is needed all the more to enhance consistency and predictability.
101. See supra note 92 and accompanying text.
102. See, e.g., Costlow v. United States, 552 F.2d 560, 564 (3d Cir. 1977); Willmar Poultry Co. v. Morton-Norwich Prods., Inc., 520 F.2d 289, 294 (8th Cir. 1975), cert. denied, 424 U.S. 915 (1976).

These cases deal only with information controlled by parties moving for summary judgment, leaving open the possibility that a distinction could be drawn between discovery of moving parties and discovery of third parties. Such a distinction would
has gone so far as to say that "where the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course." If a party has diligently pursued essential information in the exclusive possession of the moving party, the court should not grant summary judgment before it has reviewed that information.

A party may run into trouble on this final requirement if he cannot show exclusive control by the moving party or if he has not pursued discovery diligently. Where a party should be able to create a genuine issue by filing his own affidavit and fails to do so, the court will probably not allow the party to conduct further discovery. In a civil rights action, for example, the Third Circuit upheld a summary judgment partly because the plaintiff had not filed her own affidavit explaining the violation. Similarly, in a Fifth Circuit case involving the appointment of a receiver, the court upheld the denial of a continuance on the grounds that plaintiffs had not filed their own affidavit as to matters necessarily known by them, such as their financial condition.

Additionally, courts will deny a rule 56(f) motion if the party making it has been dilatory in pursuing discovery.

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make little sense. After all, the purpose of requiring the opponent of a summary judgment motion to show exclusive control by another party is to force the opponent to explain why she does not have the facts necessary to oppose the motion. See supra note 92 and accompanying text. Whether those facts are controlled by the moving party or by a third party, they are inaccessible to the opponent prior to discovery. Consequently, it would be patently unfair to grant summary judgment before allowing the opponent access to the needed facts. Of course, if the opponent fails to pursue her discovery options diligently, she should not be entitled to exert her own dilatoriness as a defense to the summary judgment motion. See infra notes 107-08 and accompanying text. Perhaps courts should be more tolerant of delay when the essential information is in the hands of the moving party, because the moving party is more likely to resist discovery than parties that are not involved in the litigation. This assumption is really unnecessary, however. If an opponent to a summary judgment motion can demonstrate that she has attempted to discover essential information and that discovery has been resisted, the court should grant the continuance regardless of whether the resisting party is the moving party or a third party. Moreover, if the opponent has been dilatory, she should not be able to exonerate herself simply by saying that the moving party controls essential information.

103. Costlow, 552 F.2d at 564.
104. See supra notes 105-08.
Courts, as a rule, expect parties to prosecute their claims diligently. They will not tolerate tardiness in pursuing claims as a backdoor defense to a summary judgment motion.\textsuperscript{107} Although courts vary somewhat in what they consider dilatory, if a party fails to conduct discovery for a period of several months, most courts will probably not be receptive to a rule 56(f) motion for a continuance.\textsuperscript{108}

C. May a Court Grant Summary Judgment Before Any Discovery?

Although rule 56(b) provides that a defendant may move for summary judgment at any time,\textsuperscript{109} some courts have been unwilling to uphold summary judgments before the plaintiff has had an opportunity for discovery.\textsuperscript{110} Other courts have upheld summary judgments granted before any discovery, where the nonmoving party had not satisfied the requirements of rule 56(f).\textsuperscript{111}

Rule 56(f) obligates a party to demonstrate that her claim is being pursued in good faith. The Eighth Circuit has noted the proper limits of the protection of rule 56(f):

\begin{itemize}
  \item 107. See, e.g., Chung Wing Ping v. Kennedy, 294 F.2d 735, 737 (D.C. Cir. 1961).
  \item 108. See, e.g., Paul Kadair, Inc. v. Sony Corp. of Am., 694 F.2d 1017, 1031 (5th Cir. 1983) (affirming denial of a continuance against plaintiff who conducted no discovery for 10 to 12 months after filing the complaint); Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186, 1189, 1193 (5th Cir. 1978) (finding summary judgment proper where plaintiff conducted no discovery for a seven-month period); and King v. National Indus., Inc., 512 F.2d 29, 34 (6th Cir. 1975) (affirming summary judgment against plaintiff who had more than a year to conduct discovery).
  \item 109. FED. R. CIV. P. 56(b).
  \item 110. See, e.g., WSB-TV v. Lee, 842 F.2d 1266, 1269 (11th Cir. 1988); Cowan v. J.C. Penney Co., 790 F.2d 1529, 1532 (11th Cir. 1986).
  \item 111. See, e.g., Washington v. Allstate Ins. Co., 901 F.2d 1281, 1284-86 (5th Cir. 1990); Keebler Co. v. Murray Bakery Prods., 866 F.2d 1386, 1390 (Fed. Cir. 1989) ("Before us Keebler relies entirely on its having had no discovery at all, noting that requests denied in earlier cases were for additional discovery. Rule 56(f), however, makes no such distinction; on the contrary, the Rule requires that each request for discovery be adequately supported by a showing of need."); THI-Hawaii, Inc. v. First Commerce Fin. Corp., 627 F.2d 991, 994 (9th Cir. 1980). It should be noted that although a summary judgment before discovery appears to be equivalent to a dismissal under rule 12(b)(6), it is really quite different. A dismissal under rule 12(b)(6) is based on the plaintiff's failure to state a claim upon which relief can be granted and usually is delayed until the party has had an opportunity to amend her complaint under rule 15. FED. R. CIV. P. 12(b)(6), 15. Summary judgment, on the other hand, is based on the plaintiff's failure to produce facts sufficient to raise a genuine issue for trial. See supra notes 19-26 and accompanying text.
\end{itemize}
Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. A party invoking its protections must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits as otherwise required by Rule 56(e) and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact. Where, as here, a party fails to carry his burden under Rule 56(f), postponement of a ruling on a motion for summary judgment is unjustified.\textsuperscript{112}

If a party faces a motion for summary judgment, the rule requires the party to reassure the court that her claim has some basis in reality.\textsuperscript{113} Rule 56(f) forces a party to show a reasonable likelihood that discovery will produce facts sufficient to raise a genuine issue. It does not distinguish between a party that has nearly finished discovery and one that has not yet begun.\textsuperscript{114} Nor should it. Neither a party who has had extensive discovery nor one who is just beginning discovery should be able to hide behind rule 56(f) and obtain a continuance without making an affirmative showing. In either case, the party opposing summary judgment has the burden to show that it is reasonably likely that, after discovery, dismissal of the claim will no longer be warranted. Obviously, if discovery is nearly complete, a party will be hard-pressed to show that further discovery will reveal anything new. If no discovery has been taken, on the other hand, the opposing party will have a great deal of room to argue that discovery will uncover facts sufficient to create a genuine issue. But even when no discovery has been taken, the court should require a showing that discovery will reveal an issue for trial. If a court permits discovery in the absence of this affirmative showing, judicial resources will be expended needlessly on a claim that probably will be dismissed after discovery.

\textsuperscript{112} Willmar Poultry Co. v. Morton-Norwich Prods., Inc., 520 F.2d 289, 297 (8th Cir. 1975), cert. denied, 424 U.S. 915 (1976).
\textsuperscript{113} See supra note 92 and accompanying text.
\textsuperscript{114} See FED. R. CIV. P. 56(f).
D. May a Party Obtain a Continuance Under Rule 56(f) Without Any Factual Showing Supporting His Claim?

On its face, rule 56(f) does not require any factual showing supporting a party's claim. It calls only for a statement of the reasons why the party cannot make a sufficient factual showing at that time to raise a genuine issue. Is it sensible, however, to grant a party a continuance for discovery when she can produce no facts supporting her claim? Several courts have considered the issue. The more thoughtful decisions rule that a plaintiff must make some factual showing to avoid losing on summary judgment.

In Contemporary Mission, Inc. v. United States Postal Service, for example, the plaintiff alleged a conspiracy to deprive it of its nonprofit organization postal permit because of its members' religious beliefs. The plaintiff produced no evidence to support these vague allegations. The defendant moved for summary judgment and supported its motions with affidavits explaining its actions. The district court granted the motion, and the Second Circuit affirmed, concluding that "the district court acted well within its discretion in preventing the plaintiff from burdening the defendants with a needless round of discovery in this frivolous lawsuit." Although the plaintiff apparently did not satisfy its normal burden under rule 56(f), the court emphasized the complete absence of factual support for the plaintiff's claim: "Where a

115. Id.
116. See, e.g., Emmons v. McLaughlin, 874 F.2d 351 (6th Cir. 1989); Kamen v. AT&T, 791 F.2d 1006 (2d Cir. 1986); Fontenot v. Upjohn Co., 780 F.2d 1190 (5th Cir. 1986); Paul Kadair, Inc. v. Sony Corp. of Am., 694 F.2d 1017 (5th Cir. 1983); Contemporary Mission, Inc. v. United States Postal Serv., 648 F.2d 97 (2d Cir. 1981); Bryant v. O'Connor, 671 F. Supp. 1279 (D. Kan. 1986), aff'd, 848 F.2d 1064 (10th Cir. 1988). These cases involve fact patterns similar to those in which some courts have required more specific pleadings. See supra note 16 and accompanying text. None of these cases were dismissed under rule 12(b)(6), however. These courts did not require more specific pleading. Instead, they required a minimal factual showing before they would grant or uphold a grant of a continuance under rule 56(f). Emmons, 874 F.2d at 357; Fontenot, 780 F.2d at 1196; Paul Kadair, 694 F.2d at 1029; Contemporary Mission, 648 F.2d at 107; Bryant, 671 F. Supp. at 1283.
117. 648 F.2d 97 (2d Cir. 1981).
118. Id. at 100.
119. Id. at 105.
120. Id. at 103, 105.
121. Id. at 105.
plaintiff fails to produce any specific facts whatsoever to support a conspiracy allegation, a district court may, in its discretion, refuse to permit discovery and grant summary judgment.\footnote{122}

The costs of discovery can hardly be justified when the party requesting additional time can produce no facts supporting his claim. In \textit{Emmons v. McLaughlin},\footnote{123} the plaintiff brought several civil rights claims, alleging that he was the subject of police harassment, but failed to provide any details concerning the approximate dates, times, manner, location or other circumstances surrounding the allegedly unconstitutional acts.\footnote{124} The Sixth Circuit upheld a summary judgment for the defendant, concluding "that it is not unfair to require a party to show some factual basis for his claims of police harassment before being permitted to conduct 'extensive' discovery."\footnote{125}

To allow a party who has no factual support for her claim to conduct further discovery under rule 56(f) would defeat the purpose of the rule.\footnote{126} In \textit{Paul Kadair, Inc. v. Sony Corp. of America},\footnote{127} the plaintiff claimed that the defendant had violated the antitrust laws by engaging in a conspiratorial group boycott.\footnote{128} The plaintiff had no factual support for its allegations, but sought the protection of rule 56(f) when the defendant moved for summary judgment.\footnote{129} The district court denied the plaintiff's rule 56(f) motion and granted summary judgment to the defendant.\footnote{130} The Fifth Circuit affirmed, quoting the district court's opinion:

"The intent of Rule 56(f) of the Federal Rules of Civil Procedure is not to open the discovery net to allow a fishing expedition. Instead, the rule is designed to enable a party to seek particular facts relevant to an already-established factual pattern of alleged anti-trust

\begin{itemize}
\item[122.] \textit{Id.} at 107.
\item[123.] \textit{Id.} at 351 (6th Cir. 1989).
\item[124.] \textit{Id.} at 357.
\item[125.] \textit{Id.}
\item[126.] \textit{See supra} note 26 and accompanying text.
\item[127.] \textit{Id.} at 1017 (5th Cir. 1983).
\item[128.] \textit{Id.} at 1020.
\item[129.] \textit{Id.} at 1020-21.
\item[130.] \textit{Paul Kadair, Inc. v. Sony Corp. of Am.}, 88 F.R.D. 280, 289 (M.D. La. 1980), \textit{aff'd}, 694 F.2d 1017 (5th Cir. 1983).
\end{itemize}
activity. . . . It is clear that plaintiff has failed to set forth a factual predicate to justify Rule 56(f) discovery."131

In the absence of such a factual predicate, the court cannot justify expending its resources on costly discovery.

Extending discovery under rule 56(f) where a plaintiff has no factual basis for his claim also may conflict with the goals of rule 11.132 In Fontenot v. Upjohn Co.,133 the Fifth Circuit noted that “[t]o permit the pleadings themselves to carry a case to trial when they rest only on the invention of counsel would permit ultimate circumvention of Federal Rule of Civil Procedure 11.”134 The court suggested that permitting speculative allegations to justify discovery would undermine the spirit of rule 11. After all, the court concluded, if a party has satisfied rule 11, “some evidentiary material should be available to support each essential element of the claim.”135

When a party argues that he should be granted a continuance because he has no factual support for his claim, the court should become suspicious. In Bryant v. O’Connor,136 the plaintiff faced both a summary judgment motion and allegations that he did not comply with rule 11.137 In response to the summary judgment motion, the plaintiff filed a rule 56(f) affidavit, arguing that he had insufficient facts to respond to the motion for summary judgment.138 In response to the rule 11 charges, the plaintiff filed an affidavit alleging that he had made a reasonable factual inquiry before filing his complaint. The court noted that the rule 56(f) affidavit suggested a violation of rule 11, while the rule 11 affidavit suggested that the rule 56(f) affidavit lacked candor. Finding this position untenable, the court denied the rule 56(f) motion.139

132. See Fed. R. Civ. P. 11 (requiring that all pleadings “of a party represented by an attorney . . . be signed by at least one attorney of record” and stating that the signature certifies that the attorney, “after reasonable inquiry,” believes that the pleading “is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law”).
133. 780 F.2d 1190 (5th Cir. 1986).
134. Id. at 1196.
135. Id.
137. Id. at 1283.
138. Id. at 1282.
139. Id. at 1283.
Does Bryant mean that any rule 56(f) affidavit constitutes an admission of a rule 11 violation? Of course not. A scenario in which a party that has satisfied rule 11 could properly file a rule 56(f) motion might go as follows. The plaintiff files her complaint. The defendant supports a summary judgment motion with affidavits. The plaintiff files her own affidavits which explain both the factual foundation for her complaint and the reasons why she cannot counter the defendant's affidavits—most likely because essential information is in the exclusive possession of the defendant. Under circumstances like these, the plaintiff will have satisfied both rule 11 and rule 56(f) and will be entitled to a continuance.

Some courts and commentators reject the idea that rule 11 considerations should affect the courts' decisions under rule 56(f). In Kamen v. AT&T, the district court denied plaintiff's rule 56(f) request for further discovery because it believed that plaintiff had violated rule 11. The Second Circuit reversed and held "that neither Rule 56 nor Rule 12(b) was in any way modified by the adoption of the 1983 amendments to Rule 11." Similarly, Judge Schwarzer, in an article, contends that rule 11 does not bear on "the sufficiency of a pleading to survive summary judgment after discovery" but bears only on "its sufficiency for filing purposes." He argues that a pleading might meet the rule 11 standard and yet, after some discovery, fail to raise a genuine issue.

Rule 11 is intended to prevent abuse of the litigation process, while rule 56 is intended to avoid unnecessary trials. They therefore involve two entirely different issues and should apply different standards.

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140. 791 F.2d 1006 (2d Cir. 1986).
141. Id. at 1011.
143. Id. at 219.
144. Id. at 219-20. A recent note argues that because both rules are aimed at reducing frivolous litigation, the same standard should be applied where the rules overlap. See Note, A Genuine Ground in Summary Judgment for Rule 11, 99 YALE L.J. 411 (1989) (authored by Beverly Dyer). Dyer suggests that the standard for summary judgment should serve as a threshold requirement for rule 11 sanctions. She contends that the use of summary judgment standards would reduce unwarranted rule 11 motions and improve fairness to litigants. Id. at 429-30. Conversely, this Note argues that where a party violates rule 11 by filing a complaint without a reasonable factual basis under the circumstances and then faces a properly supported motion for summary judgment, he should not be able to avoid summary judgment by requesting more time to establish a factual basis for his case through discovery.
Rule 11 and rule 56 certainly involve different issues and consequently apply different standards, but why should a party that has not met the standard of rule 11 (reasonable inquiry under the circumstances) be entitled to use judicial resources for discovery? If a party can be punished for filing a suit because he filed it without a sufficient factual inquiry, why should he be allowed to add to that harm by conducting needless discovery? Why should he be allowed to prolong litigation he should not have brought in the first place? To keep the rules working toward the same goals, rule 56(f) should not be used to preserve a claim that is punishable under rule 11. Therefore, if a party requests a continuance under rule 56(f) and the court believes that the party violated rule 11 in filing its complaint, the court should deny the request and grant summary judgment.

III. A PROPOSAL TO REVISE RULE 56(f)

In its current form, rule 56(f) has generated confusion and uncertainty. The result has been a tremendous amount of litigation over a rule that should be straightforward. Because the rule's language provides little guidance, judges are left on their own to decide when rule 56(f) continuances are appropriate. Resulting standards vary widely.\textsuperscript{145} A rule intended to help the courts dispose of cases fairly and efficiently has muddied further an already murky pool.

The uncertainty and ambiguity of the current rule 56(f) undermine the basic purpose of summary judgment to promote judicial economy. Ideally, summary judgment promotes efficiency in two ways: first, by disposing of factually insufficient claims before trial;\textsuperscript{146} and second, by narrowing the scope of discovery and disposing of frivolous claims before discovery.\textsuperscript{147}

The drafters of rule 56 may have considered disposing of factually insufficient claims to be a primary goal at the time the rule was drafted, but growing costs of discovery suggest that summary judgment can improve efficiency the most by

\textsuperscript{145} See supra Part II.
\textsuperscript{146} See supra note 26 and accompanying text.
economizing at the discovery stage.\textsuperscript{148} By failing to dispose of frivolous claims before discovery is completed, the current rule fails for two reasons. First, it permits courts to grant continuances too liberally and does not force them to narrow the scope of discovery during continuances. Second, the uncertainty of the rule may discourage defendants from bringing summary judgment motions before discovery is completed. The preparation of summary judgment motions consumes time and money. A defendant who faces a nearly certain continuance of her motion may hesitate to bring it. Such a "chilling effect" on early summary judgment motions wastes resources by allowing meritless claims to live on—sustained only by the uncertainty created by rule 56(f).

The current rule produces judicial inefficiency in a third, unrelated way. Because of its vagueness, rule 56(f) itself has spawned substantial litigation. Nearly every federal circuit has construed rule 56(f) several times over the last few years.\textsuperscript{149} When a rule designed to reduce litigation generates this much confusion and conflict in the appellate courts, it does not serve its purpose. Of all legal rules, those designed to promote efficiency should be clearest in their language.

Recognizing the shortcomings of the current version of rule 56(f), the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Committee on Rules of Practice and Procedure") has suggested rewriting the rule completely. In place of the current rule 56(f), it has proposed the following:

\textbf{OPPORTUNITY FOR DISCOVERY.} No summary judgment shall be rendered with respect to any claim, counter-claim, cross-claim, or third party claim, nor shall any fact be summarily established, until any opposing parties have had a reasonable time to discover evidence bearing on any fact sought to be established.\textsuperscript{150}

Although this proposal may remedy some of the uncertainty of the current rule, it cures too much. By eliminating judicial discretion, it requires courts to deny a properly supported

\textsuperscript{148} See supra notes 27-28.

\textsuperscript{149} See supra notes 79, 82, 86-112.

\textsuperscript{150} Fed. R. Civ. P. 56(d) (proposed June 12, 1989), reprinted in 110 S. Ct. at CXCI X.
motion for summary judgment where a party opposing the motion shows that he has not had a "reasonable time to discover evidence bearing on any fact sought to be established." Under this rule, a party might be able to resist a properly supported motion for summary judgment without showing that he has a factual basis for his claim or that discovery is likely to raise a genuine issue.

It should not take much to make these showings. A sworn affidavit demonstrating some factual basis for the claim, explaining why the party cannot defend against the motion at the present time, and stating why further discovery is reasonably likely to produce facts that will create a genuine issue would suffice. These showings are necessary for summary judgment to achieve its purpose of promoting judicial economy by winnowing out frivolous claims before substantial resources are expended on discovery. Under the proposed rule, however, a party opposing a motion may be able to avoid summary judgment without making any of these showings.

Furthermore, the proposed rule does not really resolve the ambiguity of the current rule. First, it is unclear what the phrase, "evidence bearing on any fact sought to be established" means. Does this language refer to evidence that is likely to raise a genuine issue? Or does it refer to any evidence related to a factual issue in the case? Second, it assumes that "a reasonable time to discover" can be determined by fairly uniform principles from case to case. In practice, however, courts will have wide discretion on this issue, because the number of factors that affect the reasonableness of the time taken to conduct discovery is so large. Because the proposed rule provides no guidance on what factors to consider in determining reasonableness, courts will be left with tremendous amount of leeway in making such determinations.

To avoid the problems and ambiguities with both the current rule and the recent proposal, I suggest the following revision of rule 56(f):

(f) When Affidavits are Unavailable. Where a party opposing the motion can, by affidavit or adequate equivalent, establish a factual predicate for the party's claim, show that further discovery is reasonably likely to produce specific facts suffi-
cient to create a genuine issue of material fact, and explain why the party is unable to produce those facts at this time, the court shall continue the motion on such terms as it deems appropriate and permit the party to conduct discovery [that is] material to the disposition of the motion.\textsuperscript{151}

Although this rule may require greater efforts from a party seeking a continuance than the current rule, it also gives greater rewards to the party who satisfies the requirements. It demands more by requiring specific showings where the present rule requires only general "reasons" why "the party cannot . . . present . . . facts essential to justify the party's opposition."\textsuperscript{152} It rewards the party, however, by making the continuance mandatory—if the party seeking it makes the necessary showing—while under the present rule the continuance is merely discretionary.

The revision suggested by this Note will bring more certainty to the procedure to obtain continuances in a number of ways. First, it specifies exactly what a party desiring a continuance must show. These requirements should be spelled out even further in the advisory committee's notes. These notes, for example, should explain what is meant by "factual predicate," "reasonably likely to produce specific facts sufficient to create a genuine issue of material fact," and "explain why the party is unable to produce those facts at this time."

"Factual predicate" should be defined as a showing sufficient to satisfy the requirements of rule 11. The notes should also point out what is necessary to establish a reasonable likelihood of creating a genuine issue. To satisfy this require-

\textsuperscript{151} The italicized part of this revision uses language suggested by Schwarzer, \textit{supra} note 142, at 214. Judge Schwarzer's entire proposed revision is as follows: "(e) Discovery. When the court finds that additional discovery may be necessary to enable a party to oppose a motion, it shall continue the motion on such terms as it deems appropriate and permit the party to conduct discovery material to the disposition of the motion." This proposal suffers from the same problems as the revision suggested by the Committee on Rules of Practice and Procedure because it fails to give either the court or the parties any guidance about what circumstances will render additional discovery necessary. It does, however, have the salutary effect of directing the court to limit discovery under a summary judgment continuance to issues material to the disposition of the motion.

\textsuperscript{152} \textit{Fed. R. Civ. P.} 56(f).
ment, a party should have to show a plausible basis for her belief that the facts exist and a realistic prospect that further discovery will produce them. Finally, the notes should indicate ways that a party can explain satisfactorily her inability to produce the facts at the time of the motion. Exclusive possession of the facts by the opposing party should be chief among these. Although this proposal allows room for interpretation of these requirements, the requirements themselves are certain.

Second, the revision suggested by this Note specifically allows a party to make the required showings based on adequate equivalents to affidavits. Although many courts have interpreted the affidavit requirement of the current rule loosely, this proposal negates those decisions that have demanded strict compliance with the affidavit requirement. The proposal also negates extremely loose interpretations of the rule by requiring adequate equivalents to affidavits. The advisory committee notes should define “adequate equivalent” as a written proffer filed with the court and made in a timely and authoritative manner that subjects the maker to sanctions if made in bad faith.

Third, this proposal greatly limits judicial discretion in the granting of continuances. If a party makes the proper showings, the judge must grant a continuance. Although efficiency is the primary purpose of the summary judgment procedure, fairness should not be sacrificed. If a party can make the required showings, she has established that she has reasonable grounds to believe that her claim is supported by the facts. She has also demonstrated that further discovery is likely to raise a genuine issue for trial. The primary purpose of rule 56(f) is to prevent the premature dismissal of potentially valid claims. Therefore, if a party can make the showings, she should be entitled to a continuance and should not be subject to the discretion of an individual judge.

Finally, the revision specifically directs the judge, if a continuance is in order, to permit only discovery that is material to the disposition of the motion. This requirement will ensure that continuances serve their purposes of narrowing the scope of discovery and promoting efficiency by preventing judges from allowing general discovery after a party has made a properly supported motion for summary judgment.
IV. THE PROPOSAL ILLUSTRATED

The following hypothetical will highlight the problems of the current rule and the proposal of the Committee on Rules of Practice and Procedure. It also will illustrate how my suggested revision would alleviate those problems.

Assume that a state government files suit in federal district court against the owner of a parcel of land charging violations of state and federal law for contaminating the groundwater with volatile organic compounds (VOCs). The defendant responds by suing all of his neighbors as third-party defendants. An essential element of the contamination claims is discharge by the owner or one of his agents of VOCs onto the property.

One of the neighbors moves for summary judgment before discovery and files two affidavits. The first is signed by the neighbor, who owns the property and the business located on it. He swears that he purchased the undeveloped property and built a furniture warehouse on it, which he has operated continuously since its construction. He further swears that his business has never used and never had occasion to use VOCs and that to the best of his knowledge VOCs have never been discharged onto his property.

The second affidavit is by a state geologist who has studied the groundwater beneath the relevant properties. He swears that the groundwater under the third-party defendant's property is not contaminated by VOCs, that the third-party defendant's property is down-gradient from the defendant's, and that in his professional opinion it is impossible that any of the contamination under the defendant's property originated on the third-party defendant's property.  

153. This hypothetical is a variation on a hypothetical discussed in a class on federal environmental law. I devised it to demonstrate a fact pattern in which there is some incentive to use the discovery and summary judgment rules to prolong frivolous litigation.

154. Opinion testimony is generally not an appropriate basis for summary judgment because it is always subject to evaluation by the fact finder. See Webster v. Offshore Food Serv., Inc., 434 F.2d 1191 (5th Cir. 1970), cert. denied, 404 U.S. 823 (1971); see also 10A C. WRIGHT, A. MILLER & M. KANE, supra note 21, § 2738, at 502-04 (1983) ("However, if the only issue is one of the kind on which expert testimony must be presented, and nothing is presented to challenge the affidavit of the expert,
The defendant files no affidavits in response and rests on his pleadings. Under the standard of *Celotex*, the third-party defendant is entitled to summary judgment because a reasonable jury could only find for the third-party defendant. The defendant responds by moving for a rule 56(f) continuance to conduct discovery of the third-party defendant. The defendant's attorney files an affidavit with this motion asserting only that answers to interrogatories and discovery of third-party defendant's records are necessary to respond to the motion.

Under the current version of rule 56(f), the decision on this motion would be within the discretion of the judge. The judge could grant the motion for one of two reasons. First, she could decide that summary judgment is improper before the initiation of discovery. Second, she could hold that summary judgment is inappropriate because discovery might possibly reveal a discharge of VOCs by the third-party defendant.

Under the proposal of the Committee on Rules of Practice and Procedure, the judge would probably be even more likely to grant the continuance. The proposal provides that summary judgment shall not be entered "until any opposing parties have had a reasonable time to discover." Because in this case the defendant has had no opportunity to conduct discovery, few courts would avoid the clear directive of the rule and grant summary judgment at this stage.

Under the rule proposed by this Note, the court would almost certainly have to grant summary judgment. The defendant has done nothing to show that he filed this claim in good faith. He has offered no factual support for his claim and has made no effort to show that discovery is reasonably likely to create a genuine issue of fact. He has not proffered the affidavit of an expert saying that it is at least possible that the contamination came from the third-party defendant's property. His claim rests solely on the physical proximity of the third-party defendant's property and the possibility that discovery will uncover facts sufficient to create an issue.

Should this case proceed to discovery? All of the evidence suggests that the third-party defendant is not responsible for the VOCs in the defendant's ground water. The defendant can

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155. See supra notes 43-52 and accompanying text.
156. Fed. R. Civ. P. 56(d) (proposed June 12, 1989), reprinted in 110 S. Ct. at CXCIC.
offer no plausible reason why discovery would change this state of affairs. Moreover, this case has all the signs of a frivolous suit. The defendant’s shotgun strategy of suing everyone who might possibly be connected to the contamination suggests that defendant is simply trying to bully anyone he can into contributing to a settlement. The possibility of protracted litigation with its attendant costs might convince his neighbors to contribute to the settlement pot, reducing the defendant’s financial burden.

This is precisely the type of behavior that the Federal Rules should prevent and discourage. The current rules as well as the recent proposal by the Committee on Rules of Practice and Procedure do not accomplish this purpose. When a party knows that she will have to demonstrate some factual basis for her claim even before discovery begins, she will think twice about suing in the hopes that she can use the costs of discovery and the potential of huge damages to coerce a settlement. Until the Federal Rules provide the courts with a mechanism to throw out factually baseless claims early in the game, the system will continue to be plagued by frivolous suits that consume time and resources that should be devoted to meritorious claims. The revision of rule 56(f) proposed by this Note would be a step in the right direction. By requiring a party seeking a continuance to show that her claim has some factual basis and that further discovery is reasonably likely to raise a genuine issue, this proposal will further the goal of the Federal Rules that all claims be resolved as expeditiously as fairness will allow.