UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4871/June 15, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-17352

In the Matter of SAVING2RETIRE, LLC, and MARIAN P. YOUNG	ORDER DENYING DEPOSITION CORRECTIONS

In connection with the post hearing submission of deposition designations, Respondents move for leave to make corrections to the transcript of Respondent Marian P. Young's deposition. I denied a similar request during the hearing because Young, who was deposed on November 1, 2016, did not timely raise any issue regarding the transcript of her deposition. Tr. 16–17.

Commission Rule of Practice 233(k), 17 C.F.R. § 201.233(k), governs corrections to deposition transcripts.[1] The Rule provides that:

> On request by the deponent or a party … the deponent must be allowed 14 days after being notified by the deposition officer that the transcript or recording is available, unless a longer time is … permitted by the hearing officer, in which: (i) [t]o review the transcript or recording; and (ii) [i]f there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

This language is largely drawn from Federal Rule of Civil Procedure 30(e). Given the language's origin, it is appropriate when interpreting Rule of

[1] During the hearing, I referred to Rule 233(i). Tr. 17. The applicable rule is Rule 233(k).

Practice 233(k), to consider cases interpreting Rule 30(e).[2] Considering that courts typically require "strict" compliance with Rule 30(e),[3] it is apparent that Respondents have not complied with Rule 233(k).

First, Respondents offer no evidence that they made any request to review the transcript of Young's deposition.[4] Because such a request is "an absolute prerequisite to amending or correcting a deposition," Respondents' omission is fatal to their current motion.[5]

Second, Respondents did not meet the fourteen-day deadline for submitting changes. The court reporter certified the transcript on November 11, 2016.[6] Respondents do not claim they were not notified at or near this time of the transcript's availability. Yet they waited six months to submit proposed changes. And even if Respondents were not immediately notified of the transcript's availability, they received the transcript on December 9, 2016, when the Division of Enforcement served it by e-mail as an exhibit to a motion for summary disposition. Even counting from December 9, 2016, Respondents' corrections come far too late, and they have provided no reason for me to exercise my discretion to permit a longer time in which to make corrections.[7]

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[2] *Cf. Gately & Assocs., LLC*, Securities Exchange Act of 1934 Release No. 62656, 2010 WL 3071900, at *7 (Aug. 5, 2010) (concluding that "federal court interpretations of Rule 56 [of the Federal Rules of Civil Procedure] are instructive" in interpreting a rule of the Public Company Accounting Oversight Board that "mirrors" Rule 56).

[3] *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 266 (3d Cir. 2010) (quoting *Holland v. Cedar Creek Mining, Inc.*, 198 F.R.D. 651, 653 (S.D.W.V. 2001)).

[4] *See* 17 C.F.R. § 201.233(k) (conditioning a deponent's ability to review and offer changes on the deponent making a request to do so).

[5] *Rios v. Bigler*, 67 F.3d 1543, 1552 (10th Cir. 1995) (interpreting Rule 30(e)); *see EBC, Inc.*, 618 F.3d at 265; *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217, 1226 (9th Cir. 2005).

[6] *See* Div. Ex. 9 at 177.

[7] *See Del. Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC*, 597 F.3d 1374, 1380–81 (Fed. Cir. 2010); *Calloway v. Marvel Entm't Grp., div. of Cadence Indus. Corp.*, 110 F.R.D. 45, 52 (S.D.N.Y. 1986); *cf. EBC, Inc.*, 618 F.3d at 266 n.12 ("While courts retain the authority to enforce the

Third, Respondents propose substantive changes—"yes" to "no" or vice versa—claiming that Young was mistaken or simply incorrect in her answers. Although Rule 30(e) arguably allows changes to the "substance" of a witness's statements under oath,[8] courts generally require some showing that the reporter actually mistranscribed the testimony at issue or another persuasive justification.[9] Respondents present no reason to apply Rule 233(k) in a different manner.

Against this weight of authority, Respondents merely observe that the face of Young's deposition does not show that she was told that she had the right to examine the transcript and offer corrections. Assuming that this amounts to an argument that Young was entitled to such notice, there are two problems with Respondents' argument. The first is that Rule 233(k) does not provide that a deponent is entitled to actual notice that she may examine and offer corrections to a transcript. And the second is that because Rule

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amendment window strictly, we leave the matter to their sound discretion if and when extension of the time limit is appropriate.").

[8] *See, e.g.*, *Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 481 (5th Cir. 2012) ("clients do sometimes make substantive missteps in deposition testimony which may be corrected with an errata sheet"); *see also Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1281-82 (11th Cir. 2010) (collecting decisions describing the disagreement between the circuits and concluding that counsel's "errata sheet making a slew of material changes to their client's deposition testimony was improper"); 8A Charles Alan Wright et al.. *Federal Practice and Procedure* § 2118 (3d ed. Apr. 2017) (acknowledging "contrary authority").

[9] *See EBC, Inc.*, 618 F.3d at 268 ("[A] district court does not abuse its discretion under Rule 30(e) when it refuses to consider proposed substantive changes that materially contradict prior deposition testimony, if the party proffering the changes fails to provide sufficient justification."); *Jackson v. Teamsters Local Union 922*, 310 F.R.D. 179, 183 (D.D.C. 2015) ("[T]his Court believes our Circuit would agree with essentially every circuit in holding that material revisions should not be accepted absent convincing explanations."); *see, e.g.*, *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000) ("[A] change of substance which actually contradicts the transcript is impermissible unless it can plausibly be represented as the correction of an error in transcription.").

233(k) was published in the Federal Register,[10] Young received all the notice to which she was entitled.[11]

Respondents' motion is denied.

James E. Grimes
Administrative Law Judge

[10] *See* Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50212, 50238 (July 29, 2016).

[11] *See* 44 U.S.C. § 1507; *Taylor v. Huerta*, 856 F.3d 1089, 1094 (D.C. Cir. 2017); *California ex rel. Lockyer v. FERC*, 329 F.3d 700, 707 (9th Cir. 2003); *North Ala. Express, Inc. v. United States*, 585 F.2d 783, 787 n.2 (5th Cir. 1978).