ANOTHER CALL TO AMEND LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 966 TO PROMOTE EFFICIENCY, PRACTICALITY, AND ALIGNMENT WITH THE EXPLICIT PURPOSE OF SUMMARY JUDGMENT PROCEDURE

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INTRODUCTION

The Louisiana State Legislature has given significant attention to motions for summary judgment in recent years.[1] In 1996, the Legislature adopted the modern burden-shifting framework and legal standard for summary judgment motions in an effort to bring Louisiana's summary judgment procedures in Article 966 of the Louisiana Code of Civil Procedure more closely in line with the federal summary judgment procedures in Rule 56 of the Federal Rules of Civil Procedure.[2] In furtherance of this effort, the 1996 amendments to Article 966 also included an explicit policy statement that summary judgment is a preferred means for resolving cases, which stated:

> The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by Article 969. The procedure is favored and shall be construed to accomplish these ends.[3]

Although the Legislature has subsequently amended or revised Article 966 multiple times since 1996,[4] the legal standard for summary judgments and the statement of policy set forth in the Article have not changed. Most recently, the Legislature passed Act No. 422 of the 2015 Regular Session, which enacted

1. As one commentator noted, the Legislature amended or revised La. Code Civ. Proc. art. 966 twenty times between 1996 and 2015. Garrett Filetti, Comment, *22nd Time's the Charm: The 2015 Revisions to Summary Judgment in Louisiana*, 77 LA. L. REV. 479, 489 n.85 (2016).

2. *See id.* at 486-488.

3. *Id.* at 487; LA. CODE CIV. PROC. ANN. art. 966(A)(2) (rev. 1997).

4. Filetti, *supra* note 1, at 489 n.85.

major changes to the procedural requirements in Article 966, while retaining the same legal standard and statement of policy codified by the 1996 amendments.[5]

The amended Article 966, which went into effect on January 1, 2016,[6] differs from its predecessors in three main ways. The first change pertains to the documents that can be filed in support of or in opposition to the motion, as well as the manner in which objections to these documents must be raised. The next change sets forth precise deadlines for filing and serving motions, oppositions, and reply memoranda, and provides definitive deadlines by which the trial court must set the motion for hearing and render judgment. The last change relates to appellate review of the district court's denial of a motion for summary judgment. This Article focuses on the first two of the foregoing changes, highlights the practical issues and confusion that these provisions have created since they went into effect, and proposes (yet another) legislative amendment to remedy these issues.

Part I outlines the relevant provisions in Article 966 that were added by the 2015 legislative amendments and explains how these provisions differed from the prior version of Article 966. Part II highlights several practical issues that the provisions in the amended Article 966 have caused and identifies other potential problems that could arise. Part III proposes a legislative solution to amend Article 966 again to eliminate the issues discussed in Part II, to promote efficiency and practicality in the court system, and to fall back in line with the Article's stated purpose—just, speedy, and inexpensive determination of all cases.

I. THE 2015 LEGISLATIVE AMENDMENTS TO ARTICLE 966

A. NEW EVIDENTIARY REQUIREMENTS.

The 2015 Legislature overhauled the evidentiary requirements for motions for summary judgment in Article 966 in four major ways. First, Subsection (A)(4) creates an exclusive list of documents that may be filed in support of or in opposition to a motion for summary judgment. Second, Subsection (B)(1)-(3) outlines the process by which parties must file evidence in

5. *See* Act No. 422, 2015 Leg., Reg. Sess. (La. 2015).

6. *Id.*

support of or in opposition to a motion. Third, Subsection (D)(2) outlines the process by which parties object to evidence submitted in support of or in opposition to a motion. Fourth, Subsection (D)(2) also limits the evidence that the court may consider in ruling on a motion for summary judgment.

Subsection (A)(4) creates an "exclusive list of documents that may be filed in support of or in opposition to a motion for summary judgment."[7] This provision states:

> The *only* documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions. The court may permit documents to be filed in any electronically stored format authorized by court rules or approved by the clerk of court.[8]

As explained in the revision comments, "This Subparagraph intentionally does not allow the filing of documents that are not included in the exclusive list, such as photographs, pictures, video images, or contracts, unless they are properly authenticated by an affidavit or deposition to which they are attached."[9] In other words, evidence attached to the motion or the opposition must fall within the exclusive list in Subsection A(4) or else it must be independently authenticated by affidavit or deposition.

Subsection (B)(1)-(3) outlines the process by which parties must file evidence in support of or in opposition to a motion. These provisions are as follows:

> B. Unless extended by the court and agreed to by all of the parties, a motion for summary judgment shall be filed, opposed, or replied to in accordance with the following

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7. LA. CODE CIV. PROC. ANN. art. 966 cmt. c (rev. 2015).

8. *Id.* art. 966(A)(4) (emphasis added).

9. *Id.* art. 966 cmt. c. Although "answers to interrogatories" are expressly included in Subsection (A)(4), the revision comments explain that "Article 1458 requires that interrogatories be answered under oath, *and only answers that are made under oath may be filed in support of or in opposition to a motion for summary judgment*." *Id.* (emphasis added). Article 1458 also requires the party answering interrogatories to "verify he has read and confirmed the answers and objections." *Id.* art. 1458. Thus, answers to interrogatories that were not answered under oath or verified are not proper summary judgment evidence unless independently authenticated by affidavit or deposition. *See* Dowdle v. State, 2018-878, pp. 4-7 (La. App. 3 Cir. 5/15/19); 272 So. 3d 77, 80-83.

provisions:

> (1) A motion for summary judgment and all documents in support of the motion shall be filed and served on all parties in accordance with Article 1313 not less than sixty-five days prior to the trial.
>
> (2) Any opposition to the motion and all documents in support of the opposition shall be filed and served in accordance with Article 1313 not less than fifteen days prior to the hearing on the motion.
>
> (3) Any reply memorandum shall be filed and served in accordance with Article 1313 not less than five days prior to the hearing on the motion. No additional documents may be filed with the reply memorandum.[10]

"The Article makes clear that all motions, memoranda, and supporting documents shall be served on all the parties and filed with the clerk of court," and further prohibits new documents from being filed with a reply memorandum.[11] This effectively requires the mover to "show all of his cards" in the motion, as Subsection (B)(3) prohibits rebuttal evidence from being filed with a reply memorandum. The prior versions of Article 966 did not specifically preclude the mover from filing additional documents with his reply memorandum.[12]

Subsection (D)(2) outlines the process by which parties object to evidence submitted in support of or in opposition to a motion and also limits the evidence that the court may consider in ruling on a motion for summary judgment. This provision states:

> (2) The court *may* consider *only those documents filed in support of or in opposition to a motion for summary judgment* and *shall* consider *any documents to which no objection is made*. Any objection to a document shall be raised in a timely filed opposition or reply memorandum. The court shall consider all objections prior to rendering judgment. The court shall specifically state on the record or in writing which

10. LA. CODE CIV. PROC. ANN. art. 966(B)(1)-(3) (emphasis added).

11. *Id.* art. 966 cmt. d.

12. *See* Reed v. Cowboy's W. Store & Trailer Sales, Inc., 2016-462, p. 4 (La. App. 3 Cir. 3/1/17); 214 So. 3d 987, 991 (applying pre-2016 law that was in effect at the time the motion was filed and rejecting non-mover's argument that mover was prohibited from filing new evidence with his reply brief on the grounds that this provision in Article 966(B)(3) was not applicable under the law in effect at the time the motion was filed).

> documents, if any, it held to be inadmissible or declined to consider.[13]

Before the 2015 amendments, "part[ies] could object to [summary judgment] evidence via a written motion to strike or in writing via their opposition or reply memorandum."[14] But, "[p]roblems arose from the use of the motion to strike because an additional hearing would have to be held on that motion, and that motion would also be subject to the deadlines set out in [Uniform District Court] Rule 9.9."[15] This "led to unnecessary delays," as hearings on motions for summary judgment would be postponed until all of the evidentiary issues were resolved.[16]

The 2015 amendments changed the prior law "by specifically removing the motion to strike as a means of raising an objection to a document offered by an adverse party in support of or in opposition to a motion for summary judgment."[17] The revised provision "does not allow a party to file that motion."[18] This provision "also makes explicit that an oral objection to any document *cannot* be raised at the hearing on the motion for summary judgment and that a court *must* consider all documents to which there is no objection."[19]

Additionally, "Subsection (D)(2) makes clear that the court can consider only those documents filed in support of or in opposition to [a] motion."[20] The revision comments note that "Subsection (D)(2) maintains most of the recent legislative changes" to Article 966.[21] Between 1996 and 2012, Article 966(B) provided that the district court "could render a summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions *on file*, together with the affidavits, if any, show that there is no genuine issue as to material fact, and the mover is entitled to judgment as a matter

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13. LA. CODE CIV. PROC. ANN. art. 966(D)(2) (emphasis added).

14. Filetti, *supra* note 1, at 500 (citing LA. CODE CIV. PROC. ANN. art. 966(F)(3) (rev. 2015)).

15. *Id.*

16. *Id.*

17. LA. CODE CIV. PROC. ANN. art. 966 cmt. k (rev. 2015).

18. *Id.*

19. *Id.* (emphasis added).

20. *Id.* (emphasis added).

21. *Id.*

of law.'"[22] Under that version of Article 966, parties could simply support or oppose a motion for summary judgment by referencing documents already filed into the record.[23] Indeed, under the old law, evidence could be considered in support of a motion for summary judgment even if it was only attached to a previously filed pleading in the record.[24] That version of Article 966 aligned with Rule 56(c)(3) of the Federal Rules of Civil Procedure, which allows a federal district court to consider other materials in the record when deciding a motion for summary judgment.[25]

This practice began to change when the Legislature amended Article 966 in 2012 and then again in 2013. "The 2012 amendments renumbered Subsection B as (B)(2), removed the words 'on file' from that part of the Article," and added a provision in Subsection (E)(2) stating that "[o]nly evidence admitted for purposes of the motion for summary judgment shall be considered by the court in its ruling on the motion."[26] "[T]he 2013 amendments moved the evidentiary requirements to [Subsection (F)(2)]," which provided:

> (2) Evidence cited in and attached to the motion for summary judgment or memorandum filed by an adverse party is deemed admitted for purposes of the motion for summary judgment unless excluded in response to an objection made in accordance with Subparagraph (3) of this Paragraph. Only evidence admitted for purposes of the motion for summary judgment may be considered by the court in its ruling on the motion.[27]

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22. Meyer & Assocs., Inc. v. Coushatta Tribe of La., 2014-1109, p. 27 (La. App. 3 Cir. 1/27/16); 185 So. 3d 222, 240-41 (emphasis added) (discussing historical changes to Article 966's evidentiary requirements).

23. *See* La. AG Credit, PCA v. Livestock Producers, Inc., 42,072, p. 7 (La. App. 2 Cir. 4/4/07); 954 So. 2d 883, 888.

24. *See id.* This is because "pleadings" are one type of proper summary judgment evidence. A written motion for summary judgment is one type of "pleading." *See* LA. CODE CIV. PROC. ANN. art. 852. As such, documents attached to pleadings are a part thereof for all purposes. *See id.* art. 853.

25. FED. R. CIV. P. 56(c)(3). The Federal Rule provides that "[t]he court need consider only the cited materials, *but it may consider other materials in the record*" in deciding a motion for summary judgment. *Id.* (emphasis added).

26. *Meyer & Assocs., Inc.*, 185 So. 3d at 241 (discussing 2012 and 2013 amendments to Article 966's evidentiary requirements).

27. *Id.* (citing LA. CODE CIV. PROC. ANN. art. 966(F)(2) (rev. 2014)). The 2014 amendments to Article 966 retained this provision and added another sentence providing that "[t]he court may permit documentary evidence to be filed in the record with the motion or opposition in any electronically stored format authorized by the

As one court explained, "The intended effect of the 2012 and 2013 amendments was to establish that no longer could a trial court (or reviewing court for that matter) consider any and all pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record when considering a motion for summary judgment."[28] Instead, the court's review "was limited to consideration of only the pleadings, depositions, answers to interrogatories, admissions, and affidavits properly admitted for the purpose of the motion."[29]

The 2015 amendments continued this trend with Subsection (D)(2), by narrowly defining the field of evidence that a court can consider for purposes of a motion for summary judgment to "those documents filed in support of or in opposition to the motion."[30] This provision is much more restrictive than its federal counterpart, as recognized in the revision comments.[31]

In summary, the mover and the non-mover must attach all documentary evidence to their motion and opposition, respectively, and file the evidence with the clerk of court in advance of the hearing. The mover is barred from submitting any additional evidence with his reply memorandum, however. Additionally, evidence attached to the motion or the opposition must fall within the exclusive list in Subsection (A)(4) or else it must be independently authenticated by affidavit or deposition. However, if the non-mover or the mover fails to object to otherwise incompetent summary judgment evidence vis-à-vis a timely filed opposition or reply memorandum, respectively, the court must consider it. Finally, when ruling on the motion, the court cannot consider any evidence that was not attached to and filed with the motion or the opposition.

B. NEW DEADLINES FOR FILINGS, SERVICE, SETTING HEARINGS, AND RENDERING JUDGMENTS.

The 2015 amendments to Article 966 made several substantial changes to the various time periods required for filing, service, setting hearings, and rendering judgments. These

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local court rules of the district court or approved by the clerk of the district court for receipt of evidence." LA. CODE CIV. PROC. ANN. art. 966(F)(2) (rev. 2015).

28. *Meyer & Assocs., Inc.*, 185 So. 3d at 241.

29. *Id.*

30. LA. CODE CIV. PROC. ANN. art. 966(D)(2).

31. *See id.* art. 966 cmt. k.

changes are reflected in Subsections B and C of the Article.

The first set of summary judgment-specific deadlines established by the 2015 amendments to Article 966 are those in Subsection B, which sets forth deadlines for filing and serving the motion, opposition, and reply. Before the 2015 amendments, Article 966(B) provided, in relevant part:

> B. (1) The motion for summary judgment, memorandum in support thereof, and supporting affidavits shall be served within the time limits provided in District Court Rule 9.9. For good cause, the court shall give the adverse party additional time to file a response, including opposing affidavits or depositions. The adverse party may serve opposing affidavits, and if such opposing affidavits are served, the opposing affidavits and any memorandum in support thereof shall be served pursuant to Article 1313 within the time limits provided in District Court Rule 9.9.[32]

Incidentally, the prior version of "Article 966 relied on Uniform District Court Rule 9.9 . . . to set the timeline for filing motions for summary judgment, oppositions, replies, and other supporting documents," although the Article itself had no specific provision governing reply memoranda.[33] Rule 9.9 requires a party who files a motion to serve a supporting memorandum on all other parties "so that it is received . . . at least fifteen calendar days before the hearing."[34] The party opposing the motion is required under Rule 9.9 to serve an opposition memorandum on all other parties so that it is received at least eight calendar days before the hearing.[35] Lastly, Rule 9.9 requires the mover to serve a reply memorandum on all other parties "so that it is received before 4:00 p.m. on a day that allows one full working day before the hearing."[36]

Now, Article 966 has no references to Rule 9.9, and instead establishes its own set of deadlines for filing and serving motions, oppositions, and replies in Subsection (B)(1)-(4).[37] The motion and all supporting documents must be filed and served on all

32. *Id.* art. 966(B).
33. Filetti, *supra* note 1, at 493.
34. *See* LA. DIST. CT. R. 9.9(b).
35. *See* LA. DIST. CT. R. 9.9(c).
36. *See* LA. DIST. CT. R. 9.9(d).
37. *See supra* note 10 and accompanying text.

parties pursuant to Article 1313 not less than sixty-five days before trial.[38] The opposition and all supporting documents "shall be filed and served in accordance with Article 1313 not less than fifteen days prior to the hearing on the motion."[39] The reply "shall be filed and served pursuant to Article 1313 not less than five days prior to the hearing on the motion."[40] "These provisions supersede Rule 9.9 . . . but at the same time recognize the ability of the trial court and all of the parties to enter into a case management or scheduling order or other order to establish deadlines different from those provided" in the Article.[41] Nevertheless, in the absence of consent by the parties, "these orders may not shorten the period of time allowed for a party to file or oppose a motion for summary judgment under [Article 966]."[42]

In this regard, the 2015 amendments removed language in the former Subsection (B)(1) that expressly gave the district "court the discretion, upon a showing of 'good cause,' to afford additional time to oppose a motion for summary judgment."[43] The introductory phrase in the amended Article 966(B) is clear that the deadlines set forth in Subsection (B)(1)-(4) are mandatory and may not be extended or modified by the court unless all parties agree.[44] The Louisiana Supreme Court examined the effect of this legislative change as follows: "By removing the discretionary language and replacing it with mandatory language, we must assume the legislature intended to change the law to eliminate [the trial court's] previously afforded discretion" to extend the summary judgment briefing deadlines.[45]

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38. LA. CODE CIV. PROC. ANN. art. 966(B)(1).

39. *Id.* art. 966(B)(2).

40. *Id.* art. 966(B)(3).

41. *Id.* art. 966 cmt. d (rev. 2015).

42. *Id.* art. 966 cmt. d (rev. 2015) (emphasis added). In fact, the Louisiana Supreme Court has recognized that a district court has *no discretion* to consider a late-filed opposition under Article 966(B)(2). *See* Auricchio v. Harriston, 2020-01167, p. 1 (La. 12/10/21); 2021 WL 5865496, at *1.

43. *Auricchio*, 2021 WL 5865496, at *3.

44. LA. CODE CIV. PROC. ANN. art. 966(B) ("Unless extended by the court *and agreed to by all of the parties*, a motion for summary judgment *shall* be filed, opposed, or replied to in accordance with the following provisions . . .").

45. *Auricchio*, 2021 WL 5865496, at *4. Under the 2015 amendments, the district court only has discretion to order a continuance of the hearing on the motion for summary judgment so as to enable the parties to comply with the deadlines in Subsection (B). *See* LA. CODE CIV. PROC. ANN. art. 966(C)(2). Otherwise, the court has no discretion to consider late-filed documents under Subsection (B). *Auricchio*,

The 2015 amendments also added a new provision, Subsection (B)(4), which was intended to provide guidance for situations when the deadline for filing a motion, opposition, or reply falls on a legal holiday. This provision states:

> If the deadline for filing and serving a motion, an opposition, or a reply memorandum falls on a legal holiday, the motion, opposition, or reply is timely if it is filed and served no later than the next day that is not a legal holiday.[46]

For example, if a hearing on a motion for summary judgment is set for Tuesday, July 19, under Subsection (B)(2), the opposition would need to be filed and served on all parties no less than fifteen days before the July 19 hearing. Thus, in this example, the deadline for filing and serving the opposition falls on Monday, July 4, which is a legal holiday (Independence Day). According to Subsection (B)(4), however, the opposition is timely if it is filed and served no later than the next day that is not a legal holiday––in this case, Tuesday, July 5.

The next set of summary judgment-specific deadlines established by the 2015 amendments to Article 966 are contained in Subsection C. This Subsection sets forth deadlines imposed on the court (and presumably, the clerk of court) in the administrative context of summary judgment motions. The provisions in Subsection C most pertinent to this Article are as follows:

> C. (1) Unless otherwise agreed to by all of the parties and the court:
>
> (a) A contradictory hearing on the motion for summary judgment *shall* be set not less than thirty days after the filing and not less than thirty days prior to the trial date.
>
> (b) Notice of the hearing date *shall* be served on all parties in accordance with Article 1313(C) or 1314 not less than thirty days prior to the hearing.
>
> (2) For good cause shown, the court may order a continuance of the hearing.
>
> (3) The court *shall* render a judgment on the motion not less

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2021 WL 5865496, at *1.

46. LA. CODE CIV. PROC. ANN. art. 966(B)(4). Legal holidays are listed in Louisiana Revised Statute § 1:55. LA. REV. STAT. ANN. § 1:55.

than twenty days prior to the trial.[47]

Thus, when a timely motion for summary judgment is filed, Subsection (C)(1)(a) requires the court to set it for hearing at least thirty days after the date of filing and at least thirty days before trial.[48] If a party has good cause for failing to meet the briefing deadlines in Subsection (B), Subsection (C)(2) authorizes the court to "order a continuance of the hearing on the motion so that the parties and the court can comply with the applicable deadlines."[49]

Once the court sets a hearing date for the motion, Subsection (C)(1)(b) requires that "[n]otice of the hearing date" be served on all parties at least thirty days before the hearing, but this provision is silent on who is responsible for serving the "notice of the hearing date."[50] Further, there have not been any cases that have shed light on who bears this responsibility. The legislature likely intended for the clerk of court to perform this task, especially considering another provision in the Code requiring the clerk to provide written notice of a trial date to a party who has made a written request for one.[51] Without any authoritative guidance, however, the answer remains unclear.

The court is required to render judgment on the motion at least twenty days before trial, pursuant to Subsection (C)(3). Before the 2015 amendments, courts were permitted to rule on motions for summary judgment at "a reasonable time," but no less than ten days before trial.[52] The new deadline in Subsection (C)(3) "requires the court to decide a motion for summary judgment sufficiently in advance of the trial to allow a party to apply for supervisory writs without interrupting the trial setting."[53]

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47. LA. CODE CIV. PROC. ANN. art. 966(C)(1)-(3) (emphasis added).

48. *Id.* art. 966(C)(1)(a).

49. *Id.* art. 966 cmt. g (rev. 2015).

50. *Id.* art. 966(C)(1)(b).

51. *Id.* art. 1572 ("The clerk shall give written notice of the date of the trial whenever a written request therefor is filed in the record or is made by registered mail by a party or counsel of record. This notice shall be mailed by the clerk, by certified mail, properly stamped and addressed, at least ten days before the date fixed for the trial. The provisions of this article may be waived by all counsel of record at a pre-trial conference.").

52. *See* LA. CODE CIV. PROC. ANN. art. 966(D) (rev. 2015).

53. *Id.* art. 966 cmt. h (rev. 2015).

To summarize, the 2015 amendments to Article 966 removed summary judgment motions from the purview of Uniform Rule 9.9's general briefing deadlines for motions and established summary judgment-specific deadlines for filing and serving motions, oppositions, and replies. These new deadlines are mandatory, and courts no longer have discretion to extend or modify them without all of the parties' agreement. The 2015 amendments also imposed mandatory deadlines in which the motion must be set for hearing, notice of the hearing must be served on the parties, and judgment on the motion must be rendered.

II. PRACTICAL ISSUES RESULTING FROM APPLYING THE 2015 AMENDMENTS TO ARTICLE 966

A. THE EVIDENTIARY REQUIREMENTS IN SUBSECTIONS (A)(4), (B)(1)-(2), AND (D)(2) NECESSITATE REDUNDANT FILINGS AND UNNECESSARY EXTRA EXPENSES.

One of the most important but often overlooked changes brought about by the 2015 amendments to Article 966 is Subsection (D)(2), which addresses the evidence that can be introduced and considered by a court when deciding a motion for summary judgment. That provision restricts the documents that the trial court may consider to those *filed* in support of or in opposition to the motion.[54] Recall that, pursuant to Subsection (B)(1)-(2), the mover and non-mover must *file all of their supporting documents* with the motion and opposition, respectively.[55] When read *in para materia*, the foregoing provisions have created harsh practical consequences. The parties are precluded from supporting or opposing a motion by referencing previously filed documents, irrespective of whether the documents are competent summary judgment evidence under Subsection (A)(4). The trial court is prohibited from considering documents that are not filed with the motion or opposition, regardless of whether those documents are admissible under Subsection (A)(4).

Prior versions of Article 966 allowed parties to support or oppose a motion for summary judgment by simply referencing

54. *See* LA. CODE CIV. PROC. ANN. art. 966(D) (emphasis added).

55. *See id.* art. 966(B)(1)-(2) (emphasis added).

documents already filed into the record.[56] This practice, colloquially referred to as "incorporation by reference," was considered sufficient to direct the court's attention to the supporting documents.[57] Under that procedure, documents could be considered in support of a motion for summary judgment even if they were only attached to a previously filed pleading in the record.[58] The previous versions of Article 966 were consistent with the requirements of Federal Rule of Civil Procedure 56(c)(3), which allows a federal district court to "consider other materials in the record" when deciding a motion for summary judgment.[59]

The 2015 revisions to Article 966 continued the recent legislative trend of restricting summary judgment evidence "by no longer allowing a court to consider the record as a whole when deciding a motion for summary judgment."[60] Subsection (D)(2) of the revised Article 966 provides, in pertinent part, that "[t]he court may consider *only* those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made."[61] Although this language may seem perfunctory, the Legislature's use of the word "only" in Subsection (D)(2) effectively put in place stricter and substantially narrower evidentiary requirements for motions for summary judgment.

Indeed, the evidentiary standard in Subsection (D)(2) "makes

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56. *See* La. AG Credit, PCA v. Livestock Producers, Inc., 42,072, p. 7 (La. App. 2 Cir. 4/4/07); 954 So. 2d 883, 888.

57. *See* Palmer v. Ameriquest Mortg. Co., 41,576, p. 10 (La. App. 2 Cir. 12/13/06); 945 So. 2d 294, 300-01 (emphasis in original).

58. *Id.* This is because "pleadings" are one type of proper summary judgment evidence. A written motion for summary judgment is one type of "pleading." *See* LA. CODE CIV. PROC. ANN. art. 852. As such, documents attached to pleadings are "a part thereof for all purposes." *Id.* art. 853.

59. FED. R. CIV. P. 56(c)(3). The Federal Rule provides that "[t]he court need consider only the cited materials, *but it may consider other materials in the record*" in deciding a motion for summary judgment. *Id.* (emphasis added).

60. Davis v. Hixson Autoplex of Monroe, L.L.C., 51,991 (La. App. 2 Cir. 5/23/18); 249 So. 3d 177, 182 (2018).

61. LA. CODE CIV. PROC. ANN. art. 966(D)(2) (emphasis added). As previously explained, the revised article also limits the types of documentary evidence that may be filed in support of or in opposition to a motion for summary judgment to "pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions." *Id.* art. 966(A)(4). Documents that are not included in this exclusive list are not proper summary judgment evidence "unless they are properly authenticated by an affidavit or deposition to which they are attached." *Id.* art. 966 cmt. c (rev. 2015).

clear that the court can consider *only* those documents filed in support of or in opposition to the motion."[62] As a result, "the parties must now attach all documents in support of or in opposition to their motion . . . ."[63] Unlike the prior versions of Article 966, the 2015 version differs from its federal counterpart, Federal Rule of Civil Procedure 56(c)(3),[64] and makes clear that parties can no longer support or oppose a motion for summary judgment via incorporation by reference. Thus, because previous versions of Article 966 mirrored Federal Rule 56 in that respect, it was foreseeable that the 2015 revisions to Article 966—specifically Subsection (D)(2)—would cause some confusion.

A 2018 opinion issued by the Fourth Circuit Court of Appeal illustrates the significant consequences of failing to follow the requirements of Article 966(D)(2). In *Forstall v. City of New Orleans*, the Fourth Circuit reversed the trial court's ruling granting summary judgment in favor of the mover because the mover had supported its motion solely by referencing documents that were already in the court record.[65] In reaching its decision, the court explained that "[the mover] failed to meet its burden . . . to establish a *prima facie* case showing that there are no genuine issues of material fact" because it merely "referenced

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62. *Id.* art. 966 cmt. k (rev. 2015) (emphasis added). This standard also applies to courts of appeal, which review motions for summary judgment "*de novo* 'under the same criteria governing the trial court's consideration of whether summary judgment is appropriate.'" Makhoul v. City of New Orleans, 2019-1099, pp. 6-7 (La. App. 4 Cir. 12/16/20); 312 So. 3d 678, 682. In doing so, an appellate court "*looks to the record before it* and makes an independent determination regarding whether there are genuine issues of material fact that would preclude granting summary judgment." *Id.* (emphasis added). Thus, a court of appeal reviewing a district court's ruling on a motion for summary judgment likewise cannot consider any materials that were not attached to the motion or opposition filed in the district court. LA. CODE CIV. PROC. ANN. art. 966(F) ("A summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at the time.").

63. Viering v. Liberty Mut. Ins. Co., 2017-0204, p. 8 (La. App. 1 Cir. 9/27/17); 232 So. 3d 598, 603.

64. LA. CODE CIV. PROC. ANN. art. 966 cmt. k (rev. 2015). Indeed, the Federal Rule provides that "[t]he court need consider only the cited materials, *but it may consider other materials in the record*" in deciding a motion for summary judgment. FED. R. CIV. P. 56(c)(3) (emphasis added).

65. Forstall v. City of New Orleans, 2017-0414, p. 12 (La. App. 4 Cir. 1/17/18); 238 So. 3d 465, 471-72. The Second Circuit and the First Circuit have followed *Forstall*'s interpretation of Article 966(D)(2) as prohibiting trial courts from considering the record as a whole when deciding a motion for summary judgment. *See* Davis v. Hixson Autoplex of Monroe, L.L.C., 51,991, p. 8 (La. App. 2 Cir. 5/23/18); 249 So. 3d 177, 182; James as Co-Trustees of Addison Family Tr. v. Strobel, 2019-0787, p. 4 (La. App. 1 Cir. 6/24/20); 2020 WL 3446635, at *8.

evidence located elsewhere in the record," without "attach[ing] any documents in support of its motion for summary judgment."[66] Therefore, "[g]iven that La. [Code Civ. Proc.] art. 966(D)(2) precluded the trial court from considering other materials in the record for purposes of ruling on the motion for summary judgment," the trial court should not have granted summary judgment in favor of the mover.[67]

While *Forstall* may have been a proper interpretation of Subsection (D)(2), the Fourth Circuit's decision had practical consequences. Under *Forstall*, the district courts (and courts of appeal conducting de novo review) essentially consider motions for summary judgment in a vacuum without regard for any previous activity in the case. Thus, a party moving for summary judgment must file all supporting evidence with the motion—even if that evidence has already been filed into the suit record. The court will not take judicial notice of such evidence in deciding motions for summary judgment, "even though [the evidence] may technically be 'in the record.'"[68]

Forstall is clear that the mover must attach *every* piece of supporting evidence to his motion or he will fail to meet his burden of proof. This effectively requires parties to make redundant filings, thereby necessitating increased expenses to the parties, increased administrative manpower, and a superfluous lengthening of the suit record. This was a detrimental consequence (perhaps unintended, but nonetheless negative) of a court endorsing a rigid, "form-over-substance" interpretation of Article 966—a result that contravenes Article 966's expressly stated purpose:

> The summary judgment procedure is designed to secure the *just, speedy, and inexpensive* determination of every action,

66. *Forstall*, 238 So. 3d at 471.

67. *Id.* at 472. The Court acknowledged that the revised Article 966(D)(2) differs from its federal counterpart, Fed. R. Civ. P. 56(c)(3). *Id.* at 471.

68. *See* Washington v. Gallo Mech. Contractors, LLC, 2016-1251, pp. 4-6 (La. App. 4 Cir. 5/17/17); 221 So. 3d 116, 119-21 (rejecting non-mover's argument that trial court erred in failing to take judicial notice of sworn testimony he gave at prior hearing in the case, because non-mover did not attach it to his opposition, and, therefore the court could not consider it in deciding the motion, pursuant to Article 966(D)(2)). *See also* Horrell v. Alltmont, 2019-0945, pp. 9-11 (La. App. 1 Cir. 7/31/20); 309 So. 3d 754, 760-61 (holding that district court erred in taking judicial notice of various court decisions and not requiring the movers to attach those decisions to their motion for summary judgment).

> except those disallowed by Article 969. *The procedure is favored and shall be construed to accomplish these ends.*[69]

The practice of referencing otherwise competent summary judgment evidence already in the suit record and allowing courts to consider the record as a whole eliminates all of these issues. That was the previous practice in Louisiana state courts for many years, and it remains the practice in federal courts under Rule 56. Therefore, Subsection (D)(2) should be amended to revive the former practice while maintaining the current evidentiary safeguards in Subsection (A)(4). Doing so would align Article 966's evidentiary rules with the Article's stated purpose—i.e., that the summary judgment procedure is favored and should be construed to secure the just, speedy, and inexpensive determination of every action.

B. THE MOVER'S INABILITY TO FILE REBUTTAL EVIDENCE WITH REPLY MEMORANDA PURSUANT TO SUBSECTION (B)(3) PREVENTS THE PARTIES FROM MAKING A COMPLETE RECORD.

Another evidentiary issue stemming from the 2015 amendments to Article 966 is Subsection (B)(3)'s prohibition against filing rebuttal evidence with reply memoranda. Indeed, Subsection (B)(3) explicitly states that "[n]o additional documents may be filed with [a] reply memorandum."[70] Of course, the introductory phrase in Article 966(B) suggests that additional documents may be filed with a reply memorandum if all of the parties and the court agree to it.[71] In reality, however, the adversarial nature of litigation will be unlikely to lend itself to those circumstances. Consequently, there is effectively no scenario in which parties may file rebuttal evidence in support of or in opposition to a motion for summary judgment with a reply (or sur-reply) memorandum.

The First Circuit has suggested two possible options for parties that wish to file rebuttal evidence in compliance with Article 966's evidentiary rules:

> If a party filing a reply memorandum needs additional documents to be filed . . . that party may either request that

69. LA. CODE CIV. PROC. ANN. art. 966(A)(2) (emphasis added).

70. *Id.* art. 966(B)(3).

71. *See id.* 966(B) ("Unless extended by the court and agreed to by all of the parties, a motion for summary judgment shall be filed, opposed, or replied to in accordance with the following provisions . . . .").

> its motion for summary judgment be dismissed so as to allow a new motion for summary judgment to be filed that would include all necessary documents, or they may request additional time to supplement their initial motion with the necessary documents, which may necessitate the continuance of the hearing on the motion for summary judgment and allow for all of the mandatory delays under La. Code Civ. Proc. art. 966(B) to be adhered to.[72]

Neither of those options, however, favors a "just, speedy, and inexpensive determination" of a case.[73] Article 966(B)(3) makes no exceptions to the rule precluding any additional evidence filed with reply memoranda.

Presumably, the Legislature intended to craft Subsection (B)(3) to streamline the process for resolving the issues raised in the motion.[74] After all, that was the reason why the Legislature removed the motion to strike as one method for objecting to summary judgment evidence in favor of including all objections in opposition and reply memoranda.[75] In fact, the objections procedure set forth in Subsection (D)(2) is in many ways consistent with Subsection (B)(3)'s prohibition of filing evidence with reply memoranda.

In this respect, the present version of Article 966 only contemplates three filings: a motion, an opposition, and a reply.[76] The mover can only file evidence with his motion and the non-mover can only file evidence with his opposition. In turn, the non-mover can only raise objections to the mover's evidence in his opposition, while the mover can only raise objections to the non-mover's evidence in his reply memorandum. If this process were

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72. Adolph v. Lighthouse Prop. Ins. Corp., 2016-1275, p. 6 (La. App. 1 Cir. 9/8/17); 227 So. 3d 316, 320 n.6.

73. *See* LA. CODE CIV. PROC. ANN. art. 966(A)(2).

74. Filetti, *supra* note 1, at 500.

75. *Id.*

76. Crump v. Lake Bruin Recreation & Water Conservation Dist., 52,559, p. 4 (La. App. 2 Cir. 4/10/19); 267 So. 3d 1229, 1234. "There is no provision for a surreply or supplementary opposition." *Id.* (citing Baez v. Hosp. Serv. Dist. No. 3, 2016-951, p. 10 (La. App. 3 Cir. 4/5/17); 216 So. 3d 98, 105). "A court may, in its discretion, permit a surreply to allow the opponent to contest matters presented for the first time in the mover's reply, if the surreply is filed within the delays of Art. 966(B)." *Id.* (citing Dufour v. Schumacher Grp. of La. Inc., 18-20, p. 8 (La. App. 3 Cir. 8/1/18); 252 So. 3d 1023, 1029). "A surreply may not be used to correct an alleged mischaracterization or to reiterate arguments already made." *Id.*

allowed to continue *ad infinitum*, it would delay resolution of the motion for summary judgment. Thus, the 2015 amendments drew a hard line by giving the mover and the non-mover each one chance to file all of their evidence and one chance to make all of their objections to the other party's evidence.

The inability of the parties—especially the mover—to file any additional evidence after their initial filings can overcomplicate the issues raised in the motion, however. The mover is put in a bind when preparing his motion. The mover is left to anticipate the non-mover's opposition arguments and evidence and is effectively required to attach every piece of documentary evidence to his motion—irrespective of its direct relevance to the arguments in the motion. This essentially requires the mover to "show all of his cards" when filing the motion, which could distract from arguments relating to nuanced factual issues.

In this regard, the non-mover might raise arguments in his opposition that appear relevant, but which may not be entirely accurate or ultimately have little-to-no bearing on the material factual issues in the motion. While the mover can always object to the non-mover's evidence when he files his reply memorandum, this may not always prove sufficient to redirect the court's attention to the relevant issues. Often times, the best way to rebut these arguments is with hard evidence; but the mover is unable to do that unless he already filed the rebuttal evidence with his motion.[77]

This differs from Federal Rule 56, which has no express prohibition on summary judgment evidence filed after the motion or the opposition. With this void, each federal district court in Louisiana has its own set of rules governing motion practice in general, as well as summary judgment motions.[78] Each of the

77. Unless, of course, all of the other parties and the court agree to allow the mover to file rebuttal evidence. *See* LA. CODE CIV. PROC. ANN. art. 966(B). Without all of the other parties' consent, however, the court has *no discretion* to allow the rebuttal evidence. *See Auricchio*, 2021 WL 5865496, at *4-5 (holding that 2015 amendments to Article 966 removed language that gave court the discretion, upon a showing of "good cause" to afford additional time to oppose a motion for summary judgment, replacing it with mandatory deadlines that cannot be extended by court without all parties' agreement).

78. *See* U.S. DIST. CT. E.D. LA. LR. 7.1, 7.2, 7.4, 7.5, 7.7, 56.1, 56.2; U.S. DIST. CT. M.D. LA. LR 7(b), 7(d), 7(f), 7(g), 56; U.S. DIST. CT. W.D. LA. LR 7.4.1, 7.4, 7.5, 7.8, 56.1, 56.2.

three federal district's local rules requires supporting evidence to be filed with the motion or with the opposition.[79] Only the Middle District explicitly permits the filing of supporting evidence with the reply memoranda without leave of court for Rule 12 and Rule 56 motions.[80] The Middle District also allows parties to file sur-reply memoranda for Rule 12 and Rule 56 motions, but only after obtaining leave of court.[81] In contrast, the Eastern District and the Western District do not have any specific rules that address reply and sur-reply memoranda filed in support of or in opposition to motions—apart from limiting the length of reply briefs.[82] Even without specific rules governing reply and sur-reply memoranda or evidence filed with such memoranda, Louisiana's federal courts frequently consider and allow such filings with leave of court.

In this respect, Louisiana's federal courts have determined that *new arguments* raised for the first time in a summary judgment reply brief need not be considered.[83] But, district courts may consider *new evidence* introduced in a reply brief if the non-mover is given an adequate opportunity to respond.[84] When deciding whether to consider new evidence, the court may consider the circumstances of the case, including the posture of the case or timing of the filings.[85] Notably, federal courts in Louisiana have allowed a mover to file evidence with his reply memorandum where the evidence did *not* pertain to *new arguments* and simply responded to matters raised in the non-mover's opposition.[86]

The Legislature should amend Article 966 to align with the approach applied by Louisiana's federal district courts.

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79. *See* U.S. DIST. CT. E.D. LA. LR 7.4, 7.5; U.S. DIST. CT. M.D. LA. LR. 7(d), 7(f); U.S. DIST. CT. W.D. LA. LR 7.4, 7.5.

80. *See* U.S. DIST. CT. M.D. LA. LR 7(f).

81. *See* U.S. DIST. CT. M.D. LA. LR 7(f).

82. *See* U.S. DIST. CT. E.D. LA. LR 7.7; U.S. DIST. CT. W.D. LA. LR 7.8.

83. *See* Elwakin v. Target Media Partners Operating Co. LLC, 901 F. Supp. 2d 730, 745 (E.D. La. 2012); Mitchell v. Univ. of La. Sys., 154 F. Supp. 3d 364, 388 (M.D. La. 2015); Cummings v. Elec. Ins. Co., No. 1:18-cv-00786, 2020 WL 5505652, at *2 (W.D. La. Sept. 11, 2020).

84. *Elwakin*, 901 F. Supp. 2d at 745-46; *Mitchell*, 154 F. Supp. 3d at 388 (quoting *Elwakin*, 901 F. Supp. 2d at 745-46); *Cummings*, 2020 WL 5505652, at *2.

85. *Elwakin*, 901 F. Supp. 2d at 746; *Mitchell*, 154 F. Supp. 3d at 388 (quoting *Elwakin*, 901 F. Supp. 2d at 745-46); *Cummings*, 2020 WL 5505652, at *2.

86. *See, e.g.*, Keybank Nat'l Ass'n v. Perkins Rowe Assoc., LLC, No. 09-497, 2010 WL 1945715, at *1-2 (M.D. La. May 12, 2010).

Specifically, the evidentiary requirements associated with motions, oppositions, and replies set forth in Subsection (B)(1)-(3) should be revised to give courts the discretion to allow parties to file rebuttal evidence with leave of court. Further, Subsection (D)(2) should be revised to provide the non-mover with a mechanism by which to file objections to any rebuttal evidence that is allowed by the court. When determining whether to grant the mover leave to file the rebuttal evidence, the court should consider the circumstances of the case, including the posture of the case and timing of the filings. These changes would afford the mover the chance to make a complete record when addressing matters presented in the non-mover's opposition, while giving the non-mover an adequate opportunity to respond by way of objecting to the rebuttal. This approach would bring the evidentiary rules in Article 966 more in line with the Article's stated purpose of just, speedy, and inexpensive determination of all cases.

C. THE REQUIREMENTS FOR SERVING THE NOTICE OF THE HEARING DATE UNDER SUBSECTION (C)(1)(B) ARE UNCLEAR.

As explained in Part II(B), *supra*, Article 966 contains instructions on the manner and timing of service of the motion, opposition, and reply, as well as the "notice of the hearing date" for the motion. This Subpart addresses the uncertainties surrounding the manner of serving these papers under Section (C)(1)(b). Subsection B(1)-(3) of Article 966 provides that the motion, opposition, and reply memorandum "shall be filed and served in accordance with Article 1313" by a specific number of days preceding the hearing on the motion.[87] Subsection (C)(1)(b) is ostensibly more specific in its instructions for serving the notice of hearing. It provides that "[n]otice of the hearing date shall be served on all parties in accordance with Article 1313(C) or 1314 not less than thirty days prior to the hearing."[88]

Article 1313 outlines the requirements for serving pleadings subsequent to the original petition. Under Article 1313(A),[89]

87. *See* LA. CODE CIV. PROC. ANN. art. 966(B)(1)-(3).

88. *Id.* art. 966(C)(1)(b).

89. This provision states:

> (A) Except as otherwise provided by law, every pleading subsequent to the original petition, and ever pleading which under an express provision of law may be served as provided in this Article, may be served either by the sheriff or by:
>
> (1) Mailing a copy thereof to the counsel of record, or if there is no counsel

parties can serve post-petition pleadings by U.S. mail, hand delivery, or email unless the pleading sets a court date, in which case Subsection(C) of Article 1313 governs the manner for serving it. Thus, because a motion for summary judgment is a contradictory motion that is required to be set for hearing,[90] it must be served pursuant to Article 1313(C).[91]

Until recently, service of a pleading or an order that sets a court date was proper under Article 1313(C) if made by registered mail, certified mail, the sheriff under Article 1314,[92] or actual

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> of record, to the adverse party at his last known address, this service being complete upon mailing.
>
> (2) Delivering a copy thereof to the counsel of record, or if there is no counsel of record, to the adverse party.
>
> (3) Delivering a copy thereof to the clerk of court, if there is no counsel of record and the address of the adverse party is not known.
>
> (4) Transmitting a copy by electronic means to counsel of record, or if there is no counsel of record, to the adverse party, at the number or addresses expressly designated in a pleading or other writing for receipt of electronic service. Service by electronic means is complete upon transmission but is not effective and shall not be certified if the serving party learns the transmission did not reach the party to be served.

LA. CODE CIV. PROC. ANN. art. 1313(A)(1)-(4).

90. *See* LA. DIST. CT. R. 9.8(a) ("All exceptions and motions, including those incorporated into an answer, *shall be accompanied by a proposed order requesting that the exception or motion be set for hearing*.") (emphasis added); LA. CODE CIV. PROC. ANN. art. 963 ("If the order applied for by written motion is one to which the mover is not clearly entitled, or which requires supporting proof, the motion *shall be served on and tried contradictorily with the adverse party*.") (emphasis added).

91. In contrast, a memorandum in opposition to a motion for summary judgment and a reply memorandum in support of a motion for summary judgment do *not* request a hearing date (the hearing has usually already been set). Therefore, those memoranda need not be served pursuant to Article 1313(C). This is presumably why Subsection B(1)-(3) of Article 966 broadly references "Article 1313" rather than any specific subsections of Article 1313.

92. Article 1314 states:

> A pleading which is required to be served, but which may not be served under Article 1313, shall be served by the sheriff by either of the following:
>
> (1) Service on the adverse party in any manner permitted under Articles 1231 through 1266.
>
> (2) (a) Personal service on the counsel of record of the adverse party or delivery of a copy of the pleading to the clerk of court, if there is no counsel of record and the address of the adverse party is not known.
>
> (b) Except as otherwise provided in Article 2293, service may not be made

delivery by a commercial courier.[93] Recognizing the need for modernizing certain provisions in the Code of Civil Procedure, the Legislature passed Act No. 68 during the 2021 Regular Session.[94] Among other things, Act No. 68 amended Article 1313(C) "to allow service of a pleading or order setting a court date by emailing the party or his counsel at a designated email address, provided that the sender receives an electronic confirmation of delivery."[95] Thus, effective January 1, 2022, parties may serve pleadings and orders that set a court date via email.[96]

The recent amendment to Article 1313(C) allowing email service allows parties to avoid the added expenses associated with serving physical copies of pleadings and orders that set a court date via certified mail, registered mail, the sheriff, or commercial courier. This is particularly advantageous when serving motions for summary judgment, which often include voluminous exhibits attached to the motion. Moreover, email service is instantaneous, whereas delivering pleadings via the other methods in Article 1313(C) often takes at least one business day (and often times, more than that). Consequently, if a party uses any of the other methods for service under Article 1313(C), that party effectively shortens the already tight deadlines for making timely service. Email service avoids this dilemma.

Consistent with the new amendment to Article 1313(C), Act No. 68 also amended Articles 863 and 891 to further require every pleading to include an email address of the party or the party's attorney for service.[97] In today's world, these changes were important to streamline litigation and avoid unnecessary delays caused by antiquated procedural rules.

Of course, these changes, while certainly steps in the right

> on the counsel of record after a final judgment terminating or disposing of all issues litigated has been rendered, the delays for appeal have lapsed, and no timely appeal has been taken.

LA. CODE CIV. PROC. ANN. art. 1314(A).

93. *Id.* art. 1313(C).

94. *See* Act No. 68, 2021 Reg. Leg. Sess. (La. 2021).

95. LA. CODE CIV. PROC. ANN. art. 1313 cmt. (2021). As an aside, practical issues may arise from the inability of the sender to obtain an "electronic confirmation of delivery" due to incompatibility between the sender's and the recipient's email servers. Those issues, however, are outside the scope of this article.

96. *Id.* art. 1313(C).

97. *See* Act No. 68, 2021 Reg. Leg. Sess. (La. 2021).

direction, did not (and could not) address every problem. One issue that remains unclear following the passage of Act No. 68 relates to the requirements for serving the "notice of the hearing date" for a motion for summary judgment under Article 966(C)(1)(b). This provision requires the notice of the hearing date to be served "on all parties in accordance with Article 1313(C) or 1314 not less than thirty days prior to the hearing."[98] However, unlike the motion, opposition, and reply, none of the parties creates or files the "notice of the hearing date." Further, Subsection (C)(1)(b) does not specify exactly what the "notice of the hearing date" is—i.e. the form of the notice. As a result, while Subsection (C)(1)(b) is clear that the "notice of the hearing date" must be served on all parties by certified mail, registered mail, the sheriff, commercial courier, or email, it is unclear what the "notice" must look like or who is responsible for serving it. Compounding this problem is that the "notice" must be served on all parties no later than thirty days before the hearing date, and courts cannot modify these requirements under any circumstances unless all of the parties agree.[99]

Much of this confusion can be attributed to the lack of homogeneity among Louisiana's forty-two district courts, particularly with respect to technological standards for the clerks of court. For example, while some district courts allow parties to file documents electronically, others do not.[100] Additionally, some

98. LA. CODE CIV. PROC. ANN. art. 966(C)(1)(b).

99. *Id.* art. 966(C)(1) ("*Unless otherwise agreed to by all of the parties* and the court . . .") (emphasis added).

100. Specifically, Article 253 authorizes the clerks of court to establish their own electronic filing and recordkeeping systems. The article provides, in relevant part:

> A. All pleadings or documents to be filed in an action or proceeding instituted or pending in a court, and all exhibits introduced in evidence, shall be delivered to the clerk of the court for such purpose. The clerk shall endorse thereon the fact and date of filing and shall retain possession thereof for inclusion in the record, or in the files of his office, as required by law. The endorsement of the fact and date of filing shall be made upon receipt of the pleadings or documents by the clerk and shall be made without regard to whether there are orders in connection therewith to be signed by the court.
>
> B. The filings as provided in Paragraph A of this Article and all other provisions of this Chapter may be transmitted electronically in accordance with a system established by a clerk of court or by Louisiana Clerks' Remote Access Authority. When such a system is established, the clerk of court shall adopt and implement procedures for the electronic filing and storage of any pleading, document, or exhibit. The official record shall be the electronic record. A pleading or document filed electronically is deemed filed on the date and time stated on the confirmation of electronic filing sent from the system, if the clerk of court accepts

district courts maintain electronic docket records that enable parties to monitor activity in their cases online; but many other district courts are not equipped with these features.[101]

This is in stark contrast to the comprehensive electronic filing and recordkeeping system used in all federal courts across the country (including federal courts in Louisiana), known as CM/ECF.[102] When a party or the party's attorney files a document in a federal lawsuit using CM/ECF, the document is immediately uploaded onto the docket for that lawsuit, and the other parties' attorneys promptly receive an email notifying them of the filing and providing them access to the online docket to view it.[103] Additionally, when the court sets a matter for hearing or another type of conference, CM/ECF sends an email to all of the parties notifying them of the court's action and giving them access to the online docket to view the court's order, if any.

Needless to say, this process is exponentially more efficient than the analogous patchwork of different processes among Louisiana's state district courts. Unfortunately, however, this problem is unlikely entirely fixable by legislation, as it is more of an administrative budgetary issue.[104]

Without uniformity among Louisiana's district courts, there is less certainty as to the proper form of the "notice of hearing" under Article 966(C)(1)(b) and who is responsible for serving it.

> the electronic filing. Public access to electronically filed pleadings and documents shall be in accordance with the rules governing access to written filings.

LA. CODE CIV. PROC. ANN. art. 253(A)-(B). The Louisiana Clerks' Remote Access Authority ("LCRAA") is established by LA. STAT. ANN. § 13:754. LA. STAT. ANN. § 13:754.

101. *Id.*

102. CM/ECF is an abbreviation for "case management/electronic case files." In 2001, the federal judiciary began the process of installing CM/ECF in bankruptcy, district, and appellate courts. 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1147 (4th ed.). "The system now operates throughout the federal judiciary." *Id.*

103. *Id.*

104. The Judicial Budgetary Control Board is responsible for establishing rules and regulations to govern the expenditure of all funds appropriated by the legislature to the Louisiana judiciary and judicial agencies. *See* LA. SUP. CT. GEN. ADMIN. R., Part G, § 4. Additionally, the Louisiana Clerks' Remote Access Authority would likely have a say in how any funds appropriated to the Louisiana judiciary and judicial agencies should be allocated for the creation and implementation of a comprehensive uniform electronic filing and recordkeeping system used on a statewide basis. *See* LA. STAT. ANN. § 13:754.

In some district courts, the clerk of court will typically issue a "notice of hearing" to all counsel of record after the judge sets a motion for hearing. This is usually a one-page document addressed to each attorney in the case, which states that a particular motion is set for hearing at a specified date, time, and location. Sometimes, the notice will attach a copy of the court's signed order setting the motion for hearing.

Notably, a party is only entitled to receive "notice" of a hearing from the clerk of court via certified mail at least ten days before the hearing if that party has filed a "request for written notice" into the record, pursuant to Article 1572.[105] Otherwise, each district court has its own procedures for providing adequate notice to all parties.[106] But, even if a party has filed a "request for written notice" in accordance with Article 1572, nothing in that Article mandates the clerk of court to serve a notice of hearing on the requesting party *more* than ten days before the hearing or in any manner other than certified mail. Consequently, the notice required by the clerk of court in Article 1572 is not broad enough to comply with the notice required in Article 966(C)(1)(b).

Absent any assurance that the clerk of court will serve a "notice of the hearing date" for a motion for summary judgment on all of the parties via Article 1313(C) at least thirty days before the hearing, the mover may have to take matters into his own hands to ensure compliance with Article 966(C)(1)(b). How does the mover accomplish this? The best practice would be to secure a hearing date from the court as soon as the motion is filed, obtain a copy of the court's signed order setting the motion for hearing, and serve the signed order on all of the other parties pursuant to Article 1313(C), which now authorizes email service.

However, this may not be feasible in every instance for a

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105. Article 1572 states:

> The clerk shall give written notice of the date of the trial whenever a written request therefor is filed in the record or is made by registered mail by a party or counsel of record. This notice shall be mailed by the clerk, by certified mail, properly stamped and addressed, at least ten days before the date fixed for the trial. The provisions of this article may be waived by all counsel of record at a pre-trial conference.

LA. CODE CIV. PROC. ANN. art. 1572.

106. *See id.* art. 1571(A)(1) ("The district courts shall prescribe the procedure for assigning cases for trial, by rules which shall . . . [r]equire adequate notice of trial to all parties . . . .").

variety of circumstances—especially if the district court is located across the state and is not one of the more technologically advanced jurisdictions. In those scenarios, the mover should account for potential logistical delays when preparing to file a motion for summary judgment and try to file the motion with enough lead-time to comply with all of the statutory and case-specific deadlines.

Obviously, the latter scenario is not ideal; but, that is the most prudent approach under the current rules. It follows that litigants would undoubtedly benefit from a clearer rule addressing service of the "notice of the hearing date" for a motion for summary judgment than the current rule in Article 966(C)(1)(b). This should be the clerk of court's responsibility rather than the mover's. Indeed, the clerk's office is in a much better position to learn when a judge signs an order setting a hearing date. Moreover, the clerk is already responsible for giving written notice of a trial date to a party who submits a request for such notice under Article 1572. Accordingly, the Legislature should amend this provision to specify that the clerk of court shall serve notice of the hearing date for a motion for summary judgment on all of the parties via Article 1313(C) not less than thirty days before the hearing. The Legislature should also permit the mover to serve notice to the other parties via Article 1313(C) in the event that the clerk's office does not promptly do so, to ensure compliance with the rule.

D. THE DELAY FOR FILING AND SERVING REPLY MEMORANDA IN SUBSECTION (B)(3) NEEDS TO SPECIFY WHETHER OR NOT LEGAL HOLIDAYS ARE INCLUDED.

As explained in Part II(B), *supra*, prior to the 2015 amendments to Article 966, the delays for filing and serving memoranda in support of, memoranda in opposition to, and reply memoranda in support of motions for summary judgment were governed by the Louisiana Uniform District Court Rules.[107] The

107. *See* LA. CODE CIV. PROC. ANN. art. 966(B)(1) (2015) ("The motion for summary judgment, memorandum in support thereof, and supporting affidavits shall be served within the time limits provided in District Court Rule 9.9. For good cause, the court shall give the adverse party additional time to file a response, including opposing affidavits or depositions. The adverse party may serve opposing affidavits, and if such opposing affidavits and any memorandum in support thereof shall be served pursuant to Article 1313 within the time limits provided in District Court Rule 9.9."). The previous version of Article 966 did not specify the delay for filing a reply memorandum in support of a motion for summary judgment. *See id; see also* LA.

2015 amendments carved out an exception, and provided specific, lengthier delays for filing and serving memoranda in support of, memoranda in opposition to, and reply memoranda in support of motions for summary judgment. This Subpart concerns the delay for filing reply memoranda set forth in Article 966(B)(3). The language of this provision has led to uncertainty about whether or not legal holidays are included in calculating the delay for filing reply memoranda in support of motions for summary judgment.

Uniform District Court Rule 9.9(d) previously governed the delay for filing and serving reply memoranda in support of motions for summary judgment. That provision states that "[t]he mover or exceptor may furnish the trial judge a reply memorandum, but only if the reply memorandum is furnished to the trial judge and served on all other parties so that it is received before 4:00 p.m. on a day that allows one full working day before the hearing."[108]

Now, Article 966(B)(3) governs the delay for filing reply memoranda in support of motions for summary judgment. Under that provision, "[a]ny reply memoranda shall be filed and served in accordance with Article 1313 not less than five days prior to the hearing on the motion."[109] Although this new time delay seems straightforward, it has nevertheless caused confusion about whether legal holidays (including weekends) are included in the five-day period. Put differently, it is not entirely clear whether the five-day period in Article 966(B)(3) means five *calendar days*. This confusion stems from the Code of Civil Procedure's computation of time rules set forth in Article 5059, which states, in relevant part:

> B. A half-holiday is considered as a legal holiday. A legal holiday is to be included in the computation of a period of time allowed or prescribed, *except when*:
>
> (1) It is expressly excluded;
>
> (2) It would otherwise be the last day of the period; or

DIST. CT. R. 9.9(b)-(d).

108. LA. DIST. CT. R. 9.9(d). Rule 9.9(d) was also amended by the 2015 amendments to explicitly carve out reply memoranda in support of motions for summary judgment from the purview of the rule, noting that the delays for filing and serving reply memoranda in support of motions for summary judgment are established by Article 966. *Id.*

109. LA. CODE CIV. PROC. ANN. art. 966(B)(3).

(3) *The period is less than seven days.*[110]

Hence, because the delay for filing and serving reply memoranda in Article 966(B)(3) is less than seven days, there is an argument that legal holidays are not included in calculating this time period. Two different appellate courts examined this conundrum in 2017, although neither of those cases resulted in a binding opinion on the issue.

In *Baez v. Hospital Service District No. 3*, the Third Circuit Court of Appeal considered whether the district court erred in vacating its previous order granting the non-mover's motion for leave to file a sur-reply in opposition to a motion for summary judgment, which was filed five calendar days before the hearing on the mover's motion.[111] The Third Circuit affirmed the district court's ruling vacating the order allowing the sur-reply for two reasons: (1) Article 966(B) does not provide for the filing of a sur-reply memorandum, and (2) even if a sur-reply were permitted as a reply memorandum under 966(B), it would have been untimely under Subsection (B)(3).[112] Regarding the timeliness issue, the Third Circuit explained that:

> At the time Ms. Baez filed her motion to file a surreply, the hearing was set for Wednesday, July 6, 2016. *Louisiana Code of Civil Procedure Article 5059 provides that in the computation of time, the last day of a period of time is to be included in the period of time allowed by law. However, if the period is less than seven days, legal holidays are not included. La. Code Civ. Proc. art. 5059(3). In that case, Ms. Baez should have filed her motion to file surreply on June 28, 2016, five days before July 6, not including Saturday, Sunday, or July 4.*[113]

Although this was dicta, the Third Circuit in *Baez* interpreted the five-day delay for filing and serving reply memoranda in Article 966(B)(3) to *exclude* legal holidays, pursuant to Article 5059(B)(3).

A few months later in *Adolph v. Lighthouse Property Insurance Corp.*, the First Circuit Court of Appeal sua sponte

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110. *Id.* art. 5059(B)(3) (emphasis added).

111. Baez v. Hosp. Serv. Dist. No. 3, 16-951 (La. App. 3 Cir. 04/05/17); 216 So. 3d 98.

112. *Id.* at 105-06.

113. *Id.* (emphasis added).

considered the issue of whether legal holidays are included in the five-day time delay under Article 966(B)(3), but the majority opinion did not ultimately rule on the issue.[114] Instead, the majority opinion, though ostensibly endorsing an interpretation that legal holidays *are included* in the five-day time period in Article 966(B)(3), simply recognized in a footnote that there is a conflict between Article 966(B)(3) and Article 5059(B)(3):

> The hearing on Lighthouses' motion for summary judgment was scheduled for June 23, 2016. [La. Code Civ. Proc. art.] 966(B)(3) requires that a reply memorandum be served "not less than five days prior to the hearing on the motion." Five days prior to the hearing was June 18, 2016, which was a Saturday (a legal holiday). Therefore, under [La. Code Civ. Proc.] art. 966(B)(4), the reply memorandum would be timely because it was fax-filed the next day that was not a legal holiday-June 20, 2016. However, [La. Code Civ. Proc.] art. 5059 states that in computing time delays, if the period of time allowed by law is less than seven days, then legal holidays are not included. *It appears that [La. Code Civ. Proc.] art. 5059 and [La. Code Civ. Proc.] art. 966(B) are in conflict in computing the time delays for filing a reply memorandum in the instant matter. Because [La. Code Civ. Proc.] art. 966(B) is the most current expression of legislative intent and the time requirements provided therein are specific rather than general, it appears that [La. Code Civ. Proc.] art. 5059 does not apply to the instant matter.* However, because the parties did not raise this issue on appeal, we decline to address the issue.[115]

Nevertheless, two of the judges on the panel—Judge Welch and Judge Crain—penned separate concurring opinions, each having a different conclusion on the proper interpretation of the five-day time period in Article 966(B)(3). Both Judges based their conclusions in part on differing analyses of another provision in Article 966—Subsection (B)(4).

First, Judge Welch opined in his concurrence that Article 5059 governed the time periods for filing and serving reply memoranda under Article 966 (thus, legal holidays are not included in calculating the delay).[116] Judge Welch reasoned:

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114. *Adolph*, 227 So. 3d at 318 n.3.

115. *Id.* (emphasis added).

116. *Id.* at 322 (Welch, J., concurring).

> The majority has determined (implicitly) that the reply memorandum was timely, presumably on the basis that five days prior to the hearing was June 18, 2016, which was a Saturday (and a legal holiday), and therefore under [La. Code Civ. Proc.] art. 966(B)(4), the reply memorandum was timely because it was filed the next day that was not a legal holiday—June 20, 2016. *However, as previously set forth, legal holidays are not included in the computation of the time period within which to file the reply memorandum and the majority's inclusion of legal holidays in the calculation of the time period to file the reply memorandum ignores the express provisions of [La. Code Civ. Proc.] art. 5059.*[117]

Judge Welch pointed out that the 2015 revision comments to Article 966 explicitly state that Subsection (B)(4) follows Article 5059.[118] Therefore, because Subsection (B)(4) applies to the deadlines for filing motions, oppositions, and replies set forth in Subsection (B)(1)-(3), Judge Welch concluded that the general rules for computation of time in Article 5059 should apply to each of those deadlines. Specifically, Judge Welch explained:

> In addition, the majority's determination suggests that [La. Code Civ. Proc.] art. 5059 is applicable to the computation of the applicable time period for filing the motion for summary judgment and the opposition, but not to the reply memorandum. However, such an interpretation would require us to read language into [La. Code Civ. Proc.] art. 966(B)(3) to the effect of "including legal holidays" when such language was not included or intended by our legislature. Furthermore, *there is no language in [La. Code Civ. Proc.] art. 966(B)(4) to suggest that the provisions of [La. Code Civ. Proc.] art. 5059 is not applicable to the reply memorandum or that the calculation of the time period within which to file a reply memorandum should include legal holidays*. Rather, *[La. Code Civ. Proc.] art. 966(B)(4) simply provides a rule that if the deadline for filing and serving the motion, opposition, or reply falls on a legal holiday, then it is timely if it is filed and served no later than the next day that is not a legal holiday; such language neither abrogates [La. Code Civ. Proc.] art. 5059 nor expressly provides that the calculation of time for filing the reply memorandum should include legal*

117. *Id.* (emphasis added).

118. *See id.*

> *holidays*. As such, the majority has erred in its determination that the defendant's reply memorandum was timely and that a review of the merits of the defendant's objection to the plaintiff's expert's affidavit was warranted.[119]

Conversely, Judge Crain opined in his concurrence that the time periods in Article 966 are sui generis, and, therefore, not governed by Article 5059—thus finding that legal holidays *are* included in calculating the delay. Judge Crain explained:

> In addition to the objection being properly made, I find the reply memorandum was timely filed. [La. Code Civ. Proc. art.] 966(B)(3) requires a reply memorandum be filed "not less than five days prior to the hearing on the motion." [La. Code Civ. Proc. art.] 966(B)(4) then provides, in relevant part, that when "the deadline for filing and serving a . . . reply memorandum falls on a legal holiday, [it] is timely if it is filed and received no later than the next day that is not a legal holiday." The hearing on the motion for summary judgment was set for June 23, 2016. "[F]ive days prior to the hearing" was Saturday, June 18, 2016, a legal holiday; therefore, the express language of Article 966(B)(4) required the reply memorandum be filed "no later than the next day that is not a legal holiday," which was Monday, June 20, 2016. The defendant's reply memorandum filed that day was timely.[120]

Judge Crain added that:

> By expressly addressing in Article 966(B)(4) the circumstance where the filing deadline "falls on a legal holiday," the legislature necessarily excluded the application of the more general rule of [La. Code Civ. Proc. art.] 5059, which requires that legal holidays not be counted if the delay provided for is less than seven days. *Because legal holidays are not counted under Article 5059, its application to Article 966B would prohibit the filing deadline from ever falling on a legal holiday—the very scenario that Article 966B(4) expressly addresses*.[121]

As the foregoing excerpts from *Baez* and *Adolph* illustrate,

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119. *Id.* at 322-23 (emphasis added).

120. *Id.* at 325 (Crain, J., concurring) (emphasis added).

121. *Id.* at 325 n.2.

there are arguments that the five-day time period in Article 966(B)(3) includes legal holidays and there are arguments that it does not include legal holidays. Unfortunately, this issue has not been addressed in any other cases since *Baez* and *Adolph*. Therefore, without further legislative action or the Louisiana Supreme Court weighing in, the issue remains unclear and unresolved.

III. PROPOSAL

As explained throughout this Article, several problems have arisen from courts applying the highly technical and sometimes confusing rules established by the 2015 amendments to Article 966. The Louisiana Legislature should rectify these problems by revising Article 966 in four main respects:

(1) Allow parties to cite and courts to consider competent summary judgment evidence that is already in the record.

(2) Permit rebuttal evidence filed with reply memoranda and objections to rebuttal evidence under appropriate circumstances.

(3) Clarify the requirements for serving the notice of the hearing date.

(4) Clarify the delay for filing and serving reply memoranda.

These proposed changes would require amending Subsections (A)(4), (B)(1)-(4), (C)(1)(b), and (D)(2) in the present version of Article 966. Most importantly, these changes would bring Article 966 back in line with the Article's stated purpose of just, speedy, and inexpensive determination of all cases.

A. Allow Parties to Cite and Courts to Consider Competent Summary Judgment Evidence that is Already in the Record.

First, Subsections (A)(4), (B)(1), and (B)(2) should be revised to allow the parties to cite to competent summary judgment evidence already contained in the suit record. Correspondingly, Subsection (D)(2) should be revised to broaden the scope of materials that the court may consider when deciding a motion and specifically allow the court to consider competent summary judgment evidence that is already in the record.

The current version of Subsection (D)(2) mandates that

"[t]he court may consider only those documents *filed in support of or in opposition to the motion for summary judgment*" and further requires that the court "*shall* consider any documents [filed in support of or in opposition to the motion] to which no objection is made."[122] Thus, because Subsection (B)(1) and (2) require that the mover and non-mover must file "*all documents in support*" of the motion and the opposition, respectively,[123] courts can only consider those documents, pursuant to Subsection (D)(2). Further, Louisiana courts have interpreted the foregoing provisions as prohibiting parties from citing documents already in the record in lieu of physically filing those same documents with a motion or an opposition—even if the documents are admissible summary judgment evidence under Subsection (A)(4).[124] In the same vein, district courts are barred from considering materials that are not filed with a motion or an opposition, irrespective of whether those materials are competent summary judgment evidence and already filed in the record.[125]

As such, under the current version of Article 966, the mover must attach every piece of supporting evidence to his motion or he will fail to meet his burden of proof. This effectively requires parties to make redundant filings, thereby necessitating increased expenses to the parties and superfluously lengthening the suit record.

The practice of referencing otherwise competent summary judgment evidence already in the suit record and allowing courts to consider the record as a whole eliminates all of these issues. That was the previous practice in Louisiana state courts for many years, and it remains the practice in federal courts under Rule 56. Therefore, Subsections (A)(4), (B)(1), and (B)(2) should be revised to allow parties to cite to the types of documents listed in Subsection (A)(4) in lieu of physically filing them, so long as the documents are already in the suit record. This would be sufficient to direct the court's attention to the supporting

122. LA. CODE CIV. PROC. ANN. art. 966(D)(2) (emphasis added).

123. *Id.* art. 966(B)(1)-(2) (emphasis added).

124. *See, e.g.*, Forstall v. City of New Orleans, 2017-0414 (La. App. 4 Cir. 1/17/18); 238 So. 3d 465, 471-72; Davis v. Hixson Autoplex of Monroe, L.L.C., 51,991 (La. App. 2 Cir. 5/23/18); 249 So. 3d 177, 182; James as Co-Trustees of Addison Fam. Tr. v. Strobel, 2019-0787 (La. App. 1 Cir. 6/24/20); 2020 WL 3446635, at *4.

125. *See, e.g.*, *Forstall*, 238 So. 3d at 471-72; Washington v. Gallo Mech. Contractors, LLC, 2016-1251 (La. App. 4 Cir. 5/17/17); 221 So. 3d 116, 120-21; Horrell v. Alltmont, 2019-0945 (La. App. 1 Cir. 7/31/20); 309 So. 3d 754, 758.

documents, and it would not unnecessarily increase the size of the suit record with redundant materials.[126] In turn, Subsection (D)(2) should be amended to expand the court's review of the evidence supporting and opposing a motion to documents already filed in the record. These revisions would align Article 966's evidentiary rules with the Article's stated purpose—i.e., that the summary judgment procedure is favored and should be construed to secure the just, speedy, and inexpensive determination of every action.

B. PERMIT REBUTTAL EVIDENCE FILED WITH REPLY MEMORANDA AND OBJECTIONS TO REBUTTAL EVIDENCE UNDER APPROPRIATE CIRCUMSTANCES.

Second, the introductory paragraph in Subsection (B) should be amended to delete the phrase requiring all of the parties to agree on extending or modifying any of the provisions in Subsection (B)(1)-(4). The introductory phrase should also be revised so that the provisions in Subsection (B)(1)-(4) may be extended or modified by the court, upon showing of good cause. This would give the court discretion to address issues regarding timeliness of briefs and supporting evidence. It would also eliminate the onerous and unrealistic requirement that all parties must agree to extend or modify any of the provisions in Subsection B.

As a corollary, the evidentiary requirements associated with filing reply memoranda set forth in Subsection (B)(3) should be revised to give courts the discretion to allow parties to file rebuttal evidence with leave of court. Further, Subsection (D)(2) should also be revised to provide the non-mover with a mechanism by which to file objections to any rebuttal evidence that is allowed by the court. When determining whether to grant the mover leave to file the rebuttal evidence, the court should consider the circumstances of the case, including the posture of the case and timing of the filings.

These changes would afford the mover the chance to make a complete record when addressing matters presented in the non-mover's opposition, while giving the non-mover an adequate opportunity to respond by way of objecting to the rebuttal. Most importantly, this approach would bring the evidentiary rules in

126. *See* Palmer v. Ameriquest Mortg. Co., 41,576, p. 10 (La. App. 2 Cir. 12/13/06); 945 So. 2d 294, 300-01 (emphasis in original).

Article 966 more in line with the Article's stated purpose of just, speedy, and inexpensive determination of all cases.

C. CLARIFY THE REQUIREMENTS FOR SERVING THE NOTICE OF THE HEARING DATE.

Third, much like Subsection (B), the introductory paragraph in Subsection (C)(1) should be revised to delete the phrase requiring all of the parties to agree to any modification of the provisions in Subsections (C)(1)(a)-(b). The introductory phrase should also be revised so that the provisions in Subsections (C)(1)(a)-(b) may be modified by the court, upon showing of good cause.

Correspondingly, Subsection (C)(1)(b) should be revised to clarify the "notice of hearing date" requirement. This provision requires the notice of the hearing date to "be served on all parties in accordance with Article 1313(C) or 1314 not less than thirty days prior to the hearing."[127] But, it does not specify exactly what the "notice of the hearing date" is or who is responsible for serving it.

In other contexts, the clerk of court is responsible for providing "notice" to all parties that have submitted a written request.[128] It follows that it should likewise generally be the clerk's responsibility for serving all of the parties with the "notice of hearing date" for a motion for summary judgment.

That said, practical considerations also warrant an exception allowing a party to serve the other parties with any form of "notice" of the hearing date. In particular, parties cannot be sure that every litigant in a case receives timely notice of the hearing date from the clerk's office, given that the forty-two clerks of court in Louisiana do not have a uniform notification system. Unless and until this happens, Article 966(C)(1)(b) should be amended to prevent unnecessary technical defects in the form of a judgment granting a motion for summary judgment. In addition to giving the court discretion to modify the "notice of hearing date" requirements when appropriate, as proposed above, the revised Subsection (C)(1)(b) should require the clerk of court to serve the notice on all of the parties at least thirty days before the hearing; but, it should also allow any of the parties to serve the other

127. LA. CODE CIV. PROC. ANN. art. 966(C)(1)(b).

128. *See id.* art. 1572.

parties with any form of "notice" to ensure compliance.

D. CLARIFY THE DELAY FOR FILING AND SERVING REPLY MEMORANDA.

Finally, Subsection (B)(3) should be amended to clarify whether the five-day delay for filing and serving reply memoranda includes legal holidays. The most practical interpretation of the current provision is that legal holidays *are included* in the five-day period. As Judge Crain explained in his concurring opinion in *Adolph*, "[b]y expressly addressing in Article 966(B)(4) the circumstance where the filing deadline 'falls on a legal holiday,' the legislature necessarily excluded the application of the more general rule of [La. Code Civ. Proc. art.] 5059, which requires that legal holidays not be counted if the delay provided for is less than seven days."[129] Thus, "[b]ecause legal holidays are not counted under Article 5059, its application to Article 966B would prohibit the filing deadline from ever falling on a legal holiday—*the very scenario that Article 966B(4) expressly addresses*."[130] As mentioned above, this interpretation makes the most practical sense—if the general rule of Article 5059 applied, the "five-day" delay in Article 966(B)(3) is, in reality, a period of at least seven calendar days (because weekends will never be included).

Still, there are other logical interpretations of Article 966(B)(3) that arrive at the opposite conclusion.[131] Without a clear answer, the prudent approach for the mover would be to file his reply memorandum on a date that satisfies the general rule excluding legal holidays, which necessitates an earlier filing deadline. The Legislature should eliminate all doubt by revising the five-day time delay for filing reply memoranda in Subsection (B)(3) to explicitly include legal holidays. Doing so would ensure consistency with the rule in Subsection (B)(4) extending the delays for filing and serving motions, oppositions, and replies in Subsections (B)(1)-(3) when the deadline falls on a legal holiday. Put differently, by explicitly providing that the five-day delay for filing and serving reply memoranda in Subsection (B)(3) includes legal holidays, the deadline could definitively fall on a legal holiday, thus triggering Subsection (B)(4). If legal holidays are

129. *Adolph*, 227 So. 3d at 325 n.2 (Crain, J., concurring).

130. *Id.* (emphasis added).

131. *See id.* at 322 (Welch, J., concurring).

not included in the five-day delay, Subsection (B)(4) would be superfluous when applied to Subsection (B)(3).

CONCLUSION

In conclusion, the 2015 amendments to Article 966 substantially overhauled the rules governing summary judgment procedure in Louisiana's state courts. Importantly, however, these revisions did not change the legal standard for summary judgments. And the 2015 amendments retained the explicit statement of policy from prior versions of Article 966—i.e., that the summary judgment procedure is favored and should be construed to secure the just, speedy, and inexpensive determination of every action.

The biggest changes brought about by the 2015 amendments were to the briefing, evidentiary, and service requirements codified in Subsections (A)(4), (B)(1)-(4), (C)(1)(a)-(b), (C)(3), and (D)(2) of Article 966. While the Legislature's goal in enacting these requirements was streamlining the summary judgment procedure, a number of issues have arisen from courts applying the new rules.

Four issues are particularly problematic. First, the evidentiary requirements in Subsections (A)(4), (B)(1)-(2), and (D)(2) necessitate redundant filings and unnecessary extra expenses by prohibiting parties from citing to and courts from considering materials already in the suit record. Second, the mover's inability to file rebuttal evidence with reply memoranda pursuant to Subsection (B)(3) prevents the parties from making a complete record. Third, the requirements for serving the notice of the hearing date under Subsection (C)(1)(b) are unclear. Fourth, the delay for filing and serving reply memoranda in Subsection (B)(3) needs to specify whether or not legal holidays are included. As a result, these new rules have resulted or could result in added expenses and delays—contrary to the expressly stated purpose of the summary judgment procedure in Article 966.

This Article calls for the Legislature to go back to the drawing board to fix these problems by revising Subsections (A)(4), (B)(1)-(4), (C)(1)(b), and (D)(2) in the present version of Article 966. This amendment would change the current procedures in four respects by:

(1) Allowing parties to cite and courts to consider competent

summary judgment evidence that is already in the record;

(2) Permitting rebuttal evidence filed with reply memoranda and objections to rebuttal evidence under appropriate circumstances;

(3) Clarifying the requirements for serving the notice of the hearing date; and

(4) Clarifying the delay for filing and serving reply memoranda.

Above all, these proposed changes would bring Article 966 back in line with the Article's stated purpose of just, speedy, and inexpensive determination of all cases.