

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
GREENVILLE DIVISION

AIMEE MADDONNA,	)	
	Plaintiff, )	
	)	
v.	)	<b>Civil Action No. 6:19-cv-03551-JD</b>
	)	
UNITED STATES DEPARTMENT OF	)	
HEALTH AND HUMAN SERVICES, <i>et</i>	)	
<i>al.</i> ,	)	
	Defendants. )	
_____	)	

**PLAINTIFF’S OPPOSITION TO STATE DEFENDANTS’ MOTION TO STRIKE**

State Defendants have (ECF No. 123) moved to strike part of Plaintiffs’ Motion for Summary Judgment filed on November 21, 2022 (ECF No. 110-2). They contend that the form of Plaintiff’s papers is improper because our filing included a separate Statement of Undisputed Material Facts, and that they are prejudiced as a result. Both contentions are meritless.

Defendants contend that Local Rule 7’s general requirements for memoranda that support motions preclude the filing of a separate Statement of Undisputed Material facts in support of summary judgment. Yet neither the Local Rules nor the Standard Filing Preferences address motions for summary judgment at all, other than to exclude them (and all dispositive motions) from the consultation requirement of Local Rule 7.02. Plaintiff’s memorandum complies with the general rule: It contains the required Statement of Facts and is fewer than 35 pages. To manufacture their criticism that *Plaintiff’s* memorandum is overlength, State Defendants must treat the separate Statement of Undisputed Material Facts as part of Plaintiffs’ memorandum and not as “supporting documentation,” to which the page limit does not apply. (*See* Local Rule 7.05(B) (“The page limitation is exclusive of affidavits, supporting documentation, and copies of authority required to be attached by Local Civ. Rule 7.05(C) (D.S.C.).”))

While this District has adopted rules that pertain to memoranda supporting motions generally, it has not adopted any local rule or requirement respecting the form for providing the

necessary support under Federal Rule of Civil Procedure 56(c) for assertions that facts are not genuinely disputed. That means Rule 56(c) is controlling. And the Rules Committee’s comments to that rule make clear that there are many different ways for parties to show that facts are undisputed—the showing may, “for example, . . . be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum”—with the Rules Committee explaining that some district courts and some individual judges have adopted specific “forms” for doing so. Fed. R. Civ. P. 56(c), advisory committee’s note to 2010 amendment. But this District and this Court have not. Defendants’ attempt to read a specific modification of Rule 56 into the general local rule governing all motions practice reaches too far.

And while in many cases in this District, the only statement of undisputed facts supporting summary judgment is in the memorandum’s fact section, separate statements of undisputed facts are sometimes filed in support of the memorandum, in just the way that the Rules Committee contemplated. *See, e.g., Avoki v. Chester*, 0:17-cv-1141SAL (ECF No. 327); *Degidio v. Crazy Horse Saloon and Restaurant, Inc.*, No. 4:13-cv-2136-JD ((ECF No. 102-2, including Plaintiffs’ “Response to Defendant’s Statement of Undisputed Facts” as an attachment to their opposition to summary judgment at ECF No. 107-1); *U.S. v. Frazier*, No. 5:04-cv-396-TLW (ECF 59-2).

Districts that have adopted local rules specifically requiring a separate statement of undisputed material facts undoubtedly favor this approach because it forces the parties to limit each sentence to a single factual assertion, with specific supporting record citations. Factual statements included in narrative form as part of a memorandum are fine for framing the arguments that follow, but because they tend to include multiple factual assertions wrapped in compound sentences or discursive paragraphs, followed by string cites not keyed to specific facts, the absence of a separate statement may encourage overgeneralizations or fudging. When that happens, it makes courts’ (and opposing parties’) job more difficult, requiring them to parse compound factual assertions to suss out what is indeed supported by the record. As long as the memorandum is compliant with Local Rule 7—which Plaintiff’s memorandum is—a separate statement of

undisputed facts that mirrors the memorandum’s statement of facts but formats it as individual factual assertions supported by the record—as Plaintiffs’ supporting statement does—only makes things easier for opposing counsel and the Court.

The cases that Defendants cite all address memoranda that are noncompliant because they are overlength on their face, not because they are accompanied by supporting materials—much less ones that the Rules Committee for Rule 56(c) expressly identified. *Naji v. Fluor Federal Services*, 2021 WL 1731759, \*9 n.9 (D.S.C. May 3, 2021), warns against using excessive substantive footnotes. In *Reese v. South Carolina Department of Mental Health*, 2018 WL 4677714, \*5 (D.S.C. Sept. 28, 2018), the party’s principal briefs themselves were over the page limit, and the District Court adopted the magistrate judge’s recommendation to strike the additional pages because “consideration of the[] filings beyond the thirty-five page limit would not change the court’s analysis or recommendation.” Similarly, in *Iota Xi Chapter of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 149-50 (4th Cir. 2009), the Court struck the final two pages of a party’s brief because they exceeded the page limit; supporting attachments had nothing whatever to do with the Court’s action. Likewise, in *Columbus-American Discovery Group v. Atlantic Mutual Insurance Co.*, 56 F.3d 556, 574 N.23 (4th Cir. 1995), the opinion clearly states that the Court struck part of a party’s brief—without regard to its attachments. Here, Plaintiff’s memorandum is compliant.

That leaves the State Defendants’ insistence that they are unduly prejudiced by the presence of a separate statement of undisputed material facts. To be fair, there might be some instances when a separate statement is filed in lieu of an adequate statement of facts in the memorandum, in a bad faith attempt to circumvent the rules. But this is not such a case: Plaintiff’s statement of facts in her memorandum is virtually identical to the separate Statement of Undisputed Material Facts; the difference is that the former is in narrative form while the latter is broken into separately numbered assertions. If Plaintiff were to refile her memorandum replacing the “SUMF ¶” citations with direct references to the exhibits themselves, the entire memorandum would still be fewer than

the allotted 35 pages. It would just make some extra, unnecessary work for defense counsel and the Court to confirm that Plaintiffs' statement is accurate.

So who is prejudiced? Certainly not the State Defendants. Their own memorandum on their cross-motion for summary judgment runs **40** pages. Meanwhile, if the citations in Plaintiffs' memorandum are changed to longer record cites, as State Defendants demand, all that would do is increase the portion of Plaintiffs' still-compliant brief that relates to those Defendants from 25 pages to **26**, counting the entire introduction, statement of facts, and conclusion rather than discounting the parts addressing the Federal Defendants. And *nothing* substantive would change, because the separate statement merely duplicates the factual narrative in in the memorandum, in a more user-friendly form. Thus, striking Plaintiff's separate Statement of Undisputed Material Facts would change nothing for Defendants, while making the Court's work more cumbersome.

State Defendants' Motion to Strike should be denied.

Greenville, South Carolina  
December 22, 2022.

s/ Aaron J. Kozloski  
Aaron J. Kozloski (D.S.C. Bar No. 9510)  
CAPITOL COUNSEL, LLC  
P.O. Box 1996  
Lexington, SC 29071-1996  
Tel: (803) 465-1400  
Fax: (888) 513-6021  
*aaron@capitolcounsel.us*

Richard B. Katskee (admitted *pro hac vice*)  
Kenneth D. Upton, Jr. (admitted *pro hac vice*)  
AMERICANS UNITED FOR SEPARATION OF CHURCH  
AND STATE  
1310 L Street NW, Suite 200  
Washington, DC 20005  
Tel: (202) 466-3234  
Fax: (202) 466-3353  
*katskee@au.org*  
*upton@au.org*

*Counsel for Plaintiff Aimee Maddonna*