Brief on the Merits

No. 16-0715

In the Supreme Court of the United States

SARAH FOSTER,

Petitioner,

v.

SENTINEL MEDIA, INC., *et. al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether an individual is a "whistleblower" under the Dodd-Frank Wall Street Reform and Consumer Protection Act when the violation is reported internally rather than to the Securities and Exchange Commission; and

2. Whether a party can supplement a statement given in a deposition with an amendment that contradicts the original statement under Federal Rule of Civil Procedure 30(e).

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The opinion of the United States Court of Appeals for the Thirteenth Circuit, affirming the lower court, is reported at *Foster v. Sentinel Media, Inc., et. al*., No. 16-0715 (13th Cir. 2016) and can be found in the Record at 8-31.

JURISDICTION

The United States Court of Appeals for the Thirteenth Circuit affirmed in part, reversed in part, and remanded to the United States District Court for the Eastern District of Everton in favor of Respondent Sentinel Media, Inc., et al. This Court granted a petition for writ of certiorari to the Court of Appeals on December 1, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(b).

STATUTES AND RULES INVOLVED

The Dodd-Frank Wall Street Reform and Consumer Protection Act, specifically 15 U.S.C. § 78u-6 (2012), and the Sarbanes-Oxley Act, specifically 18 U.S.C. § 1514A (2012), are relevant to this appeal and are reprinted, in relevant part, in Appendix A. Additionally, Federal Rule of Civil Procedure 30(e) is relevant to this appeal, and is reprinted in Appendix B.

STATEMENT OF THE FACTS

Respondent, Sentinel Media, Inc., *et. al.* (hereinafter "Sentinel" or "Respondent") is a multi-faceted, publically traded media corporation that once owned a number of media assets including *The Everton Sentinel* newspaper. R. at 3, 9. At its peak it was valued at approximately $14 billion, and its stock consistently averaged $65 per share. R. at 9. Sarah Foster (hereinafter "Petitioner") was a financial reporter for *The Everton Sentinel*. R. at 3, 10.

I. Little Equity Partners, LLC's Purchase of Sentinel Media, Inc

Because Sentinel derived much of its revenue from print media, the availability of free news on the Internet caused a sharp decline in Sentinel's business. R. at 9. By 2014, Sentinel's stock price was trading at less than $23 a share and the company was conservatively valued at $8 billion dollars. R. at 9. Investor R. Forrest Little ("Little") of the investment firm Little Equity Partners, LLC, ("Little Equity"), made a play for control of Sentinel. R. at 9. Little arranged for a leveraged buyout and obtained several valuations of Sentinel. R. at 9. He took the highest valuation of $11.3 billion and subsequently made a tender offer of $70 per share to Sentinel's stockholders. R. at 9. In March 2014, the shareholders accepted the offer. R. at 9. Little Equity and Sentinel's then-existing management team, including Karen Crowder ("Crowder"), General Counsel and CFO of Sentinel, jointly submitted a copy of Little Equity's solicitation to Sentinel's stockholders and to the Securities and Exchange Commission ("SEC"). R. at 9-10.

The resulting transaction was disastrous for Sentinel, burdening the company with $10 billion in debt. R. at 10. By March 2015, Sentinel, under Little Equity's management, was unable to make interest payments on the buyout, and filed for bankruptcy protection. R. at 10. Unsecured creditors—namely, retirees in Sentinel's pension fund and participants in Sentinel's employee stock program—bore the brunt of the buyout and bankruptcy. R. at 10. Little Equity, however,

profited from the transaction; the company was able to net $645 million in upfront fees. R. at 10. A reorganization plan was approved and Sentinel exited bankruptcy proceedings. R. at 10.

II. Petitioner's Employment with Sentinel Media, Inc. and Subsequent Litigation

Petitioner was a financial reporter for *The Everton Sentinel* from 2002 to March 2014. During her employment, Petitioner was known to be a problematic employee. R. at 10-12. She consistently complained about the quality of the coffee, often chided employees who smoked outside, and was known for insulting the work of other employees and for consistently mumbling behind coworker's backs. R. at 11. In addition, Petitioner caused controversy in her official capacity as a reporter at *The Everton Sentinel*. In 2012, Petitioner's article regarding the Ally's Organics IPO ("Ally's) was called into question when the owner of Ally's claimed several quotes attributed to her were fabricated. R. at 11. Conveniently, Petitioner's recording of her interview with the owner of Ally's was erased and the issue was dropped. R. at 11. Petitioner also wrote a critical letter about *The Everton Sentinel's* endorsement of a certain political candidate that was published by a competitor, and her co-workers publically disapproved of her criticism. R. at 12. However, despite these myriad controversies, Petitioner generally received positive performance reviews and was praised by her editor, Karl Woodward. R. at 12.

In January 2014, Petitioner received a call from a source with information about Little's plan to purchase Sentinel. R. at 12. Subsequently, Petitioner conducted her own investigation came to believe that Little's valuation submitted to the SEC appeared too high, which if true could constitute a violation of securities laws. R. at 12. Seeking approval to publish an investigative story on the buyout, Petitioner presented her discoveries to Woodward but was denied based on a lack of information. R. at 12. While accounts of Petitioner's subsequent meeting with Crowder remains disputed, it is clear that Petitioner shared "[s]ome" of her investigative findings [with Crowder]

and requested [that she] comment on these findings or facilitate a meeting with Little." R. at 13. Crowder declined both. R. at 13. Despite reporting possible securities fraud internally to both Woodward and Crowder, it is undisputed that Petitioner never reported her concerns to the SEC. R. at 4, 15. On March 15, 2014, Petitioner was terminated. R. at 13.

In March 2016, Petitioner filed suit against Sentinel in the Eastern District of Everton, alleging that her termination violated Everton state law and federal workplace laws. R. at 13. Additionally, Petitioner argued she was a "whistleblower" under the Dodd-Frank Act based on her internal reports to Woodward and Crowder, and therefore protected under the Act's anti-retaliation provision. R. at 13. During the litigation, numerous witnesses were deposed, including Woodward. R. at 13. During his deposition, Woodward stated that though Petitioner generally received positive performance reviews, she was terminated because her abrasive personality made her difficult to work with. In response to a question from Petitioner's counsel regarding why Petitioner was fired, Woodward stated specifically that while Petitioner's "work was good," "[m]any of her co-workers were afraid of her and tended to avoid her. Her personality was so abrasive." R. at 13-14.

Immediately following this exchange, Sentinel's counsel requested that, pursuant to Federal Rule of Civil Procedure 30(e)(1), Woodward be given an opportunity to review the transcript of his deposition. R. at 14. After the transcript was completed, Woodward reviewed his deposition and timely submitted a notarized errata sheet that supplemented his original testimony regarding the reasons for Petitioner's termination. R. at 14. Woodward explained the revisions were due to a recent meeting with Crowder, where he had been reminded of a management meeting during which journalistic integrity concerns stemming from Petitioner's controversial Ally's Organics IPO article were discussed. R. at 14. Woodward attested to the fact that he had forgotten

about the meeting, and attributed his temporary lapse in memory to preoccupation with his wife's recovery from recent knee surgery. R. at 14.

III. Proceedings Below

Following Woodward's submission of changes to his testimony, Petitioner filed a motion to reopen the deposition and to strike the errata sheet. R. at 15. The district court deemed the changes permissible under Rule 30(e), and denied Petitioner's motion. R. at 15. The parties also filed cross motions for partial summary judgment on the issue of Petitioner's status as a "whistleblower" under the Dodd-Frank Act. R. at 15. The district court granted Petitioner's motion for partial summary judgment, finding that she qualified as a whistleblower even though she reported the purported securities violations to internal management rather than the SEC. R. at 5, 15. Thereafter, the district court certified its discovery order and its partial grant of summary judgment for interlocutory appeal. R. at 15.

The United States Court of Appeals for the Thirteenth Judicial Circuit reversed the grant of partial summary judgment, holding instead that the Dodd-Frank Act unambiguously requires an individual report to the SEC and, because Petitioner failed to do so, she did not qualify as a "whistleblower." R. at 19. On the discovery issue, The Thirteenth Circuit affirmed, holding that the district court "properly applied" Rule 30(e) of the Federal Rules of Civil Procedure in finding that the rule permits changes to deposition testimony in both form and substance. R. at 21. The Thirteenth Circuit further held that the district court did not abuse its discretion in denying Petitioner's motion to reopen the deposition and strike the errata sheet. R. at 21. On December 1, 2016, this Court granted certiorari, and directed that briefing and argument be limited to the issues noted above.

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit correctly held that Petitioner is not a statutorily defined whistleblower and thus cannot receive protection under Dodd-Frank. Section 78u-6(a)6) explicitly defines "whistleblower" as an individual who reports "*to the Commission*," and to the Commission only; for that reason, Petitioner's concession that she reported internally and not to the Commission places her outside of the Dodd-Frank anti-retaliation provision's protection. The Thirteenth Circuit's conclusion that the statutory text unambiguously requires an individual report to the Commission is supported by the statute's plain language, structure, and legislative history. The lower courts that have adopted Petitioner's position disregard this plain language and justify their erroneous interpretation with policy goals that reach beyond the clear expression of Congressional intent. However, even if this Court were to conclude the statutory text was ambiguous, the SEC does not deserve deference because its construction of the statute is impermissible. By expanding the statutory definition of "whistleblower" to include internal reporting, the SEC is not interpreting the law, but amending it. For these reasons, Sentinel respectfully requests the Court to affirm the Thirteenth Circuit's finding regarding Petitioner's motion for summary judgment.

This Court should affirm the Thirteenth Circuit's decision to abide by the plain language of Rule 30(e) ("the Rule") and find that the supplemental statements submitted by Woodward are permissible. An examination of both the text and history of the Rule, and the compelling discovery interests it serves, it is evident that permitting only non-substantive changes would undermine the long-recognized traditional the discovery-deposition rules should be accorded broad and liberal treatment. *Hickman v. Taylor,* 329 U.S. 495 (1947). Further, requiring courts to strike non-substantive changes would unduly burden courts in determining whether a change constitutes form or substance. Adequate safeguards to protect against abuse are provided by the Rule, including a

30-day period in which review can be requested and changes can be submitted, requiring the deponent to include specific reasons for making changes, and attaching any changes to the original transcript. *Reilly v. TXU Corp.,* 230 F.R.D. 486, 490 (N.D. Tex. 2005). Even if this Court finds that the Rule did not intend to allow deponents to "alter what has been said under oath" by submitting substantive changes, Woodward did not attempt to rewrite his testimony but rather supplemented his answers with statements consistent with his original deposition. *Greenway v. Int'l Paper Co*., 144 F.R.D. 322, 325 (W.D. La. 1992).

ARGUMENT

I. PETITIONER IS NOT A WHISTLEBLOWER UNDER THE DODD-FRANK ACT'S ANTI-RETALIATION PROVISION BECAUSE SHE DID NOT REPORT DIRECTLY TO THE SEC.

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") was enacted in 2010 in response to the 2008 financial crisis. Among its provisions, Congress included a statute entitled "Securities whistleblower incentives and protection," which was created to encourage individuals to report securities violations to the SEC. 15 U.S.C. § 78u-6 (2012); *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1175 (2014). Notably, this statute contains a "definitions" section that specifically defines the term "whistleblower" as an individual who reports securities violations "*to the Commission*." § 78u-6(a)(6) (emphasis added). This definition section expressly notes that each definition provided "shall apply" throughout the statute's various subsections. § 78u-6(a). One of those subsections is an anti-retaliation provision designed to protect "whistleblowers" who engage in three categories of activity. § 78u-6(h)(1)(A).

The issue presented here is whether the third of Dodd-Frank's three enumerated forms of protected activity, which arguably encompasses the type of *internal* reporting engaged in by Petitioner, expands the definition of "whistleblower" beyond that found in § 78u-6(a)(6) such that

Petitioner can maintain a cause of action under Dodd-Frank despite failing to report directly to the SEC. The plain language, structure, and legislative history demonstrate that Petitioner's claim must fail because Dodd-Frank only protects individuals who report *to the Commission.* In addition, the SEC's regulations to the contrary cannot supersede the plain language of the statute, and therefore are not entitled to deference. For these reasons, the finding of the Thirteenth Circuit should be affirmed.

A. Dodd-Frank's unambiguous definition of "whistleblower" mandates a finding that Dodd-Frank's protections only extend to individuals who report directly to the SEC.

The plain text, structure, and legislative history of Dodd-Frank's whistleblower incentives and protection statute unambiguously demonstrate that only those who report to the SEC fall within the statutory definition of "whistleblower." *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 625 (5th Cir. 2013). However, Petitioner maintains that her internal report to Crowder and Woodward is protected by Sarbanes-Oxley ("SOX"), which specifically allows for internal reporting as a form of protected activity. 18 U.S.C. § 1514A(a)(1)(C) (2012). Because SOX is expressly included in the third category of the anti-retaliation provision's list of protected activities, Petitioner argues that her internal report is cloaked with the protections of Dodd-Frank. It is undisputed that Petitioner made no report directly to the SEC, and therefore does not meet the statutory definition of "whistleblower" found in § 78u-6(a)(6). Instead, Petitioner asks this Court to read subsection (iii) of the anti-retaliation provision as an *expansion* of the definition of "whistleblower," giving her the protections of the statute as a matter of law. Petitioner asks too much.

Dodd-Frank's anti-retaliation provision is found in 15 U.S.C. § 78u-6(h), titled "Protection of *whistleblowers."* (emphasis added). The subsection states:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a *whistleblower* in the terms and conditions of employment because of any lawful act done by the *whistleblower*—
>
> (i) in providing information to the Commission in accordance with this section;
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

§ 78u-6(h)(1)(A) (emphasis added). This anti-retaliation provision's specific use of the term "whistleblower*"* is critical because that term is explicitly defined in the statute. Section 78u-6(a)(6) reads: "The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." § 78u-6(a)(6) (emphasis added).

The plain text reading of § 78u-6 confirms the Thirteenth Circuit's finding that only an individual who reports to the Commission can be a whistleblower. It is a well-accepted principle of statutory construction that courts "must first determine whether the statutory text is plain and unambiguous" and, "[i]f it is, [courts] must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (citations omitted). If the text is plain, there is no room for judicial interpretation or novel construction; rather, a court's "inquiry begins with the statutory text, and ends there as the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 177 (2004). Additionally, the statute must be interpreted "in a manner that renders [its provisions] compatible, not contradictory." *Asadi*, 720 F.3d at 622 (citations omitted). Here, the Court's

inquiry should end with the text because the definition of "whistleblower" is plain, unambiguous, and can be read compatibly with the enumerated protected activity found in § 78u-6(h)(1)(A)(iii).

First, the definition of "whistleblower" is clear: it "means any individual" who reports "*to the Commission."* § 78u-6(a)(6) (emphasis added). It is difficult to imagine statutory text that better fits the "plain and unambiguous" standard. When a statute so clearly and conspicuously defines a term, courts should adhere to the definition provided by Congress. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 156 (2d Cir. 2015) (Jacobs, J., dissenting). It is not for the court to eschew an overtly defined term "for it would be idle for Congress to define the sense in which it used [the term] 'if we were free in despite of it to choose a meaning for ourselves.'" *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 111 (1960) (quoting *Fox v. Standard Oil Co.*, 294 U.S. 87, 96 (1935)). Reliance on the definition is reinforced by the statute's use of the word "means," for when "…a definitional section says that a word 'means' something, the clear import is that this is its *only* meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 226 (1st ed. 2012) (emphasis in original).

Moreover, the argument that the definition of whistleblower does not apply to each subsection of § 78u-6, including the anti-retaliation provision, is refuted by § 78u-6(a), which states, "[i]n this section the following definitions shall apply." Thus, the definition of "whistleblower," which requires reporting to the Commission, is to be consistently applied throughout. This "statutory language clearly answers two questions: (1) *who* is protected; and (2) *what* actions by protected individuals constitute protected activity." *Asadi*, 720 F.3d at 625 (emphasis added). The answer to the first question is "a whistleblower;" the anti-retaliation provision, in other words, is a prohibition of retaliation against individuals who report to the Commission. *Id.* The answer to the second question is "any lawful act done by the whistleblower"

that falls within one of the three categories of action described in the statute. *Id*. In sum, an individual may participate in any of the three categories of protected activity and state a claim under Dodd-Frank, but *only* if that individual has, at a minimum, also reported to the SEC, meeting the statutory definition of "whistleblower."

The Ninth and Second Circuits read ambiguity into these two provisions where there is none. *See Somers v. Dig. Realty Tr. Inc.*, 850 F.3d 1045, 1050 (9th Cir. 2017); *Berman* 801 F.3d at 154 (2d Cir. 2015). These Circuits find ambiguity in the face of a much simpler explanation: a third category of protected activity that has limited applicability. The relationship between the two provisions can be interpreted harmoniously, and should be. Subsection (iii) can be read as a catch-all; a way to protect "those individuals who qualify as whistleblowers from retaliation on the basis of other required or protected disclosures." *Asadi*, 720 F.3d at 628. The Fifth Circuit provided an example in *Asadi*: if an individual makes a disclosure to both her employer and to the Commission, but is retaliated against only because of her disclosure to her employer, she would not be protected unless the third category of protected activity existed. *Id.* Without the third category, an internal disclosure to an employer is not a protected activity even if the individual also reported to the Commission.

Here, if Petitioner had reported the potential securities violation to the Commission following her meetings with Crowder and Woodward, but was terminated prior to Woodward and Crowder becoming aware of that report, she would be both (1) a "whistleblower," and (2) protected by subsection (iii). But she did not report to the Commission, and therefore her claim under Dodd-Frank fails. This interpretation of subsection (iii), while limited, fits harmoniously with the remainder of the statute, and therefore "there can be no justification for needlessly rendering [these] provisions in conflict." Scalia & Garner, *supra*, at 180.

Second, the structure of another statute within Dodd-Frank supports this interpretation because it demonstrates Congress' careful use of the word "employee," and highlights the lack thereof here. Title X of Dodd-Frank, which creates the Consumer Financial Protection Bureau ("CFPB"), contains an anti-retaliation statute which states, in relevant part, "No covered person or service provider shall terminate…any covered *employee*…by reason of the fact that such *employee* or representative…has— (1) provided…information *to the employer*…" 12 U.S.C. § 5567(a)(1) (2012) (emphasis added). "To find that Dodd-Frank implicitly provides internal whistleblower protection in [§ 78u-6] after it explicitly provided the same protection in Title X would violate a core tenant of statutory interpretation, *expressio unius est exclusio alterius* [the expression of one thing is the exclusion of another]." Leonardo Labriola, *Paying Too Dearly for A Whistle: Properly Protecting Internal Whistleblowers*, 85 Fordham L. Rev. 2839, 2867 (2017). In other words, because Congress explicitly provided for the protection of employees who report to their employer in the CFPB, we can assume that it knew how to provide for this protection and instead chose to omit such protections in § 78u-6. *Id.* The same argument can be applied regarding SOX. By specifically referencing SOX's requirements and protections, it is clear that Congress was aware of those provisions and yet chose not to incorporate them into the definition of "whistleblower" in § 78u-6(a)(6). This choice makes it even more likely Congress did not intend to encompass internal reporting in its Dodd-Frank protections. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014).

Finally, the third category of protected activity's lack of legislative history and later addition to the statute does not indicate carelessness on Congress' part; rather, the legislative history supports a narrow construction of the statute because of the legislature's choice of the word "whistleblower" over the word "employee." In its inception, Dodd-Frank prohibited retaliation

against any "*employee, contractor, or agent*." Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7023(g)(1)(A) (1st Sess. 2009) (emphasis added). As the bill progressed, this phrasing in the anti-retaliation provision was dropped and replaced with "*whistleblower*." Restoring American Financial Stability Act of 2010, H.R. 4173, 111th Cong. § 922(a)(6) (2d Sess. 2010) (emphasis added). By specifically rejecting the phrasing "employee, contractor, or agent," in favor of "whistleblower," Congress deliberately transformed the statute into a "whistleblower," not "employee," regime. This available history outweighs any *absence* of history related to the third category of protected activity and alleviates any concerns about the third category's later addition to the statute. It is unlikely that Congress intended "*sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 442-43 (1987). Thus, Congress' intentional creation of a "whistleblower" regime should be respected.

B. The lower courts' reliance on various policy considerations to impermissibly expand the "whistleblower" definition is unfounded and should be ignored.

In order to alter the clear definition of "whistleblower," Petitioner argues that subsection (iii) is an *expansion* of the protections of Dodd-Frank, and that such an expansion is consistent with the statute's purpose. However, "Congress has already spoken," and because of this, the Court does not "need to take that step [of examining the statute's primary purpose] in the least." R. at 17. Any construction of the statute that ventures beyond the statutory text is an impermissible overreach. But even if this Court were to look beyond the four corners of the text, it would find the contrary policy considerations set forth in lower courts to be fatally flawed.

First, the courts that support Petitioner's position falsely rely on the language found in *King v. Burwell* to read ambiguity into an otherwise unambiguous definition. *King v. Burwell,* 135 S. Ct. 2480, 2493 n.3 (2015) ("the use of a term in one part of a statute 'may mean [a] different thing[

]' in a different part, depending on context."); *See, e.g.*, *Somers*, 850 F.3d at 1049, *Berman*, 801 F.3d at 150. This novel principle of statutory construction is conspicuously misapplied when the circumstances surrounding the issues in *King* are juxtaposed with the circumstances here. In *King*, the language was genuinely ambiguous, had the potential to nullify a key provision of the Affordable Care Act, and provided no definitional section for the phrase at issue. Brent T. Murphy, *A Textual Analysis of Whistleblower Protections Under the Dodd-Frank Act*, 92 Notre Dame L. Rev. 2259, 2270 (2017). By contrast, here the language is unambiguous, has only the potential to limit a particular provision's scope, and there is already a definition of the word "whistleblower" for the courts to turn to for guidance. *Id.* The Court in *King*, moreover, "emphasized that categorical guidance as to congressional intent should better be looked for in a more predictable location—*like a definitions section*." *Berman*, 801 F.3d at 153 (Jacobs, J., dissenting) (emphasis in original). In short, "we should quarantine *King* and its potentially dangerous shapeshifting nature to the specific facts of that case to avoid jurisprudential disruption on a cellular level." *Somers*, 850 F.3d at 1051 (Owens, J., dissenting).

The lower courts also conveniently disregard the fact that SOX, at issue in the third category of protected activity, would be largely rendered moot if their overreaching construction of the statute prevailed. SOX, enacted in 2002 in the wake of the Enron scandal, also included an anti-retaliation provision entitled "Civil Action to protect against retaliation in fraud cases." 18 U.S.C. § 1514A. Unlike Dodd-Frank, however, SOX does not limit who qualifies for its protections to only those who report to the Commission, but instead also offers protections to those who report internally. If the *Berman* and *Somers* interpretation of the third category of protected activity is accepted, individuals who report internally under SOX will be able to nonetheless receive the protections of Dodd-Frank, even if they have never reported to the SEC. The

differences between Dodd-Frank and SOX illustrate that this cannot have been Congress' intent. Dodd-Frank offers entitlement to double back pay, while SOX only allows for back pay. *Compare* 15 U.S.C. § 78u–6(h)(1)(C) *with* 18 U.S.C. § 1514A(c)(2). Dodd-Frank allows whistleblowers to by-pass administrative requirements and seek relief directly in federal court, whereas SOX requires individuals to file with the Secretary of Labor and only allows suit in federal court if a final decision is not issued within 180 days. *Compare* 15 U.S.C. § 78u–6(h)(1)(B)(i) *with* 18 U.S.C. § 1514A(b)(1). Dodd-Frank has a considerably longer statute of limitations than SOX. *Compare* 15 U.S.C. § 78u–6(h)(1)(B)(iii) *with* 18 U.S.C. § 1514A(b)(2)(D). Additionally, if an individual's report to the Commission leads to a successful enforcement, Dodd-Frank allows for a sizable financial award. 15 U.S.C. § 78u–6(b)(1).

The more appealing incentives of Dodd-Frank make it "…unlikely…that an individual would choose to raise a SOX anti-retaliation claim instead of a Dodd–Frank whistleblower-protection claim." *Asadi,* 720 F.3d at 628–29. It is equally as unlikely that an individual would choose SOX for its potentially less costly administrative procedures or for the option for special damages. *Somers*, 850 F.3d at 1050. Dodd-Frank's far greater award provisions would likely outweigh any cost concern, and special damages are often lower and more unpredictable in contrast to Dodd-Frank's guarantee of double back pay. *See* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 19, *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (U.S. 2017). It would be a stretch to assume Congress rendered much of SOX moot without explanation or comment because "Congress does not alter a regulatory scheme's fundamental details in vague terms or ancillary provisions." *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001).

Furthermore, the contention that internal reporting will be discouraged if the statute is interpreted narrowly once again ignores the unambiguous text and supplants adherence to the plain language with courts' own policy goals. In light of the unambiguous text, these and other policy goals have no room in this debate. The court's "task is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989). Here, concerns about internal reporting are secondary to Congress' requirement that whistleblowers report to the Commission, and to the Commission only. Moreover, even if this Court were to extend its analysis beyond the plain text, the policy goals behind Dodd-Frank do not support a broad interpretation. While a goal of enacting Dodd-Frank as a whole may have been "…improving accountability and transparency in the financial system," in enacting the whistleblower provisions of Dodd-Frank, Congress' goal was to establish "a new, robust whistleblower program designed to motivate people who know of securities law violations *to tell the SEC*." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010); The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176, at 38 (2010) (emphasis added). The greater financial incentives that Dodd-Frank provides and the fact that individuals would still have anti-retaliation protection under SOX support this goal of encouraging reporting to the SEC, rather than reporting internally. Courts' desire to extend Dodd-Frank protection to internal reporting should not outweigh the plain text or the goal of enacting the whistleblower provisions in the first place.

Finally, the concern that auditors and attorneys will not be protected by Dodd-Frank because they are required to report internally before reporting externally is similarly unfounded because these groups would retain SOX anti-retaliation protection. *See Somers*, 850 F.3d at 1049; *Berman*, 801 F.3d at 151-52. Here, courts attempt to bolster their fabrication of ambiguity between the definition of "whistleblower" and the third category of protected activity by including two

groups within the anti-retaliation provision's protections that Congress may not have intended to include. Because lawyers and auditors, as professionals, are subject to far more contractual duties than the average individual, "Congress may well have considered that additional incentives should not be offered to get lawyers and auditors to fulfill existing professional duties, for the same reason reward posters often specify that the police are ineligible." *Berman*, 801 F.3d at 159 (Jacobs, J., dissenting). And, far from being left high and dry, attorneys and auditors retain whistleblower protections under SOX, so this is hardly the grave scenario that courts have put forward to justify their broad reading of Dodd-Frank. *See Lawson v. FMR LLC*, 134 S. Ct. 1158, 1169-70 (2014) (holding that lawyers and auditors are entitled to protection under SOX).

C. The SEC is not entitled to deference because its interpretation of the statute in both 17 C.F.R. § 240.21F-2 and the interpretive guidance is unreasonable and contrary to the intent of Congress.

Because the text is unambiguous in this case, the text "is also where the inquiry should end." *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (internal quotation marks and citation omitted). As *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984), dictates, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." However, even if this Court determines that the text of the statute is ambiguous, the SEC's regulation and interpretation are not entitled to *Chevron* deference because they do not fulfill *Chevron*'s step two requirement that the agency's interpretation be a permissible construction of the statute. *Chevron,* 467 U.S. at 843.

The SEC's 2011 regulation, "…instead of using the statute's definition of 'whistleblower,' redefines 'whistleblower' more broadly by providing that an individual qualifies as a

whistleblower even though he never reports any information to the SEC, so long as he has undertaken the protected activity listed in 15 U.S.C. § 78u–6(h)(1)(A)." *Asadi*, 720 F.3d at 629 (citing 17 C.F.R. § 240.21F-2(b)(1)). Here, there does not appear to be "any authority suggesting the SEC issued this regulation *because* of ambiguity in the statute." *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 757 (N.D. Cal. 2013) (emphasis in original). There is no evidence, then, that the SEC was trying to resolve a statutory ambiguity; its only justification was that Dodd-Frank's anti-retaliation provision "expressly protec[ts]" internal whistleblowing. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300 n.38 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249). In short, as Judge Maddux correctly noted, "the SEC isn't merely interpreting the law; it's amending it." R. at 17.

Significantly, the SEC's attempt at amending the "ambiguous" statute through their regulation was ambiguous in itself because it directly conflicts with another SEC regulation. This second regulation explicitly requires an individual report to the SEC to be considered a whistleblower. 17 C.F.R. § 240.21F-9(a). After the *Asadi* court held 17 C.F.R. § 240.21F-2(b)(1) invalid due to the SEC's own conflicting regulations, the SEC issued interpretive guidance reiterating its position that individuals who have not reported to the SEC are covered by the Act's anti-retaliation provision even if they are not eligible for an award. *Asadi*, 720 F.3d at 630; Interpretation of the SEC's Whistleblower Rules under Section 21F of the Securities Exchange Act of 1934, Release No. 34-75592 (2015). The SEC's acknowledgement of their own regulation's ambiguity supports the idea that the regulation did not "reasonably effectuate Congress' intent," because it is unlikely Congress' intent was to create ambiguity in an otherwise unambiguous statute. *Texas v. United States*, 497 F.3d 491, 506 (5th Cir. 2007). Therefore, even if this Court

finds the statute is ambiguous, it should not defer to the SEC and should instead interpret the statute in accordance with its plain meaning.

Finally, any contention that the SEC's interpretative guidance deserves deference should be discounted because the guidance appears to be nothing more than a "post hoc rationalizatio[n] advanced by an agency seeking to defend past agency action against attack." *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (citations and quotations omitted). Deferring to an agency's interpretation of their own regulations "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) (citation omitted). If anything, the interpretive guidance should be evaluated by the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citations and quotations omitted). Here, the plain language of the statute is clear. Any ambiguity in this statutory scheme was created not by Congress, but by the *SEC* in "amending" the statute to expand the definition of "whistleblower." The interpretive guidance only confuses the issue more. Accordingly, because the interpretive guidance is attempting to resolve an ambiguous regulation that is regulating an unambiguous statute, it lacks the power to persuade.

II. RULE 30(e) PERMITS A PARTY TO SUBMIT SUBSTANTIVE CHANGES TO A DEPOSITION, INCLUDING SUPPLEMENTAL STATEMENTS, AS EVIDENCED BY ITS TEXT, HISTORY, AND OVERALL PURPOSE.

The text and history of Federal Rule of Civil Procedure 30(e) permits changes in both form and substance, and support affirming the court below. A deponent "must be allowed 30 days … to review the transcript or recording; and 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)(A),(B). In this case,

Woodward timely requested review of his deposition and submitted a notarized errata sheet containing two supplemental statements and the reasons for his changes. R. at 14. The plain language and legislative history of the Rule support a finding that these revisions are permissible. Further, a broad interpretation of the Rule comports with this Court's pronouncement in *Hickman v. Taylor*, 329 U.S. 495 (1947), along with the holdings of a majority of federal courts, that the purpose of the deposition-discovery rules is better effectuated when accorded broad and liberal treatment.

A. The text and history of Rule 30(e) support a broad interpretation permitting substantive changes including supplemental or contradicting statements.

The Rule's plain language and legislative history demonstrate that this Court should adopt an expansive interpretation. A deponent is not limited to fixing errors in the deposition transcript, but can make any change, whether in form or substance, so long as it complies with the Rule's procedural requirements. The drafters used the terms "form or substance" not as a means of limiting the changes a deponent could make, but rather to expand the scope of permissible edits. Fed. R. Civ. P. 30(e)(1)(B). A liberal construction of the Rule furthers the purpose of discovery, and courts should not be permitted to ignore the plain language of the Rule and arbitrarily exclude changes as they see fit.

1. Woodward's supplemental statements are explicitly permitted by the text of Rule 30(e).

A logical interpretation of the language of Rule 30(e) permits the supplemental statements submitted in Woodward's errata sheet. The specific text of Rule 30(e) at issue here provides "if there are changes in form *or substance*," the deponent must be allowed "to sign a statement listing the changes and the reasons for making them." Fed. R. Civ. P. 30(e)(1)(B) (emphasis added). When determining the application of a particular law, the first step is to assume that the legislative

purpose is expressed by the ordinary meaning of the words used. *Richards v. U.S.*, 369 U.S. 1, 8-9 (1962). Specifically, this Court has recognized that the Federal Rules are to be given their plain meaning, *Walker v. Armco Steel Corp*., 446 U.S. 740, 750 n. 9 (1980), and if the plain meaning of a Rule is evident, the inquiry ends. *See Rubin v. United States*, 449 U.S. 424, 430 (1981) (when the Court "find[s] the terms … unambiguous, judicial inquiry is complete").

The plain text of Rule 30(e) allows for changes in form or substance. Based on the use of these two words, it is apparent the drafters intended to allow deponents to make any necessary changes. Correction of misspellings, typographical or transcription errors are commonly viewed as changes in form, and courts generally accept these changes. *See* Darby Dickerson, *Deposition Dilemmas: Vexatious Scheduling and Errata Sheets*, 12 Geo. J. Legal Ethics 1, 54-55 (1998). However, the extent to which courts allow deponents to make substantive changes, such as modifying or altering prior testimony, has generated much debate. *Id*. While the Rule does not define what exactly constitutes changes in "substance," the term is neither unclear nor complex, and therefore should be accorded plain meaning. Should courts query the meaning of this simple term, reference to a general purpose or legal dictionary could provide guidance in ascertaining its plain meaning. *See Price v. Time, Inc.*, 416 F.3d 1327, 1336-37 (11th Cir. 2005) (stating court's use of dictionaries is acceptable to determine the plain meaning of statutory language).

Black's Law Dictionary defines "substance" as "the material or essential part of a thing, *as distinguished from form*." *Substance, Black's Law Dictionary* (10th ed. 2014) (emphasis added). This definition coincides with the Merriam-Webster dictionary definition: "essential nature; a fundamental or characteristic part of quality." *Substance, Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/substance (last visited October 4, 2017). It follows that Woodward's revisions were "material" because the statements supplemented a "characteristic

part" of his original testimony, and therefore encompassed within the word "substance" and permitted by the Rule.

"Substance," as used in its ordinary meaning in Rule 30(e), includes a broad range of permissible changes, including supplemental statements. Rather than simply stating "any changes" can be made, the drafters went a step further by adding "in form or substance," intending to expand, rather than restrict, the scope of permissible changes. While Petitioner would restrict the Rule to exclude substantive changes, such a reading would ignore a fundamental part of the Rule that explicitly allows for non-technical changes. Reading the Rule to permit only corrections in form would render the word "substance" meaningless, and such an interpretation would be contrary to this Court's general "reluctan[ce] to treat statutory terms as surplusage" in any setting. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citation omitted). Woodward's post-deposition submissions add to the substance of his deposition in a fundamental way, and are essential to the wrongful termination claim. This type of change is precisely what the drafters contemplated when deciding to use a broad term such as "substance," rather than delineating what specific changes might be permissible under the Rule. *See Glenwood Farms, Inc., v. Ivey*, 229 F.R.D. 34, 35 (D. Me. 2005) (accepting errata sheet containing substantive changes and additions, stating "[c]hanges in the substance of a deponent's testimony are contemplated by the rule.").

Despite this plain language, some courts have impermissibly limited the extent to which deponents may make changes. This approach, clearly the minority view, adopts a narrow interpretation of the Rule permitting only changes in form and rejecting any substantive changes. *See, e.g., Greenway v. Int'l Paper Co.,* 144 F.R.D. 322, 325 (W.D. La. 1992). This restrictive interpretation disregards the general principle that "deposition-discovery rules are to be accorded a broad and liberal treatment." *Hickman*, 329 U.S. at 507. Importantly, this Court has stated "[t]he

Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations." *Schlagenhauf v. Holder*, 379 U.S. 104, 121 (1964). Under the same reasoning, a Rule should not be restricted beyond its "expressed limitations" by disregarding permissive language. Furthermore, the courts adopting this too-narrow approach do not rely on any rule or canon of interpretation to support their reading of the Rule. *See, e.g., Greenway*, 144 F.R.D. at 325 (citing no authority for the conclusion that Rule 30(e) permits only change in form). Similarly, Petitioner has provided no legal authority or compelling reason for a narrow interpretation of Rule 30(e). A reading that prohibits all substantive changes is inconsistent with both the text and purpose of the Rule, and therefore this Court should decline to adopt it.

2. A historical review of Rule 30 further shows that Woodward's substantive changes are permissible.

Even if this Court finds the text to be equivocal, a review of the Rule's legislative history should be instructive. *See, e.g., Marek v. Chesny*, 473 U.S. 1, 8-9 (1985) (looking to the history of Rule 68 for explanation of a terms intended meaning); *Bridgestone/Firestone, Inc. v. Local Union No. 988*, 4 F.3d 918, 924 (10th Cir. 1993) (using the history of Rule 4(a)(3) to interpret its scope). Because depositions are an essential tool used in discovery, Rule 30(e) should be read in light of the liberal standard used to regulate the scope of depositions under Rule 26, which permits discovery of essentially all matters relevant to a case. Fed. R. Civ. P. 26. A broad reading of Rule 30(e) furthers the overall purpose of depositions and comports with the legislative history of discovery rules.

Prior to the 1937 enactment of the Federal Rules, civil practice was primarily governed by the Federal Equity Rules. The precursor to Federal Rule 30–Equity Rules 61, 50, and 51–regulated the deposition process, and included a period of review where a deponent could express concerns about the integrity of the transcription. Gregory A. Ruehlmann, Jr., Note, *"A Deposition Is Not A*

Take Home Examination": Fixing Federal Rule 30(e) and Policing the Errata Sheet, 106 Nw. U. L. Rev. 893, 898 (2012). The scope of depositions was significantly expanded with the adoption of Rules 26-32 in 1937, with the drafters noting the new Rules "freely authorize[d] the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence." Fed. R. Civ. P. 26 advisory committee's note to 1937 amendment.

Following its initial adoption, Rule 30(e) has undergone only two substantive amendments. First, in 1970, the Rule was amended to limit the review period in which changes could be made to thirty days; however, no limitations were imposed on the *scope* of changes. Fed. R. Civ. Pro. 30(e) advisory committee's note to 1970 amendment (describing the insertion of a 30-day time period). The second amendment occurred over two decades later in 1993 to reduce problems reporters were experiencing in obtaining a deponent's signatures as required by the Rule. This revision, which remains in effect today, added language to give deponents the option to review the transcript and to indicate any changes in form or substance before signing it. Notably, the advisory committee's note accompanying this amendment specifically included the phrase "changes in form or substance," indicating the scope of changes was contemplated by the committee during this amendment. Fed. R. Civ. Pro. 30(e) advisory committee's note to 1993 amendment. It should also be noted that this substantive amendment came after several district courts interpreted the Rule to allow both substantive and contradictory changes. *See United States ex rel. Burch v. Piqua Eng'g, Inc.*, 152 F.R.D. 565, 566-67 (S.D. Ohio 1993); *Sanford v. CBS, Inc.*, 594 F. Supp. 713 (N.D. Ill. 1984); *Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981).

Finally, the legislative history makes clear that substantive changes were contemplated at Rule 30(e)'s inception and endorsed through subsequent amendments. When Congress ratified the

Rule, it did not limit the type of changes that a deponent could make and this Court should not do so now. However, Rule 30 is not without any limitations. In fact, Rule 30(d) provides a durational limitation and the grounds for terminating a deposition. Noting the "unlimited right of discovery given by Rule 26," the advisory committee stated that subdivisions (b) and (d) were "introduced as a safeguard for the protection of parties and deponents." Fed. R. Civ. P. 30 advisory committee's note to 1937 amendment. Thus, if the drafters felt it was necessary to limit the extent a deposition could be changed under (e) to protect parties, it knew how to add such language as evidenced by these amendments. Instead, consistent with the language of Rule 26, the text of Rule 30(e) was intentionally left broad and must be read to permit any changes, whether in form or substance.

B. The Rule provides other mechanisms to safeguard against potential abuse that do not include striking the changes or reopening the deposition.

A deponent seeking to invoke the privilege accorded by Rule 30(e) must comply with the procedural requirements set forth under the Rule. *See Reed v. Hernandez*, 114 Fed. Appx. 609 (5th Cir. 2004) (holding that Rule 30(e) does not provide any exceptions to its requirements). As the Thirteenth Circuit correctly noted, the Rule provides clear procedural directions for changing a deposition transcript. R. at 20. Notwithstanding the fact Rule 30(e) explicitly permits the changes submitted by Woodward, the Rule's instructions were properly followed when a review of the deposition was timely requested, the changes were submitted within 30-days, and reasons for the changes accompanied the errata sheet. Striking changes because it may alter the substance of testimony ignores the realities that memories can fade and deponents may become confused during questioning. Furthermore, reopening the examination is not warranted because the changes contained in Woodward's errata sheet did not make his original testimony incomplete or useless. *Lugtig* 89 F.R.D. at 642.

1. Woodward's prior testimony will remain a part of the record, and the procedural posture of this case favors denial of Petitioner's motion to strike.

Petitioner's motion to strike was correctly denied because the changes submitted in Woodward's errata sheet are permissible under Rule 30(e). As a general rule, motions to strike are disfavored by federal courts and, due to the harsh effects it may have on a party's case, should be granted sparingly. *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd.*, 647 F.2d 200, 201 (D.C. Cir. 1981). As one court aptly noted, "[t]o allow every failure of memory or variation in a witness's testimony to be disregarded. . .would require far too much from lay witnesses . . ." *Tippens v. Celotex Corp.*, 805 F. 2d 949, 953-54 (11th Cir. 1986). To strike Woodward's statements because he failed to remember the specifics of a meeting from four years ago due to a preoccupation with his spouse's recovery would undoubtedly be an inequitable result the drafters of the Rule did not intend.

Furthermore, "[n]othing in the language of Rule 30(e) requires or implies that the original answers are to be stricken when changes are made." *Lugtig*, 89 F.R.D. at 641-42. On the contrary, the Rule's instruction that the changes be made "upon the deposition" implies that the original answers will remain part of the record and can be read at trial." *Id.* at 642 (citing *Usiak v. N.Y. Tank Barge Co.,* 299 F.2d 808 (2d Cir. 1962); *see also Podell v. Citicorp Diners Club, Inc.,* 112 F.3d 98, 103 (2d Cir.1997) (holding that the district court was correct to make both a deponent's revised answers and original testimony part of the record).

Requiring an officer to append any changes to a deposition, rather than replace the original responses, functions as a safeguard to the opposing party by providing a powerful tool to question the credibility of the witness. *See Thorn*, 207 F.3d at 389 ("fortunately the rule requires that the original testimony be retained. . . so that the trier of fact can evaluate the honesty of the alteration."). Both the original responses and the changes will remain part of the record and can be

read at trial for impeachment purposes or to seek further clarification, thereby reducing any advantage or prejudice that may arise under Rule 30(e). *SEC v. Parkersburg Wireless LLC*, 156 F.R.D. 529, 536 (D.D.C. 1994). Appending the changes to the original testimony also furthers the overarching purpose of discovery, which is to elicit the truth and "to provide an accurate record for trial that will reduce inconsistencies." *Id.* If Woodward's statements were stricken, the record would not be fully accurate because it would lack fundamental testimony concerning Petitioner's wrongful termination claim and cause inconsistencies at trial that would unjustly affect Woodward's credibility.

Additionally, policy considerations support a finding that original answers should remain part of the record. When a witness "changes his testimony on a material matter between the giving of his deposition and his appearance at trial [he] may be impeached by his former answers … there is no reason [he] should stand in any better case." Charles Alan Wright & William H. Miller, Federal Practice & Procedure (3d ed. 1998) § 2118; *see also Holland v. Cedar Creek Mining, Inc.*, 198 F.R.D. 651, 653 (S.D. W. Va. 2001) (noting that by submitting substantive changes, a deponent "exposes himself. . . to cross-examination" regarding the changes). If both the original answers and the changes are made available to the jury at trial, then jurors will have an opportunity to discern "the artful nature of the changes." *Elwell v. Conair, Inc.*, 145 F. Supp. 2d 79, 87 (D. Me. 2001). Thus, it can hardly be said that changing answers provides a deponent with an unfair advantage or encourages improper litigation tactics.

Some courts erroneously view Rule 30(e) corrections as affidavits and analyze the changes under the sham affidavit rule when a motion to strike is filed. The doctrine provides that a court should disregard an affidavit that is inconsistent with prior deposition testimony and "constitutes an attempt to create a sham fact issue" at summary judgment. *See Burns v. Bd. Of Cty. Comm'rs*

of Jackson Cty., 330 F.3d 1275, 1282 (10th Cir. 2003) (quoting *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986)). Parties moving to strike an errata sheet under this analysis look for inherent inconsistencies between an affidavit and a deposition, and argue the changes undermine the effectiveness of a pending summary judgment by creating a dispute in the material facts. *See Thorn*, 207 F.3d at 389 (finding the trial court properly disregarded changes in deciding a motion for summary judgment); *Burns*, 330 F.3d at 1282 (finding the trial court properly characterized deposition changes as impermissible and disregarded at summary judgment); *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc*., 397 F. 3d 1217, 1225 (9th Cir. 2005) (finding plaintiff could not avoid summary judgment when changes were both untimely and submitted after the motion was filed).

This analysis is inappropriate in the context of Rule 30(e) and in this case. First, there was no pending motion for summary judgment on Petitioner's claim of wrongful discharge when Woodward requested review of the deposition transcript and timely submitted his errata sheet. Second, Woodward's statements do not create a "sham fact" because the record supports his assertion that Petitioner's involvement with the controversial Ally's Organics article contributed to her "turbulent" tenure at Sentinel. R. at 10-11. Third, there is no inherent inconsistency or contradiction between Woodward's original testimony and the changes contained in his errata sheet. Finally, the "sham affidavit rule" applies to *affidavits* that contradict prior deposition testimony to create an issue of fact. *Hambleton Bros. Lumber Co.*, 397 F. 3d at 1225. Rule 30 is meant to secure accurate testimony, whether through original responses or post-deposition changes, but makes no mention of the term affidavit. Rule 56, on the other hand, provides parties with mechanisms to question the meaning and implication of deposition testimony for purposes of summary judgment, and specifically includes a provision dealing with affidavits. Fed. R. Civ. P.

56(a),(c)(4). Based on the distinctively different functions these two rules serve, depositions cannot be analyzed under the same standard as affidavits. It follows that changes contained in an errata sheet should not be equated with facts contained in an affidavit. Furthermore, permitting a court to exclude changes on the premise it constitutes a sham would deprive the trier of fact of the opportunity to determine the credibility or truthfulness of testimony at the appropriate juncture. *Tippens*, 805 F. 2d at 954.

2. The supplemental statements submitted in the errata sheet do not warrant reopening of Woodward's deposition.

Courts have consistently held that changes submitted under Rule 30(e) do not always mandate further examination of the deponent, but rather reopening the deposition should be reserved for when the changes render a deposition "incomplete or useless without further testimony." *Lutgig* at 642. In determining whether to reopen a deposition, the number of substantive changes is not dispositive. *See Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398 (N.D. Ill. 1993) (court denied request to reopen where the forty-one changes did not make deposition incomplete or useless); *cf. Tingley Sys., Inc. v. CSC Consulting, Inc.*, 152 F. Supp. 2d 95, 119–20 (D. Mass. 2001) (finding twenty-two corrections was significant enough to warrant reopening a deposition). Instead, the court should look at whether the deposition still serves a useful function in light of the changes.

Here, the supplemental statements submitted by Woodward are not so substantial as to necessitate a reopening of the deposition. For example, allowing Woodward's two statements based on his recollection of a discussion regarding Petitioner's controversial article from four years prior is not the same as changing a "yes" to a "no" or going from "three minutes" to "twenty seconds" as was permitted in *Lugtig*. *Lugtig*, 89 F.R.D. at 640. Importantly, Woodward's changes do not contradict or change his prior testimony, but are simply an elaboration that is consistent

with the nature of his original answer. *See Wyeth v. Lupin Ltd.,* 252 F.R.D 296 (D. Md. 2008) (allowing for the rewriting of prior deposition which fit the theory of the case).

Further, if a court questions the motives of a party in submitting changes, it has the discretion to reopen so that the opposing party has a chance to examine the revisions, R. at 21, and assess the costs of additional discovery against the deponent. *Reilly*, 230 F.R.D. at 490. This provides another safeguards for parties. However, in this case there is no indication Woodward's revisions were triggered by unscrupulous motives nor should his supplemental statements require additional questioning. Therefore, granting Petitioner's motion to reopen the deposition would unnecessarily punish him for an understandably innocent lapse in memory. Assuming *arguendo* that the supplemental statements necessitate a reopening of the deposition, the reexamination should, at the very least, be limited in scope to allow only questions following up on the changes and to inquire about the origin and reasons for the changes. *Lugtig*, 89 F.R.D. at 642.

3. The Rule's procedural safeguards are sufficient to protect against abuse.

While there are no restrictions on the type of changes that can be made, the Rule has procedural requirements in place that safeguard against the risk of abuse. First, the deponent must formally request a review of the deposition before any changes may be made. Courts strictly construe this requirement, stating it is an "absolute prerequisite" for making changes. *Rios v. Bigler*, 67 F.3d 1543, 1552 (10th Cir. 1995) (rejecting changes due to deponent's failure to request review of transcript). Second, the changes must be made within 30 days after notification that the transcript is available for review. *Reed*, 114 Fed. Appx. 610 (excluding errata sheets when deponent failed to submit changes within the 30-day period). Third, the deponent must give reasons for changes "in form or substance." *Holland*, 198 F.R.D. at 653 (striking errata sheet because no specific reasons for the changes were provided by the deponent). Finally, any changes

will be appended to the original deposition and will remain part of the record. *Reilly*, 230 F.R.D. at 487 (noting Rule 30(e)'s requirement that deponent append changes).

Because the Rule gives deponents such wide latitude to submit post-testimonial changes, courts should carefully scrutinize any proffered changes to ensure deponents' full compliance with its procedures, and maintain that Rule 30(e) does not provide any exceptions to its requirements. *Reed*, 114 Fed. Appx. at 611. In Respondents' case, counsel timely requested review of the transcript and submitted the revisions as required by the Rule. R. at 14. Additionally, Woodward explained that his failure to recall the meeting regarding Petitioner's Ally's Organics article was due to his preoccupation with his spouse's recent recovery from surgery. R. at 14. Thus, Woodward fully complied with all of the Rule's directions for changing his deposition transcript. Accordingly, this Court should accept the errata sheet and the changes contained therein.

C. This Court should follow the majority approach and apply a broad reading because it accurately interprets the language and purpose behind Rule 30(e) and will provide uniformity for courts.

The Thirteenth Circuit properly determined that Rule 30(e) places no limitation on the type of changes that may be made by a witness, and the supplemental statements submitted in Woodward's errata sheet are permissible. R. at 20, 21. This interpretation follows the majority approach, which is that Rule 30(e) does not limit the types of changes a deponent may make to a deposition transcript. *See Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000) (holding that although reasons for changes were questionable, Rule 30(e) authorizes substantive changes); *Podell*, 112 F.3d at 103 (2d Cir. 1997) (plain language of Rule 30(e) places no limitations on types of changes that may be made); *Tingley Sys., Inc.*, 152 F. Supp. 2d at 119–20 (finding the express language of Rule 30(e) allows a deponent to change the substance of his answers). Adopting a narrow reading of Rule 30(e) to exclude substantive changes will hinder the

overarching purpose of the discovery-deposition rules and continue to perplex and unduly burden courts in the early stages of litigation.

Permitting substantive changes furthers the two general purposes of a deposition. First, depositions serve an instrumental role in fact finding by permitting an attorney to question a deponent on all the relevant and necessary information surrounding a case. Mutual knowledge of all relevant facts is essential to litigation, and permitting a deponent to add or alter statements in deposition testimony reduces the possibility of surprise. *Hickman*, 329 U.S. at 508. Second, depositions perform a testimonial-preservation function and Rule 30 encompasses the procedures that regulate this memorialization. *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (noting that the purpose of discovery is to elicit facts and commemorate testimony). Specifically, revisions are preserved under Rule 30(e)(2) which requires the reporter to note whether a review of the deposition was requested and attach any changes that are made.

A narrow reading of Rule 30(e) has resulted in varying degrees of judicial restrictiveness that has left the federal courts in complete discord. The most restrictive reading of the Rule originated with *Greenway v. Int'l Paper Co.*, where the court concluded the purpose of Rule 30(e) was to only permit changes to transcription errors. *Greenway*, 144 F.R.D. at 325. Striking the sixty-four changes submitted in an errata sheet, the court rejected the idea that Rule 30(e) permits a deponent "to alter what was said under oath." *Id*. Other courts have applied a more moderate approach, allowing changes that clarify but not contradict the original testimony. *See, e.g.*, *Thorn*, 207 F.3d at 389 (permitting a deponent to change deposition from what he said to what he meant to say); *DeLoach v. Phillip Morris Cos., Incorp.*, 206 F.R.D. 568 (M.D. N.C. 2002) (accepting changes that clarified and explained original answers). On the other hand, the Third Circuit employs a flexible, case-by-case approach, allowing contradictory changes if the deponent

provides sufficient justification, but reserving the discretion to reject substantive changes based on the circumstances. *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 268 (3d Cir. 2010).

Courts should not be permitted to craft arbitrary restrictions to Rule 30(e) that frustrate the objectives of discovery and undermine the clarity of a uniform application. Instead, adopting a broad reading comports with the overall goals of discovery and will further the interest of promoting uniformity in the Rule's application. *See, e.g., Prazak v. Local 1 Int'l Union of Bricklayers*, 233 F.3d 1149, 1152 (9th Cir. 2000) (observing important interest in uniformity of federal adjudication); *Cannon v. Kroger Co.*, 832 F.2d 303, 306 (4th Cir. 1987) (stating the application of alternative procedures threatens the goal of uniform adjudication). Additionally, it is widely recognized that resolutions of credibility and conflicting versions of facts are matters for the jury, not for the court. *United States v. Rem*, 38 F.3d 634, 644 (2nd Cir. 1994). Thus, applying a narrow reading of the Rule improperly permits courts to assess the credibility of the witnesses and evaluate the importance, or lack thereof, of substantive testimony. *Id.*; *see also Lugtig*, 89 F.R.D. at 641 (holding the Rule does "not require a judge to examine the sufficiency, reasonableness, or legitimacy of the reasons for the changes."). Such matters should be left for the jury. Instead, this Court should adopt a broad interpretation of the Rule to promote judicial efficiency by providing federal trial courts with a uniform standard to be employed when evaluating changes to deposition testimony, and to further the purpose of the discovery process—namely, to allow the parties to elicit the true facts of a case before trial. *Reilly*, 230 F.R.D. at 490.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court to affirm the decision of the United States Court of Appeals for the Thirteenth Circuit, declare that Petitioner is not a whistleblower under Dodd-Frank, and find the supplemental statements submitted by Woodward permissible under Rule 30(e).

Respectfully submitted,

TEAM 17

*/s/*_____

Counsel for Respondents, Sentinel Media, Inc., *et. al.*

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that the Respondent's Brief complies with the word limitation specified in Rule C(3)(d) of the ALA Moot Court Competition Rules. Specifically, this Brief contains 10, 366 words. The type face is Times New Roman, 12-point font.

/s/ _____

/s/ _____

SARAH FOSTER,

Petitioner,

v.

SENTINEL MEDIA, INC., *et. al.,*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

APPENDIX TO RESPONDENTS' BRIEF ON THE MERITS

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APPENDIX A

Relevant Statutes

15 U.S.C. § 78u-6. Securities whistleblower incentives and protection

(a) Definitions
In this section the following definitions shall apply:

> **(6) Whistleblower**
> The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

(b) Awards

> **(1) In general**
> In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—
>
> > **(A**) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
> >
> > **(B)** not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

(h) Protection of whistleblowers

> **(1) Prohibition against retaliation**
>
> > **(A) In general**
> > No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
> >
> > > **(i**) in providing information to the Commission in accordance with this section;
> > >
> > > **(ii)** in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

18 U.S.C. § 1514A. Civil action to protect against retaliation in fraud cases

(a) Whistleblower Protection for Employees of Publicly Traded Companies.--No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) Enforcement Action.—

(1) In general.--A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) Procedure.—

(A) In general.--An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) Exception.--Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) Burdens of proof.--An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of Title 49, United States Code.

(D) Statute of limitations.--An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

(E) Jury trial.--A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.

(c) Remedies.—

(1) In general.--An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) Compensatory damages.--Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

APPENDIX B

Relevant Rules

Rule 30. Depositions by Oral Examination

(e) Review by the Witness; Changes.

(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.

(2) ***Changes Indicated in the Officer's Certificate.*** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.