The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN SOTO PALMER et al., *Plaintiffs*, v. STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al., *Defendants*, and JOSE TREVINO et al., *Intervenor-Defendants*.	Case No.: 3:22-cv-5035-RSL INTERVENOR-DEFENDANTS' RESPONSE IN OPPOSITION TO DEFENDANT STATE OF WASHINGTON'S MOTION TO STRIKE NOTICE OF ERRATA CORRECTIONS FOR DEPOSITION OF BENANCIO GARCIA III

Intervenor-Defendants oppose Defendant State of Washington's ("State") Motion to Strike Notice of Errata Corrections for Deposition of Benancio Garcia III ("Motion" or "Motion to Strike").[1] (*See Soto Palmer* Dkt. # 164; *Garcia* Dkt. # 43.)

I. Introduction.

As Mr. Garcia explained, the reasoning for his corrections were as follows:

> Following my deposition, I reviewed the transcript and my communications with counsel. I realized I had misremembered many things, and now that my memory has been refreshed, I wanted to correct my misstatements for the record.

(*Soto Palmer* Dkt. # 162-1 at p. 4-10.)

[1] This Opposition brief is being filed concurrently in both *Soto Palmer v. Hobbs* and *Garcia v. Hobbs*.

Chalmers, Adams, Backer & Kaufman, LLC
701 Fifth Avenue, Suite 4200
Seattle, Washington 98104
Phone: (206) 207-3920

The subject of Mr. Garcia's errata corrections had a bearing only on the State's then-pending Motion for Inquiry (*see Soto Palmer* Dkt. # 150; *Garcia* Dkt. # 29), as the Motion to Strike recognizes (*see, e.g.*, *Soto Palmer* Dkt. # 164 ("The errata sheet would alter Mr. Garcia's testimony in response to issues raised in the State's motion concerning potential conflicts and other violations of the Rules of Professional Conduct.")). However, the Court has since resolved the State's Inquiry Motion. (*See Soto Palmer* Dkt. # 166; *Garcia* Dkt. # 47.) Thus, the errata, as well as the State's effort to strike it, have no practical import as they do not affect undersigned counsel's ability to continue representing their clients, nor does the errata have a bearing on any claim or defense in this case.[2] The outcome of the State's Motion is further rendered irrelevant by the fact that Mr. Garcia's deposition remained open after the filing of the errata corrections (*see Soto Palmer* Dkt. # 158), allowing the State to seek clarification on the corrections if it wished to do so, but the State did not continue the deposition.

Putting aside these procedural peculiarities aside, the Motion also fails on its merits for the reasons explained below.

II. Factual Background.

The State's factual background section (Dkt. # 164 at p. 2-9) is incorporated here with one exception. Intervenor-Defendants disagree that "nearly all" of the errata corrections "*materially* contradict Mr. Garcia's original deposition testimony" (*id.* at 2 (emphasis added)). As explained above, the corrections are not material to any claim or defense and are not material to any outstanding substantive motion or response. Instead, they serve to correct misstatements regarding the attorney-client relationship.

III. Argument.

Mr. Garcia's correction, made pursuant to Fed. R. Civ. P 30(e), should be allowed to stand. Rule 30(e) provides as follows:

[2] It is also worth noting that Mr. Garcia's errata corrections essentially contain the same information as his court-requested declaration. (*Compare Soto Palmer* Dkt. # 162-1 *with Soto Palmer* Dkt. # 165-1.)

Chalmers, Adams, Backer & Kaufman, LLC
701 Fifth Avenue, Suite 4200
Seattle, Washington 98104
Phone: (206) 207-3920

> (1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:
>
> (A) to review the transcript or recording; and
>
> (B) if there are changes *in form or substance*, to sign a statement listing the changes and the reasons for making them.

Fed. R. Civ. P. 30(e)(1) (emphasis added).

The phrase, "in form or in substance" has generated a split across the country on the scope of change permitted in an errata statement filed pursuant to Rule 30(e). *See generally* Gregory A. Ruehlmann, Jr., *"A Deposition Is Not a Take Home Examination": Fixing Federal Rule 30(e) and Policing the Errata Sheet*, 106 Nw. U.L. Rev. 893 (2012). The Ninth Circuit Court of Appeals expressed a very fact-specific and nuanced position in *Hambleton Bros. Lumber Co. v. Balkin Enters*., 397 F.3d 1217, 1224-26 (9th Cir. 2005), and the district courts in the Ninth Circuit have further fractured on the proper interpretation of *Hambleton* and the application of Rule 30(e), *see, e.g., Alvarez v. XPO Logistics Cartage*, 2020 U.S. Dist. LEXIS 259128, at *6–10 (C.D. Cal. Aug. 17, 2020) (explaining the tripartite split that now exists in the Ninth Circuit). However, the standard that most clearly adheres to the text of Rule 30, and best aligns with Ninth Circuit precedent, militates against striking Mr. Garcia's errata here, where the corrections made by Mr. Garcia are not material—or even relevant—to the outcome of any dispositive motion or claims in either *Soto Palmer v. Hobbs* or *Garcia v. Hobbs*.

In *Hambleton*, the court was faced with a motion that suffered numerous procedural ailments: (1) the errata sheet was signed two days after the thirty-day deadline, (2) it neglected to provide a statement of reasons explaining the corrections, and (3) the parties disputed whether the deponent had requested to review the transcript in order to make corrections. 397 F.3d at 1224-26 (9th Cir. 2005). These procedural failures were also compounded by the substance of the corrections, which "were submitted only after [a] motion for summary judgment was filed" and were "extensive," seemingly designed to "manufacture an issue of material fact . . . and to avoid a summary judgment ruling." *Id.* at 1225. The court characterized the corrections as a "sham" and analogized the standard for evaluating such a correction to that used when evaluating a "sham

affidavit." *Id.* Thus, the court ruled that "[w]hile the language of FRCP 30(e) permits corrections 'in form or substance,' this permission does not properly include changes offered solely to create a material factual dispute in a tactical attempt to evade an unfavorable summary judgment" and held "that Rule 30(e) is to be used for corrective, and not contradictory, changes." *Id.* at 1225-26.

To start, the instant case is obviously distinguishable from *Hambleton*. Here, unlike in *Hambleton*, the notice of errata was timely filed and provided reasons for the corrections, and deponent's review of the transcript was unquestionably requested. What's more, there was no summary judgment motion—or any dispositive motion—pending when the corrections were filed. Nor do the corrections relate to any claim, defense, or to Mr. Garcia's now-pending Motion for Summary Judgment in *Garcia.* (*See Garcia* Dkt. # 45.) In short, the notice of errata here is both procedurally and substantively different than the one struck in *Hambleton*.

But this raises the question, what is the standard for a court to strike a procedurally compliant deposition errata? Since *Hambleton*, "district courts in the Ninth Circuit have disagreed regarding the circumstances in which procedurally compliant deposition errata nevertheless should be stricken as improper." *Alvarez*, 2020 U.S. Dist. LEXIS 259128, at *6.[3]

The standard most applicable here can be summed up as "procedurally compliant deposition errata are improper only if they are a 'sham' with respect to a pending summary judgment motion." *Id.* at *7; *see also Cramton v. Grabbagreen Franchising LLC*, 2019 U.S. Dist. LEXIS 219780, at *50 (D. Ariz. Dec. 23, 2019) ("The Ninth Circuit stated that a party cannot make substantive changes that are offered 'solely . . . in a tactical attempt to avoid an unfavorable summary judgment.'" (citing *Hambleton*, 397 F.3d at 1225)); *Torres v. Mercer Canyons, Inc*.,

[3] "There exist at least three schools of thought" on when a court should strike a procedurally compliant notice of errata. *Alvarez*, 2020 U.S. Dist. LEXIS 259128, at *6. First, "some courts think that procedurally compliant deposition errata are improper only if they are a 'sham' with respect to a pending summary judgment motion." *Id.* at *7 (collecting cases). Second, other "courts think that procedurally compliant deposition errata are improper if: (a) they are a 'sham' (without requiring the pendency of a summary judgment motion); or (b) if they are 'contradictory' rather than 'corrective.'" *Id.* (collecting cases). Third, still other "courts think that procedurally compliant deposition errata are improper unless they are corrective of transcription errors, all other purported corrections being regarded as impermissibly contradictory of what was said under oath at the deposition." *Id.* (collecting cases); *but see Podell v. Citicorp Diners Club*, 112 F.3d 98, 103-04 (2d Cir. 1997) (holding all deposition errata changes are permitted as changes to "substance" and that the "changed answers became [simply a] part of the record generated during discovery").

2015 U.S. Dist. LEXIS 190184, at *2 (E.D. Wash. May 29, 2015) ("[T]he Court in *Hambleton* likened the errata changes to a 'sham affidavit' used to create an issue of disputed fact in an attempt to defeat summary judgment.").

Indeed, to the extent that judges in the Western District of Washington have considered the issue, they also appear to favor this interpretation of *Hambleton*. *See, e.g.*, *Campagnolo S.R.L. v. Full Speed Ahead, Inc.*, 2010 U.S. Dist. LEXIS 148794, at *5-6 (W.D. Wash. May 4, 2010) ("[W]hile [Plaintiff] makes much of the fact that the corrections to the . . . depositions are *substantive and material*, that alone is not improper. The question is whether the corrections are 'sham corrections'—changes that contradict the original deposition testimony in order to create a dispute of material fact." (emphasis added)); *Karpenski v. Am. Gen. Life Cos., LLC*, 999 F. Supp. 2d 1218, 1224 (W.D. Wash. 2014) ("In the Ninth Circuit, Rule 30(e) deposition errata are subject to the 'sham rule,' which precludes a party from creating 'an issue of fact by an affidavit contradicting his prior deposition testimony.'" (citing *Hambleton*, 397 F.3d at 1225)).

This interpretation also appears most faithful to the text of Rule 30(e), which permits changes in either "form *or* substance." Fed. R. Civ. P. 30(e)(1) (emphasis added); *see also Cramton*, 2019 U.S. Dist. LEXIS 219780, at *48 ("[Rule 30] makes clear that a party is permitted to make changes to a deposition transcript not just in 'form,' but also in 'substance.'" (citation omitted)); *Shinde v. Nithyananda Found.*, 2015 U.S. Dist. LEXIS 189258, *5 (C.D. Cal. 2015) ("The plain language of Rule 30(e) places no limitation on the types of changes a deponent can make."). Indeed, if errata corrections are limited to typographical errors, there can be little (if any) substance that is ever changed. *See Cramton*, 2019 U.S. Dist. LEXIS 219780, at *50 ("Second, the Court doesn't interpret the . . . discussion of Rule 30(e) in *Hambleton Brothers* as enacting a hard-and-fast prohibition against any sort of substantive change to deposition testimony.").

Applying this interpretation of *Hambleton* and Rule 30(e), Mr. Garcia's correction must stand. His correction address matters of attorney-client relations, not matters of redistricting law.[4]

[4] Indeed, the middle portion of Mr. Garcia's deposition is the only portion that is arguably related to the claims at issue in *Soto Palmer* and *Garcia*, and the Notice of Errata does not change any of that testimony. (*Compare Soto Palmer* Dkt. # 151-2 *with Soto Palmer* Dkt. # 162-1.)

As such, they neither create issues of material fact, nor effect the pending summary judgment motion. Put simply, Mr. Garcia's corrections have *no bearing on the outcome* of either *Soto Palmer* or *Garcia*. Indeed, the corrections do not even influence a pending motion—save this one. Once the State's Motion for Inquiry was resolved, Mr. Garcia's corrections had no effect besides correcting his previous misstatements, which is what Rule 30(e) exists to achieve. *See Hambleton*, 397 F.3d at 1226 (holding that Rule 30 is to be used for corrective purposes). Put differently, there is no possibility of the tactical filings or gamesmanship that the *Hambleton* court found problematic. *See id.* at 1225 (noting that "[t]he magistrate judge was troubled by the deposition corrections' seemingly tactical timing," i.e., being filed after summary judgment).

IV. Conclusion

For the forgoing reasons, the Court should DENY the State's Motion to Strike.

Chalmers, Adams, Backer & Kaufman, LLC
701 Fifth Avenue, Suite 4200
Seattle, Washington 98104
Phone: (206) 207-3920

DATED this 20th day of March, 2023.

Respectfully submitted,

s/ Andrew R. Stokesbary
Andrew R. Stokesbary, WSBA No. 46097
CHALMERS, ADAMS, BACKER & KAUFMAN, LLC
701 Fifth Avenue, Suite 4200
Seattle, WA 98104
T: (206) 207-3920
dstokesbary@chalmersadams.com

Jason B. Torchinsky (admitted pro hac vice)
Phillip M Gordon (admitted pro hac vice)
Andrew B. Pardue (admitted pro hac vice)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
15405 John Marshall Hwy
Haymarket, VA 20169
T: (540) 341-8808
jtorchinsky@holtzmanvogel.com
pgordon@holtzmanvogel.com
apardue@holtzmanvogel.com

Dallin B. Holt (admitted pro hac vice)
Brennan A.R. Bowen (admitted pro hac vice)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
Esplanade Tower IV
2575 East Camelback Rd
Suite 860
Phoenix, AZ 85016
T: (540) 341-8808
dholt@holtzmanvogel.com
bbowen@holtzmanvogel.com

Counsel for Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing document with the Clerk of the Court of the United States District Court for the Western District of Washington through the Court's CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 20th day of March, 2023.

Respectfully submitted,

s/ Andrew R. Stokesbary
Andrew R. Stokesbary, WSBA No. 46097

Counsel for Intervenor-Defendants

Chalmers, Adams, Backer & Kaufman, LLC
701 Fifth Avenue, Suite 4200
Seattle, Washington 98104
Phone: (206) 207-3920

CERTIFICATE OF WORD COUNT

I certify that this response brief in opposition to the Motion to Strike contains 1,904 words, in compliance with the Local Civil Rules of the United States District Court for the Western District of Washington.

DATED this 20th day of March, 2023.

Respectfully submitted,

s/ Andrew R. Stokesbary
Andrew R. Stokesbary, WSBA No. 46097

Counsel for Intervenor-Defendants

Chalmers, Adams, Backer & Kaufman, LLC
701 Fifth Avenue, Suite 4200
Seattle, Washington 98104
Phone: (206) 207-3920