SUMMARY JUDGMENT: OPPOSING SUMMARY JUDGMENT THROUGH INDIRECT EVIDENCE

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I. INTRODUCTION: HOW TO RESPOND TO A SUMMARY JUDGMENT MOVANT'S STATEMENT OF FACT, IN THE ABSENCE OF DIRECT, CONTRADICTORY PROOF

If a Court were to instruct a jury that, "you must believe everything the Defendant's witnesses say, unless there is a direct, specific and sworn contradiction," that instruction would be unconscionable, and reversible error. Unfortunately, trial judges sometimes apply that standard to summary judgment. Some judges act on the belief that unless a plaintiff provides a specific and direct factual rebuttal to a defendant's statement of fact, then that statement of fact is established. Based on this error, Judges rely on certain facts in violation of the summary judgment standard and in violation of the Constitution.

This paper will provide tools for opposing an employer's statement of fact (SOF), even in the absence of evidence directly contradicting such facts. As will be shown below, the proper standard is that a defendant's SOF may be challenged simply by demonstrating that a reasonable jury may not accept that fact. The plaintiff should not have to prove that the jury is likely to find an opposite fact, or that the witness is prevaricating. Next, this paper shall discuss the various ways of developing the record to support denials of SOFs, using attacks on credibility. Finally, the argument will be made that the requirement of direct, factual contradiction at the summary judgment stage violates the Constitution, and is inconsistent with Superior Court Rule 9A.

There are many real world situations where it will be impossible for the plaintiff to produce specific, contradictions to a SOF. For example, a defendant's witness may testify about a meeting that took place out of earshot of the plaintiff. However, it would be error for the Court to consider such a fact established for the purpose of the summary judgment record.

Even in those situations, it should be possible for plaintiffs to deny those facts, by demonstrating a basis for the jury to disbelieve the witness.

II. SUMMARY JUDGMENT MAY NOT REST UPON EVIDENCE THAT A JURY WOULD BE FREE TO DISBELIEVE

Where a fact is directly disputed by opposing parties at the rule 56 stage, it is the court's obligation to acknowledge and credit the non-movant's factual assertions. Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014). This stems from the general principle that at summary judgment, all facts and reasonable inferences must be viewed in the light most favorable to the non-moving party. Id., at 1866, 1868. However, as will be shown, a similar principle benefits non-movants, even where they lack evidence to directly challenge a fact asserted by a movant.

At trial, a jury is free to disregard any and all evidence of the defendant as not credible. Tosti v. Ayik, 394 Mass. 482, 494 (1985); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 512 (1984); Kaltsas v. Duralite Co., 4 Mass. App. 634, 639 (1976). Indeed, juries are instructed that they may refuse to credit any evidence proffered by a party. P. Brady, et al., MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE JURY INSTRUCTIONS, § 1.11, at 1-26 (Supp. 2001).

Even unchallenged testimony from a party, witness, or expert witness may be rejected. Calderone v. Wright, 360 Mass. 174, 176 (1971) (factfinder may choose to "disbelieve the whole or a part of a party's [or witness's] testimony, even where it is uncontradicted."), quoting Lydon v. Boston Elev. Ry., 309 Mass. 205, 206 (1941); Police Department of Boston v. Kavaleski, 2012 Mass. Lexis 1005, at 29 (unchallenged expert testimony may be rejected); see also Brown v. Mass. Office on Disability, 2013 Mass. App. Unpub. Lexis 996, at 5 (factfinder need not believe undisputed expert witness testimony); Reckis v. Johnson & Johnson, 471 Mass. 272, 298 n.42 (2015). The Supreme Court has determined that it is for the jury to determine facts, and that it may disregard even uncontradicted testimony. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628 (1944).

A fact finder "was not obliged to accept [a party's] evidence at face value merely because no other evidence was offered." Piemonte v. New Boston Garden Corp., 377 Mass. 719, 733 (1979); Northeastern Malden Barrel Co. v. Binder, 341 Mass. 710, 712 (1961) (fact finder did not have to accept as true uncontradicted testimony of a witness); In re Saab, 406 Mass. 315, 328 (1989) (factfinder "is not obliged to credit the evidence or

testimony offered by the [defendant] simply because it was uncontradicted").

It would be inconsistent with appropriate summary judgment practice to accord more deference to the defendant's evidence at the pre-trial stage than it would be accorded at trial.

Thus, at the summary judgment stage, the Court should disregard all evidence favorable to the moving party that the jury is not required to believe, even if it is uncontradicted. To do otherwise would supplant the jury's constitutionally-mandated role. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 151 (2000).

> Thus, although the court should review the record as a whole, **it must disregard all evidence favorable to the moving party that the jury is not required to believe**. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.* at 300.

Reeves, 530 U.S. at 151. Thus, the Court should disregard--that is, reject, ignore or dismiss--evidence proffered by the movant that a jury might not credit. Reeves, 530 U.S. at 151. Such disposable evidence includes testimony and affidavits from interested witnesses produced by, or affiliated with the defendant. Id.; see Sartor, 321 U.S. at 628. Likewise, circumstantial evidence may provide an alternative basis for doubting the credibility of a witness. Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 99 (2009).

Rule 56, no less than the analogous Rule 50, requires that the Court "disregard evidence in favorable to the [movant].[1] Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, 16 (1998) (considering Rule 50 standard); Labonte v. Hutchins & Wheeler, 424 Mass. 813, 820-821 (1997) (same); Ciccarelli v. School Dept. of Lowell, 70 Mass. App. 787, 791 (2007).

The Reeves standard establishes that a genuine, triable issue may sometimes appear not only from evidence that directly *contradicts* the

[1] The Reeves standard applies to summary judgment analysis, because the standards under Rule 50 and Rule 56 are equivalent. Reeves, 530 U.S. at 150; Bulwer v. Mount Auburn Hosp., 2016 Mass. Lexis 93, 19 n.8. Shimer v. Foley, Hoat & Eliot LLP, 59 Mass App. 302, 303 (2003).

movant's evidence, but also from evidence which tends to *impeach* the movant's affidavits or other materials. Reeves, 530 U.S. at 151; Guardian Life Ins. Co. of Am v. Grant, 22 Mass. L. Rep. 157, 160 (2007). Juries are free to ignore testimony from biased sources, or where the reliability of such testimony is undercut by direct or circumstantial evidence. To rely at summary judgment on evidence that a jury need not credit would be to engage in improper fact-finding.

Cases that properly reject summary judgment based on evidence that a jury would be free to disbelieve include Anderson v. Potter, 2010 U.S. Dist. Lexis 70808 (D. Mass.), at 8-12 & n.4, United States of America v. Commonwealth, Memorandum of Decision, C.A. No. 09-11623, Young, J., D. Mass. May 4, 2011), at 18-19, and Williams v. White Plains, 2010 U.S. Dist. Lexis 66103, Young, J. (S.D.N.Y 2010). Judge Young has gone so far to say:

> Courts may base grants of summary judgment only on facts admitted by both parties and must disregard all evidence, even if unopposed, which the jury is free to reject. Courts cannot grant summary judgment on an issue on which the moving party bears the burden if the moving party relies on evidence that the jury could disbelieve even where the nonmoving party has presented no contrary evidence.

Securities and Exchange Comm'n v. Eagleeye Asset Management, LLC, 2013 U.S. Dist. Lexis 144700 (D. Mass.), at 13-14.

Judge Young has also asserted, citing a number of supportive cases, that, "the many local rules adopting a point-counterpoint system which converts a failure to adduce affirmative contradictive evidence into an admission of the point advanced is simply contrary to Reeves when the moving party bears the burden of proof." In re: Nexium Esomeprazole Antitrust Litig., 2015 U.S. Dist. Lexis 99679 (D. Mass., at 18.

In Reynolds v. Butler Hospital, 2015 U.S. Dist. Lexis 58707 (D. Mass.), at 24-25, the Judge found that a jury could reject the unrebutted testimony of the plaintiff establishing her to be unqualified for the position, because they were "very friendly with one another, "spent time with one another outside of work," and never brought their concerns directly to the plaintiff. Judge Caspar found that the jury was free to make a credibility determination, and to disregard the alleged observations of coworkers.

A rule requiring that a movant's facts be admitted, unless there is a specific, sworn factual contradiction, would have a particular and pernicious

application to employment discrimination cases. Employees are not typically present at meetings when their performance or termination is discussed, or complaints are made. Thus, employees are not in a position to rebut an employer's version of events directly. Discrimination plaintiffs are left to rely on circumstantial evidence. To vindicate the vital public policy against discrimination, plaintiffs need to retain their arsenal of weapons to challenge the employer's version of events by relying on indirect evidence, impeachment and challenges to credibility.[2] This may be done, among other methods, through statistical analysis, or by comparing an employee's treatment to the treatment of other similarly situated individuals, or by comparing the treatment to an employer's policy.

Affidavits are generally not considered reliable as to be admissible as evidence in Court. It is incongruous that an affidavit of a defendant should constitute an unassailable record during the pre-trial stage. See Lipchitz v. Raytheon Corp., 434 Mass. 493, 499 (2001) (assessment of witness credibility is the provenance of the jury at trial). Thus, Judges should be open to rejecting proposed statements of fact, based on the statements of witnesses that a jury would be free to disbelieve.

III. DEVELOPING THE RECORD FOR THE PURPOSE OF DENYING STATEMENTS OF FACT

The record should be specifically developed to provide record support for attacks on the credibility of the defendant's witnesses. Citations should be sufficient to counter the defendants' evidence at the Rule 56 stage. Examples follow:

Resp. to SCSD Fact 21: Defendant's statement of fact is supported only by the affidavit of ZZZZZZZZZ, whose testimony could be appropriately rejected by a reasonable jury. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 151 (2000)

A. The jury need not believe the witness, because she is a biased witness. ZZZZZZZ is a current employee of Defendant, and serves as its Human Resource Director [or other job title]. [cite to the record]. Defendant provides ZZZZZZZZ with her only source of income, and she has a direct

[2] An employer's evidence is competent to satisfy its burden of articulating its reasons for acting. Anderson, 2010 U.S. Dist. Lexis 70808, at 9-11. However, an employer's evidence, based on the testimony of its decisionmakers, should generally not establish a summary judgment fact, unless the plaintiff admits to the statement. Id.

financial incentive to assist the Defendant. [Cite to the Record]. Myers v. Pennzoil Co., 889 F.2d 1457, 1460-1461 (5th Cir. 1989). ZZZZZZZ is an interested witness who was directly involved in one or more employment decisions alleged by the Plaintiff to be illegal, and therefore has a vested interest in this litigation to see her actions vindicated. [Cite to the Record]. ZZZZZZZ signed Defendants' answers to interrogatories and EEOC position statement under oath, on behalf of Defendants. [Cite to the Record]. District of Columbia v. Clawans, 300 U.S. 617, 630-631 (1937) (the testimony of private security guards is open to the suspicion of bias in favor of police).

B. The jury need not believe the witness, because she is an investor in the defendant, and therefore, has a financial interest in the outcome of this case. See Psy-Ed Corp. v. Klein, Findings of Fact, Rulings of Law and Order of Judgment, C.A. No. 99-6140, 02-5213, Middlesex, ss., Houston, J., August 18, 2006.

C. The jury need not believe the witness, despite the circumstance that the facts asserted are nominally against her interests, as her affidavit was procured as part of a lucrative settlement. Manganella v. Evanston Insurance Co., 2012 U.S. App. Lexis 25581 (1st Cir.), at 18-19.

D. The jury need not believe the witness because she has demonstrated personal hostility to the plaintiff in the past. The evidence shows that at the 2007 retreat, ZZZZZZ threw a glass of wine in the plaintiff's face. [Cite to the Record]. In 2009, ZZZZZZZ accused the Plaintiff of always spreading rumors, although ZZZZZZZ later admitted that he had no basis for making that statement.

D. The jury need not believe the witness, as the witness clearly asserted to the plaintiff that if pressed on the issue of termination, that the witness would lie to cover his tracks. Troy v. Bay State Computer Group, Inc., 141 F.3d 378, 381 (1st Cir. 1998) (witness' credibility is lost where witness had asserted to the plaintiff that he would lie to cover his tracks).

E. The jury need not believe the witness because his demeanor at deposition, which was hostile and confrontational, could cause the jury to disbelieve the witness. At his deposition, ZZZZZZZ yelled three times, and made two sarcastic comments. [Cite to the Record]. Hosp. Cristo Redentor, Inc. v. NLRB, 488 F.3d 513, 521 (1st Cir. 2007) (haughty demeanor of witness is proper basis for rejecting his or her testimony).

F. The jury need not believe the witness because the record demonstrates that ZZZZZZZZZ's testimony is changing and inconsistent in a variety of contexts, and her credibility is questionable based on contradictions between her testimony and the testimony of other witnesses.. [Cite to the Record]. R & B Transportation v. U.S. Dept. of Labor, 618 F.3d 37, 47 (1st Cir. 2010) (backdrop of contested, and contradicted testimony permits a fact finder to disbelieve a witness' statements). On the question of the timing of notice of termination, ZZZZZZZ's testimony is contradicted by YYYYYY's testimony. [Cites to the Record]. Ferguson v. Middle Tennessee State University, 451 S.W.3d 375 (2014).

G. The jury need not believe the witness, because the witness is a member of a rival union. NLRB v. Indiana & Michigan Electric Co., 318 U.S. 9, 24 (1943).

H. The jury need not believe the witness, because there is a lack of documentary support, or contemporaneous communication with the plaintiff, to support the witness' testimony. Trainor v. HEI Hospitality, LLC, 2012 U.S. App. Lexis 22554 (1st Cir.), at 14-17 (where the employer asserts it had planned to take adverse action against an employee, even prior to the employee's protected conduct, the assertion may be rebutted if the employer failed to inform the employee of the plan, and the employer failed to document its plan prior to the protected conduct); Akerson v. Pritzke, 2013 U.S. Dist. Lexis 157590, at 30-31 (lack of documentation of the date of the recommendation to terminate the plaintiff was basis for disbelieving testimony regarding the timing).

I. The jury need not believe the witness, because the witness failed to raise the issue with the plaintiff during the relevant time. Reynolds v. Butler Hospital, 2015 U.S. Dist. Lexis 58707 (D. Mass.), at 24-25.

J. The jury need not believe the witness, because the witness is very friendly with, and spends time with other co-workers of defendant employer which is taking the same position. Reynolds v. Butler Hospital, 2015 U.S. Dist. Lexis 58707 (D. Mass.), at 24-25.

K. The jury need not believe the witness, because the witness engaged in conduct reflecting poorly on her credibility. New England Office Supply, Inc., 2011 Mass. Super. Lexis 134, 2-3 ("the affiant Pant's credibility must be questioned when she seeks to function as Notary Public for a witness whose critical representations she supported in her own affidavit").

L. A witness' repeated failure to recollect important information casts doubt on his or her credibility. Brookins v. Staples Contract & Commercial, Inc., 2013 U.S. Dist. Lexis 18590 (D. Mass.), at 19-20; Davidson v. Pittsfield, 2014 Mass. App. Unpub. Lexis 100, at 8 (pretext established where employer could not recall the names of the people who had complained about the plaintiff, whose complaints notionally led to her termination); Ferguson v. Middle Tennessee State University, 451 S.W.3d 375 (2014).

IV. FURTHER TOOLS FOR RESPONDING TO SPECIFIC TYPES OF STATEMENTS OF FACT

Citation to caselaw may also be helpful to establish that Defendants' assertions need not be adopted at summary judgment. Examples follow:

"**A denial by managers of knowledge of sexual harassment**": **Denied.** A jury is entitled to reject managers' denials of knowledge of sexual harassment in light of relatively weak background evidence of the contrary. Monteagudo v. Asociacion de Emploeados del Estado Libre Asociado de Puerto Rico, 554 F.3d 164, 172 n.7 (1st Cir. 2009).

"**A denial by decisionmakers of knowledge of the race or national origin of applicants**": **Denied**. Where a decisionmaker testifies that he did not know the race or ethnicity of applicants, a jury is entitled to disbelieve the denial, where the decisionmaker says he is not "bright" enough to recognize a Spanish surname, and where two of the applicants listed work experience in Haiti. Gains v. Boston Herald, 998 F. Supp. 91, 104 (D. Mass. 1998).

"**Decisionmaker's understanding that replacement is in a similar protected class**": **Denied**. The jury is not required to believe an employer's assertion that it knew that the preferred candidate, like the plaintiff, had two children. See Chadwick v. Wellpoint, Inc., 561 F.3d 38, 42 n.4 (1st Cir. 2009)

"**The Plaintiff's legal theory of the case is limited to her understanding of that theory, as articulated in her deposition**": **Denied**. Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 534-535 & n.15 (2001) (where a plaintiff testified at deposition that untimely acts constituted sexual harassment, and that she understood those acts to be sexual harassment when they occurred, this is not a binding concession that the plaintiff understood at that time that she was a victim of a sexually hostile work environment as to generate liability under c. 151B). A plaintiff's deposition testimony that he was harassed due to sexual orientation, does not preclude

the jury from finding that the harassment was because of sex. Centola v. Potter, 183 F. Supp. 2d 403, 411 (D. Mass. 2002).

"**The Plaintiff's evidence is limited to what she testified to at her deposition" Denied**. The court may consider other evidence in the record, including expert witness testimony, that the Plaintiff did not refer to in her deposition. United States ex rel. Jones v. Brigham and Women's Hospital, 678 F.3d 72 (1st Cir. 2012); 2012 U.S. App. Lexis 9272, at 44-45. Deposition testimony with respect to the plaintiff's understanding of her evidence is not controlling; rather the evidence is controlling. Malin v. Hospira, Inc., 762 F.3d 552, 564 (7th Cir. 2014) ("Hospira claimed that Malin admitted she had no information to support her claim that Hospira retaliated against her for requesting FMLA leave. Her deposition testimony made clear, however, that she was talking about the basis for her subjective belief that she was being retaliated against, not whether she had introduced evidence of retaliation in her lawsuit").

"The Plaintiff is adding information by way of affidavit that did not appear in the deposition." Denied. Where the Plaintiff's later affidavit embellishes, and adds details to events that she testified to at deposition, the two statements are consistent, and the deposition does not foreclose later embellishment. Tang v. Citizens Bank, N.A., 2016 U.S. App. Lexis 9187 (1st Cir.), at 16-17 & n.11. Changing testimony may be the basis of impeachment at trial; it does not mean that summary judgment is warranted. Id.

"The Plaintiff's accounts are inconsistent." Denied. Griffin v. Adams & Assocs. Of Nev., 2016 U.S. Dist. Lexis 83760 (D. Mass.), at 20 n.4.

"The Plaintiff is not credible, as her statement has been proven false in other contexts." Denied. A fact finder may find a witness credible on some subject matter while findinger the same witness to lack credibility in other areas. MCAD and Mills v. A.E. Sales, Inc., Decision of the Full Commission, MCAD Docket No. 09-BEM-02162 April 19, 2016, at 8-10.

"**A statement made by the plaintiff in response to an employer-initiated survey**": **Denied**. The plaintiff's theory of what constitutes an essential function of the job is not limited by plaintiff's responses to an internal survey about her job that had been conducted by the employer. Cargill v. Harvard University, 60 Mass. App. 585, 601 n.15 (2004).

"**A statement made by the employee at her deposition**": **Denied**. A fact finder may choose to believe trial testimony that directly contradicts deposition testimony, especially if the transcript is inconsistent and the

employee claims a misunderstanding. DeCaro v. Hasbro, Inc., 542 F. Supp. 2d 141, 150-151 (D. Mass. 2008). And especially if other witnesses support the revised testimony. Haufler v. Zotos, 446 Mass. 489, 498 n.23 (2006) ("A [fact finder] who has seen and heard the witness is in a better position to determine their credibility than is a court which is confined to the printed record."). Unclear deposition testimony may be clarified by a later affidavit. Gillen v. Fallon Ambulance Serv., 283 F.3d 11, 26 (1st Cir. 2002). Changes in testimony may be justified due to a lapse of memory, new information, or other events that can explain a revision. Hernandez-Loring v. Universidad Metropolitana, 233 F.3d 49, 54 (1st Cir. 2000). Differences between an affidavit and a deposition does not mean that there is a contradiction—they may still be considered consistent. Plante v. Hinckley, Allen & Snyder, LLP, 28 Mass. L. Rptr. No. 12, 266 (May 16, 2011). The rule prohibiting contradictory affidavits is, "[w]hen an interested witness has given clear answers to unambiguous questions, [s]he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed. Colantuoni v. Alfred Calcagni & Sons, 44 F.3d 1, 4-5 (1st Cir. 1994).

"**A statement made by the Plaintiff in her Complaint."** A contradiction between the complaint and the plaintiff's deposition will be resolved in the plaintiff's favor. Vega-Colon v. Wyeth Pharmaceuticals, 625 F.3d 22, 27 n.4 (1st Cir. 2010).

"**Plaintiff testifies at her deposition to a limited range of evidence that supports her belief that she was a victim of wrongdoing**." The Defendant is seeking to limit the Plaintiff's use of evidence in support of her claim, to what the Plaintiff could assert at the time of the deposition. To the extent that the Defendant is saying that the only evidence in support of the Plaintiff's claim are those that she can testify to, the asserted fact is so conclusory or argumentative that it is not susceptible to specific factual contradiction, and/or any response to it would essentially require amassing all the evidence in the non-movant's case

"**The employee could not recall incident of harassment at her deposition, so therefore it did not happen**": **Denied**. Failure to recall other instances of harassment at a deposition does not prevent their use at summary judgment, although the faulty recollection may be fodder for impeachment. Landrau-Romero v. Banco-Popular de Puerto Rico, 212 F.3d 607, 614 (1st Cir. 2000).

"**A statement made by the Plaintiff in the MCAD charge**": **Denied.** Information in the MCAD charge is not binding on the Plaintiff, where there

is evidence in support of a different scenario. Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 527 n.5 (2001) (violation date info in MCAD charge is not controlling, where there is evidence that the incident occurred on a later date).

"An unsworn statement made by the employee to an investigator": Denied. A jury may believe an employee's trial testimony, even if it contradicts a statement made by the plaintiff to an employer's investigator, which could be discounted as a misunderstanding attributable to the plaintiff's difficulty with English. Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 114 (2000). Consequently, at summary judgment, the judge must accept as true statements offered by the plaintiff under oath, even if they contradict prior statements, where there is some legitimate explanation for the change which may be accepted by the jury.

"**A decisionmaker's denial of an improper motive"**: **Denied**. Summary judgment may not enter, simply based on a denial of the decisionmaker on the ultimate question to be decided by the jury. "A person's intent is a question of fact to be determined from his declarations, conduct, and motive, and all attending circumstances." Sudbury v. Scott, 439 Mass. 288, 302 (2003). The jury need not credit an employer's statement explaining an adverse action, especially when circumstantial evidence casts doubt on the statement's credibility. Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 99 (2009). If there is some evidence of unlawful motive, then an affidavit to the opposite effect merely places the issue of intent in dispute. Id. Here, there is more than enough evidence, to establish evidence of an unlawful motive, including a prima facie case of discrimination (SOFs), evidence of pretext (SOF), discriminatory comments (SOF), suspicious timing of discharge (SOF), and statistical analysis (SOF), all of which is sufficient to establish a material dispute.

"A decisionmaker's testimony that she subjectively felt the plaintiff performed poorly on a qualification factor": **Denied**. A jury need not believe the decisionmaker's testimony that the plaintiff performed poorly in her interview. Chadwick v. Wellpoint, Inc., 561 F.3d 38, 48 n.11 (1st Cir. 2009)

"A decisionmaker's testimony supporting the same-actor inference": Denied and motion to strike. It is improper for a judge, at the summary judgment stage, to draw an inference in the employer's favor based on the same actor inference. Verdrager v. Mintz,Levin, Cohn, Ferris, Glovsky & Popeo, ___ Mass.___ n. 32 (2016).

"**The employee's assertion is supported only by a self-serving statement, and so it should be rejected**": **Denied**. The employee's self-serving statements must be considered true, pursuant to Rule 56. Velazquez-Garcia v. Horizon Lines of P.R., Inc., 473 F.3d 11, 17-18 (1st Cir. 2007). It is only when the self-serving affidavit is conclusory that it becomes unfit. Harper v. Credit Control Services, Inc., 2012 U.S. Dist. Lexis 70403 (D. Mass.), at 6-7. Self-serving evidence may be credited by a jury. Brookins v. Northeastern University, 2014 Mass. App. Unpub. Lexis 644, at 5. "The witneses on both sides to this case come with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system." Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014). Simas v. First Citizens' Fed. Credit Union, 170 F.3d 37, 50-51 (1st Cir. 1999) ("On the other hand, the competence of the nonmovant's own testimony is treated no differently than that of any other potential trial witness. Thus, the nonmovant's statements normally pass muster *provided* they (1) are made "on personal knowledge" of the facts or events described; *51 and (2) neither depend on inadmissible hearsay nor (3) purport "to examine the [movants'] thoughts as well as their actions"); Darchak v. City of Chicago Bd. of Educ., 580 F. 3d 622, 631 (7th Cir. 2009) ("It is true that uncorroborated, self-serving testimony cannot support a claim if the testimony is based on 'speculation, intuition, or rumor' or is 'inherently implausible.' But testimony based on first-hand experience is none of those things. Darchak's testimony presents specific facts, even if that testimony may be less plausible than the opposing litigant's conflicting testimony (a question we need not-nay, cannot-reach).")

"**The employee's self-serving statement is made by affidavit, as opposed to deposition testimony, and therefore need not be credited**": **Denied.** An employee's self-serving affidavit is sufficient to defeat summary judgment. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 53 (1st Cir. 2000).

"**The employee's expert witness should not be trusted**": **Denied**. There is a general reluctance to disqualify proffered expert witnesses at the summary judgment stage, and a propensity to credit the expert testimony offered by the non-movant. Plante v. Hinckley, Allen & Snyder, LLP, 28 Mass. L. Rptr. No. 12, 263 (May 16, 2011).

V. RECENT AMENDMENTS TO SUPERIOR COURT RULE 9A REJECT THE REQUIREMENT FOR DIRECT CONTRADICTION

Superior Court Rule 9A demonstrates that a direct contradiction is not necessary in order to successfully challenge an employer's SOF. The

recently amended Rule 9A provides that employees may respond to SOFs in the following way:

> (ii) An opposition to a motion for summary judgment shall include a **response** to the moving party's statement of facts as to which the moving party claims there is no genuine issue to be tried.
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> . . . . .
>
> (iv) An opposing party, with the response to the moving party's statement of facts, may assert an additional statement of material facts with respect to the claims on which the moving party seeks summary judgment, each to be supported with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents.

Superior Court Rule 9A(b)(5)(ii)&(iv) (emphasis added).

There are two important aspects of the Rule that are relevant here. First, the employee's "response" is not limited to showing a direct contradiction in the record. Indeed, under subsection (ii), the "response" is not defined narrowly, and there is no requirement for a citation to the summary judgment record, at all.

In contrast, subsection (iv) of Rule 9A, states that citation to the record is necessary if the movant wishes to establish <u>additional</u> facts. The requirement for a citation to the summary judgment record in subsection (iv), and the lack of such requirement in subsection (ii), demonstrates that the omission of such requirement in subsection (ii) is intentional. A response to an SOF does not require a specific contradiction in the record.

This language is significant, because it reflects a departure from an earlier draft of the Rule 9A amendments. In or about May 2008, the Superior Court circulated a draft of the proposed amendments to Superior Court Rule 9A. That draft included to following requirement:

> Where a response disputes a particular statement of material fact, the opposing party shall support the response . . . with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admissions and affidavits.

In other words, the proposed rule required a response to demonstrate a contradiction rooted in the summary judgment record. Ultimately, the Superior Court rejected this language, and required only a "response," without requiring citation to the record. The Superior Court rulemaking committee explicitly considered, and rejected, and standard requiring direct contradiction.

VI. RELIANCE ON TESTIMONY OF A BIASED OR INTERESTED WITNESS VIOLATES THE CONSTITUTIONAL RIGHT TO A JURY TRIAL

To rely on the testimony of interested or biased witnesses, or to act on a movant's evidence that a jury is not required to believe, poses a clear threat to the Constitutional right to a jury.

The Seventh Amendment provides that "[i]n Suits at common law, . . . the right to a jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The Amendment preserves the jury right as it existed with reference to the English common law of 1791. Gasparini v. Ctr. for Humanities, Inc., 518 U.S. 415, 435-436 & n.20 (1996); Markman v. Westview Instruments, 517 U.S. 370, 376 (1996).

The right to a trial by jury in civil cases in Massachusetts is governed by the Declaration of Rights, Article 15. Terrio v. McDonough, 16 Mass. App. 163, 170 (1983); Mass. R. Civ. P. 38(a). Article 15 states:

> In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.

Article 15 was promulgated in 1780, and thus preserves the jury trial right to what was recognized at that time with reference to the English system. Parker v. Simpson, 180 Mass. 334, 351-5 (1902); Farnham v. Lenox Motor Car Co., 229 Mass. 478, 483 (1918).

Under the English system at the time these Constitutional protections were adopted, "demurrer to the pleadings" was the only pretrial common law device by which a case could be dismissed before trial. S. Thomas,

Why Summary Judgment is Unconstitutional, 93 VA. L. REV. 139, 148-149 & nn. 33, 34 (2007). Under English common law, a demurrer to the pleadings allowed the court to enter judgment for one of the parties upon a party's admission of the truth of the plea or declaration of the opposing party. Id. at 24; citing William Blackstone, 3 COMMENTARIES ON THE LAWS OF ENGLAND, 314-15 (1768). The Court was only allowed to consider evidence submitted by or admitted to by the non-moving party, **and the other evidence of the movant was not considered**. Id.

To be consistent with the Constitutional mandate, and to preserve the common law procedure, summary judgment should not include consideration of evidence submitted by the movant. Id. Summary judgment should focus on the evidence of, and admissions of the non-movant. The practice of accepting the movant's evidence unless it is directly contradicted with contrary sworn facts, is completely foreign to the process of summary disposition as of 1780 and 1791. It reverses the practice of ignoring the movant's evidence.

Consideration of evidence proffered by the Rule 56 movant improperly infringes upon the role of the jury. The policy of ignoring the movant's evidence at the pre-trial stage is there for good reason. Credibility assessments are within the exclusive province of the jury. Reeves, 530 U.S. at 150. At the summary judgment stage, the Court's function is limited to reviewing the record and disregarding all evidence favorable to the moving party that the jury is not required to believe. Id.

Consideration of, and reliance on the self-serving testimony and affidavits of Defendant's own agents, which a jury would be free to disbelieve in their entirety, deviates so thoroughly from the common law notion of the right to a jury as to demonstrate a Constitutional violation. Procedural devices for dismissing claims should be interpreted narrowly, in a way that does not intrude upon the jury's proper, Constitutional role. Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 402 n.4 (2006). Consequently, it is unconstitutional to consider the assertions of the movant, even it there is no direct contradiction in the record (unless such evidence is admitted by the non-movant).

The practice of considering a movant's evidence is particularly inappropriate to the discrimination context, where attitude, rolling eyes, hostility, and vague, subjective statements, and disparaging tone may be crucial to establishing a decisionmakers' true motive. It is the jury's proper role to use common sense and a fresh eye, to evaluate the individual

witnesses, and determine whether they acted out of bias or stereotypical views.