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

Team Number 9
Counsel for Respondents

QUESTIONS PRESENTED FOR REVIEW

I. 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

II. 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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEALS CASES

UNITED STATES DISTRICT COURT CASES

STATUTORY PROVISIONS, REGULATIONS, & RULES

OTHER AUTHORITIES

DISPOSITION BELOW

The opinion of the United States District Court for the Eastern District of Everton, granting partial summary judgment in favor of the Petitioner and certifying its discovery order for interlocutory appeal, is reported at *Foster v. Sentinel Media, Inc.*, No. 16-cv-01435-BLW (E.D. Ever. 2016), and can be found in the Record at 2-7.

The opinion of the United States Court of Appeals for the Thirteenth Circuit, affirming the lower court's discovery order and reversing the partial grant of summary judgment, is reported at *Foster v. Sentinel Media, Inc.*, No. 16-0715 (13th Cir. 2016) and can be found in the Record at 8-30.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Thirteenth Circuit entered judgment on October 15, 2016. On December 1, 2016, this Court granted a timely petition for writ of certiorari and has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

1. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 15 U.S.C. § 78u-(6)
2. Federal Rule of Civil Procedure, Rule 30(e)

STATEMENT OF THE CASE

I. The Sentinel Buyout and Sentinel's Termination of Petitioner's Employment

Respondent, Sentinel Media ("Sentinel"), is a multifaceted, publicly traded media conglomerate. In 2014, billionaire investor R. Forrest Little ("Little") arranged a leveraged buyout of Sentinel. R. at 9. Little used the highest valuation of Sentinel, $11.3 billion, and in March 2014 fifty-three percent of Sentinel's stockholders voted to accept Little's buyout offer. R. at 9.

Petitioner, Sarah Foster, worked as a financial reporter for *The Everton Sentinel*, a subsidiary of Sentinel, from 2002 to March 2014. R. at 10. Foster's tenure at the *Sentinel* proved to be tumultuous, with her coworkers charitably describing her as "difficult" to work with. R. at 10. Several of her difficulties are described below. R. at 10.

When Foster first started at the *Sentinel*, she griped about the "red-tin" coffee in the employee lunchroom, advocating instead for high quality coffee imported from Brazil in frequent and numerous emails to management and the Board. R. at 10-11. Foster often chastised employees who smoked near the building's entrance by waiving her arms to disperse the second-hand smoke, occasionally delivering a blow to an unsuspecting victim's head. R. at 11. One of Foster's victims even filed a complaint with human resources. R. at 11. Foster was also notorious for mumbling condescending comments about fellow employee's behind their backs. R. at 11. Despite her numerous personality "quirks," Foster generally received positive performance reviews. R. at 12.

Despite her positive performance reviews, Foster's work garnered notoriety. R. at 11. In 2012, Ally Wentworth, owner of Ally's Organics, accused Foster of publishing several fabricated quotes in an article about the company's IPO. R. at 11. However, the matter was never pursued because Foster's recording of their interview was mysteriously erased. R. at 11.

Being a financial reporter, Foster planned to write a story covering the Sentinel buyout. R. at 12. While scrutinizing the buyout materials, she ultimately determined Little's valuation of *Sentinel* was too high. R. at 12. If true, these facts could arguably constitute securities fraud. R. at 12. Foster reported the potential securities fraud information to her editor, Karl Woodward ("Woodward"). R. at 13. On March 11, 2014, Foster met with Sentinel's general counsel and CFO Karen Crowder and shared "some" of what she learned about the buyout valuations. R. at 13. Foster asked Crowder to comment for her story and to facilitate a meeting between Foster and Little. R. at 13. Crowder declined both requests. R. at 13. Foster then stormed out of the room. R. at 13. On March 15, 2014, Foster was terminated. R. at 13.

II. Procedural History

In 2016, Foster timely filed suit against Sentinel in the bankruptcy court of the Eastern District of Everton and the case was transferred to the district court pursuant to 28 U.S.C. § 1412. R. at 13. Foster claimed, *inter alia*, she qualified as a "whistleblower" under the Dodd-Frank Wall Street Reform and Consumer Protection Act and was therefore protected under the Act's anti-retaliation

provisions. R. at 13. During discovery, Foster's counsel took Woodward's deposition and the following conversation occurred:

> "Q: [Foster's counsel:] Do you know why Ms. Foster was fired?
>
> A: [Woodward:] Basically, she was just too hard to get along with. Many of her co-workers were afraid of her and tended to avoid her. Her personality was so abrasive.
>
> Q: But, you had generally given her positive performance reviews?
>
> A: Yes. Overall, her work was good, she was a good writer – probably even deserved that Pulitzer."

R. at 13-14. Pursuant to Federal Rule of Civil Procedure 30(e)(1) ("Rule 30(e)" or "the Rule"), Sentinel's counsel requested Woodward be given the chance to review his deposition transcript. R. at 14. One week after the court reporter notified Woodward his deposition was available Woodward submitted a notarized errata sheet indicating the following two revisions:

> "[A]: [Woodward]: Basically, she was just too hard to get along with. Many of her co-workers were afraid of her and tended to avoid her. Her personality was so abrasive. **And, the Ally Organics IPO article. I'm not sure what I thought about the whole episode, but we all, in management, took it very seriously. Everyone felt that journalistic integrity was crucial to the *Sentinel's* reputation. So do I.**
>
> [* * *]
>
> [A]: Yes. Overall, her work was good, she was a good writer – probably deserved that Pulitzer. **But, again, I was also beginning to wonder whether she had fabricated those quotes. It was definitely an issue.**

R. at 14.

Woodward explained in his affidavit that the reason for his revisions was a recent conversation between him and Crowder. R. at 14. Crowder reminded Woodward of a meeting in which management discussed Foster's alleged fabrication of quotes in the *Sentinel* article. R. at 14. Woodward forgot about the meeting because of his preoccupation tending his spouse who was recovering from knee surgery. R. at 14.

The district court granted Foster's motion for summary judgment, but deemed Woodward's deposition revisions permissible under Rule 30(e) and certified its discovery order for interlocutory appeal. R. at 2-7. The Thirteenth Circuit Court of Appeals reversed the district court's grant of summary judgment and held that Foster did not qualify as a whistleblower under Dodd-Frank because she did not report the securities violation to the Securities and Exchange Commission. R. at 15-19. The Thirteenth Circuit also affirmed the district court's finding that Woodward's deposition revisions were permissible under the plain meaning of Rule 30(e) without reopening Woodward's deposition. R. at 19-21.

SUMMARY OF THE ARGUMENT

I. PETITIONER IS NOT A "WHISTLEBLOWER" UNDER THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT BECAUSE SHE DID NOT REPORT A VIOLATION TO THE SECURITIES AND EXCHANGE COMMISSION.

The Thirteenth Circuit correctly held that Petitioner is not a "whistleblower" under the Dodd-Frank Wall Street Reform and Consumer Protection Act because she did not provide information relating to a violation of securities laws to the Securities and Exchange Commission. Dodd-Frank, in its exclusive definition of the

term "whistleblower," only grants an individual whistleblower protection if the individual provides information regarding a securities law violation *to the Commission*. Moreover, both the overall statutory scheme of Dodd-Frank and the context in which the term "whistleblower" is used support the exclusive and unambiguous definition provided in Dodd-Frank's text. Dodd-Frank's "whistleblower" definition is plain and unambiguous, therefore it must be applied according to its terms. Petitioner is not a whistleblower according to the terms of Dodd-Frank because she did make a report to the Commission.

Additionally, this Court should not defer to the Security and Exchange Commission's regulation to determine whether Petitioner is a whistleblower for two reasons. First, Dodd-Frank's text is unambiguous. When the text is unambiguous, "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." *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984). Second, even if there was ambiguity in Dodd-Frank's text, the Court need not give deference to the Security and Exchange Commission's unreasonable interpretation of the Act. The Security and Exchange Commission's regulation is not a reasonable interpretation of Dodd-Frank because it creates ambiguity by directly contradicting Dodd-Frank's definition of "whistleblower." The regulation is also internally inconsistent with regard to the its own definition of "whistleblower." Finally, the regulation is not a reasonable interpretation of Dodd-Frank because the regulation renders Sarbanes-Oxley's anti-retaliation provision

moot by removing any distinction between the Dodd-Frank and Sarbanes-Oxley whistleblower protections.

II. KARL WOODWARD'S SUBSTANTIVE DEPOSITION CHANGES SUBMITTED THROUGH AN ERRATA SHEET ARE AUTHORIZED UNDER THE PLAIN TEXT OF FEDERAL RULE OF CIVIL PROCEDURE 30(E).

The Thirteenth Circuit was also correct in holding that Karl Woodward's substantive deposition changes submitted though an errata sheet were authorized under the plain text of Federal Rule of Civil Procedure 30(e). Rule 30(e) provides that, if requested, a deponent may submit changes "in form *or substance*" to his or her deposition testimony so long as the changes are submitted within thirty days and the deponent provides reasons for the changes.

When interpreting the Federal Rules of Civil Procedure, as with any statute, this Court mandates the text of the Rules be given their plain meaning. Only if the language is ambiguous does the court look beyond the plain text. The plain text of Rule 30(e), however, unambiguously provides that deposition changes may be made "in form *or substance*." So as not to render either term superfluous, the Rule's plain text allows for ***both*** stenographic errors by the court reporter (form changes) ***and*** material changes to the deposition testimony (substance changes) as long as the deponent timely submits the changes and provides reasons for the changes. The reasons provided for the deposition changes need not be sufficient, reasonable, or legitimate. Rather, the mere inclusion of reasons for the changes will satisfy Rule 30(e).

Woodward submitted his deposition changes within one week of receiving notice from the court reporter that his deposition was available for review. Additionally, Woodward also provided reasons for his deposition changes, thereby satisfying the two procedural requirements stipulated by the plain text of Rule 30(e).

In order to protect Rule 30(e) from potential abuse, courts have applied two significant safeguards to the Rule: (1) both the original answer and the revised answer remain a part of the record; and (2) the deposition may be reopened if the changed responses render the original testimony incomplete or useless without further questioning. First, Woodward does not argue that both his original responses and his amended answers are a part of the record to be reviewed by the trier of fact. Second, Woodward's amendments do not render his testimony incomplete or useless if his deposition was not reopened. Woodward only revised two of his responses and the revisions did not contradict his original testimony. Rather, the revisions simply provide additional clarification to his original answers. Therefore, Respondent respectfully asks this Court to affirm the decision of the Thirteenth Circuit.

ARGUMENT

I. PETITIONER IS NOT A "WHISTLEBLOWER" UNDER THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT BECAUSE SHE DID NOT REPORT A VIOLATION TO THE SECURITIES AND EXCHANGE COMMISSION.

This Court should affirm the decision of the Thirteenth Circuit Court of Appeals and hold that Petitioner is not a whistleblower under the Dodd-Frank Wall

Street Reform and Consumer Protection Act ("Dodd-Frank" or "the Act"), 15 U.S.C. § 78u-6, because she did not report a violation to the Securities and Exchange Commission ("SEC" or "the Commission"). According to Dodd-Frank, "[t]he term 'whistleblower' means any individual who provides . . . information relating to a violation of securities laws *to the Commission*[.]" 15. U.S.C. § 78u-6(a)(6) (emphasis added). Petitioner did not provide information to the Commission, so Petitioner is not a whistleblower.

In the district court, Petitioner conceded she did not provide information "*to the commission*," yet she contends that she is still a Dodd-Frank whistleblower. R. at 15 (emphasis added). Petitioner asserts that her internal reports to Woodward and Crowder somehow satisfy Dodd-Frank's requirement that a whistleblower provide information "*to the Commission*." Further, Petitioner contends she should be safeguarded by Dodd-Frank's "Protection of Whistleblowers" anti-retaliation provision even though she is not a Dodd-Frank whistleblower. Petitioner's argument relies on a regulation issued by the SEC that states "[f]or purposes of the anti-retaliation protections afforded by Section [78u-6(h)(1)] . . . you are a whistleblower if . . . [you provide] information in a manner described in Section [78u-6(h)(1)(A)]" which includes making disclosures that are protected under the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"). 17 C.F.R. 240.21F-2(b)(1)(ii). Whether Petitioner's internal report is protected under Sarbanes-Oxley is, ultimately, irrelevant to the inquiry before this Court because the SEC's regulation should not be used as guidance to interpret Dodd-Frank.

When asked to analyze an agency's interpretation of a statute, this Court often applies the two-step framework announced in *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984). Under the *Chevron* framework, a court's first step is to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "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." *Id.* at 842–43.

When a court determines a statute is ambiguous, *Chevron's* second step asks the court to determine "whether the agency's answer [to the precise question at issue] is based on a permissible construction of the statute." *Id.* at 843. Therefore, a court does not automatically give *Chevron* deference to the agency's interpretation of the statute. *Id.* A court may "substitute its own construction of a statutory provision" when the agency's interpretation is unreasonable. *Id.* at 844.

In this case, the inquiry ends after step one of the *Chevron* test because Congress has "directly spoken to the precise question" of who is a Dodd-Frank whistleblower. Accordingly, this Court should not consider the SEC's interpretive guidance. However, even if this Court finds the term "whistleblower" ambiguous, the Court should not give *Chevron* deference to the SEC regulation because the regulation is not a reasonable interpretation of the statute.

A. Dodd-Frank unambiguously reserves whistleblower status for individuals who provide information to the Commission.

Dodd-Frank's plain language unambiguously requires an individual to provide information regarding a violation of securities laws to the Commission in

order to garner whistleblower status. 15 U.S.C. § 78u-6 "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The language of Dodd-Frank, the specific context in which the language is used, and the broader context of Dodd-Frank as a whole all show Congress unambiguously expressed intent that a Dodd-Frank whistleblower must make a report "*to the Commission*."

1. Dodd-Frank's plain language unambiguously creates a private cause of action exclusively for individuals who provide information to the Commission.

When interpreting a statute, this Court always begins with the plain text of the statute. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Petitioner asks this Court to look here, there, and everywhere except the statutory text to find her eligible for Dodd-Frank's generous remedies. However, Dodd-Frank's text plainly states "[t]he term 'whistleblower' *means* any individual who provides . . . information relating to a violation of securities laws *to the Commission*[.]" 15. U.S.C. § 78u-6(a)(6) (emphasis added). There is nothing ambiguous about the Act's "whistleblower" definition. The definition expressly requires a report "*to the Commission*" to obtain Dodd-Frank whistleblower status. This precise definition is the only definition Congress intended for Dodd-Frank whistleblower because it is the only definition offered in the text. Congress deliberately used the words "[t]he term whistleblower *means*" to express intent for an exclusive definition of Dodd-Frank whistleblower. *See Groman v. Commissioner*,

302 U.S. 82, 86 (1937) ("when an exclusive definition is intended the word 'means' is employed"). Moreover, Congress mandated this precise definition "shall apply" to the entire "Securities Whistleblower Incentives and Protection" section of Dodd-Frank. 15 U.S.C. § 78u-6(a). Congress unambiguously expressed its intent that a Dodd-Frank whistleblower is exclusively an "individual who provides . . . information . . . to the Commission," and this exclusive definition "shall apply" to the entire section, including the anti-retaliation provisions. *Id.* at § 78u-6(a)(6). "If the statutory language is plain, [the Court] must enforce it according to its terms." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). The language of Dodd-Frank is plain. This Court must enforce Dodd-Frank according to its terms, and the terms of Dodd-Frank require that whistleblowers make a report *"to the Commission*."

Conferring Dodd-Frank whistleblower status upon an individual who does not make a report "*to the Commission*" violates the cardinal canon of statutory interpretation "that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Congress did not say "in this section the following definitions shall apply *sometimes*." Nor did Congress say "whistleblower means an individual who provides information to the Commission *or to their supervisor*." Congress unambiguously said that a Dodd-Frank whistleblower is an "individual who provides . . . information . . . *to the Commission*," therefore, Congress meant that a Dodd-Frank whistleblower is an "individual who provides . . . information . . . *to the Commission*." 15 U.S.C. § 78u-6(a)(6). According to Dodd-

Frank's plain language, Petitioner cannot be a whistleblower because she did not make a report "*to the Commission*."

Similarly, Dodd-Frank's plain language unambiguously limits its anti-retaliation protection to individuals who make a report to the Commission. The text of the anti-retaliation provision plainly states "[n]o employer may discharge . . . 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*." 15 U.S.C. § 78u-6(h)(1)(A) (emphasis added). There is nothing ambiguous about this language. The plain language expressly and unambiguously prohibits employers from taking retaliatory action only against *whistleblowers*.

Petitioner contends Congress's exclusive Dodd-Frank whistleblower definition somehow does not apply to the anti-retaliation provisions of § 78u-6(a), but this contradicts the plain language stating the definition "shall apply" to the entire section, including the anti-retaliation provisions. 15 U.S.C. § 78u-6(a). Petitioner's contention might make sense if the statutory "whistleblower" definition was contradictory to the anti-retaliation provisions, or if applying the given definition would be nonsensical or absurd. However, importing the definition from §78u-6(a)(6) into the anti-retaliation provision provides: "[n]o employer may discharge . . . or in any other manner discriminate against, *any individual who provides . . . information . . . to the Commission* in the terms and conditions of employment because of any lawful act done by *any individual who provides . . . information . . . to the Commission*." 15 U.S.C. § 78u-6(h)(1)(A). The statutory

definition of "whistleblower" fits perfectly within the anti-retaliation provision and shows Congress' unambiguous intent to protect only those individuals who make a report to the Commission.

To extend Dodd-Frank's anti-retaliation provisions to individuals who do not provide information "*to the Commission*" contradicts the Act's plain text and would violate several canons of statutory interpretation. First, extending the protections of the anti-retaliation provision to an individual who only makes an internal report would render the definitional words "to the Commission" utterly superfluous. This Court has been "'reluctant to treat statutory terms as surplusage' in any setting," *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *Babbit v. Sweet Home Chapter, Cmtys. for Great Ore.*, 515 U.S. 687, 698 (1995)), because this Court has a "duty 'to give effect, if possible, to every clause and word of a statute.'" *Duncan*, 533 U.S. at 174 (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)). As shown by importing the Dodd-Frank "whistleblower" definition into the anti-retaliation provision, it is indeed possible to give effect to the words "to the Commission." Therefore, the Court has a duty to give effect to the words "to the Commission".

In order to prevent creating surplusage, the term "whistleblower" would need to have different meanings in different provisions of the Act. Not only is this contrary to Congress' intent for an exclusive definition of Dodd-Frank whistleblower that "shall apply" to the entire section, it is also "contrary to the basic canon of statutory construction that identical terms within an Act bear the same meaning."

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479 (1992). "Whistleblower" cannot mean "any individual who provides . . . information . . . to the Commission" in one provision, and "any individual who makes an internal report" in another provision.

Dodd-Frank's plain language expressly and unambiguously requires that individuals must provide information to the Commission to qualify as a whistleblower. "If the statutory language is plain, [this Court] must enforce it according to its terms." *King*, 135 S. Ct. at 2489. This Court must enforce Dodd-Frank according to its terms, therefore Petitioner is not a whistleblower because she did not provide information to the Commission.

2. Dodd-Frank's overall statutory scheme supports reserving whistleblower status for individuals who provide information to the Commission.

Further, the overall statutory scheme and context in which the term "whistleblower" is used unambiguously support Congress' intent that only individuals who provide information to the Commission will be granted the benefits and protections of the Act. *King*, 135 S. Ct. at 2489 ("when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme") (internal quotations omitted).

First, Dodd-Frank's titles and headings express Congress' intent for the Act's incentives and protections to extend only to individuals who provide information to the Commission. "[S]tatutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute." *Fla. Dep't of Revenue v.*

Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008). The relevant section of Dodd-Frank is titled "Securities *Whistleblower* Incentives and Protection." 15 U.S.C. § 78u-6 (emphasis added). Congress used the term "whistleblower" because the incentives and protection are exclusively for whistleblowers, and "whistleblower" means an individual who provides information to the Commission. Likewise, the anti-retaliation provision is under the section heading "Protection of *Whistleblowers*." 15 U.S.C. §78u-6(h)(1)(A) (emphasis added). Congress used the term "whistleblower" because the anti-retaliation provision is exclusively for whistleblowers, and "whistleblower" means an individual who provides information to the Commission. If Congress intended Dodd-Frank's incentives and protections to extend beyond individuals who provide information to the Commission it would have used a broader term, like "employee" or "individual." But, Congress said the protection is for whistleblowers and it meant the protection is for whistleblowers.

Similarly, the structure of the anti-retaliation provision and the context of the word "whistleblower" within the provision support limiting whistleblower status to those who provide information to the Commission. The anti-retaliation provision begins with the operative clause "[n]o employer may discharge . . . or in any other manner discriminate against, *a whistleblower* . . . because of any lawful act done *by the whistleblower*." 15 U.S.C. § 78u-6(h)(1)(A) (emphasis added). Congress' dual use of the term "whistleblower" unambiguously prohibits employers from retaliating against whistleblowers, and "whistleblower" means an individual who provides information to the Commission. If Congress intended these protections to shield

individuals who did not provide information to the Commission, it would have used a broader term like "employee" or "individual."

Following the anti-retaliation provision's operative clause, Congress describes three categories of conduct protected from employer retaliation. Employers may not retaliate against a whistleblower 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. § 78u-6(h)(1)(A). Congress placed these three categories of protected conduct after the operative clause because these subdivisions are subordinate to the operative clause, indicating that one must be a whistleblower to have their conduct protected from retaliation. There is nothing ambiguous about this. There is no reason why the statutory requirement for a report to the Commission would not apply here. Therefore, an individual must provide information "to the Commission" to be protected from retaliation.

Petitioner contends Dodd-Frank is ambiguous because the "whistleblower" definition given in § 78u-6(a)(6) somehow conflicts with the protected activity found in subdivision (iii) of the anti-retaliation provision. However, in its unanimous decision in *Asadi v. G.E. Energy United States, L.L.C.*, the Fifth Circuit explained why "th[is] perceived conflict between § 78u-6(a)(6) and § 78u-6(h)(1)(A)(iii) rests on

a misreading of the operative provisions of § 78u-6." 720 F.3d 620, 625 (5th Cir. 2013).

The appellant in *Asadi* made an internal report that was protected under Sarbanes-Oxley, but did not provide information to the Commission. 720 F.3d at 625. His internal report fell into the category of action protected by subdivision (iii), yet he was not protected from retaliation because he did not make a report *"to the Commission*." *Id.* He argued this conflict created ambiguity. *Id.* at 621. The court denied his claim because this perceived conflict relies on the incorrect assumption that the anti-retaliation provision defines three additional categories of Dodd-Frank whistleblowers. *Id.* To the contrary, "[t]he three categories listed in subparagraph § 78u-6(h)(1)(A) represent the protected activity in a whistleblower-protection claim. They do not, however, define which individuals qualify as whistleblowers." *Id.* The language and structure of § 78u-6(h)(1)(A) support this logic: "No employer may discharge . . . a whistleblower . . . because of any lawful act done by the whistleblower" that falls into one of the three categories of protected actions. § 78u-6(h)(1)(A). "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 626. First, the protection is granted to "a whistleblower." *Id.* Second, "any lawful act done by the whistleblower" that falls into one of the three categories is protected from retaliation." *Id.* Like the appellant in *Asadi*, Petitioner's internal report does not satisfy Dodd-Frank's requirement to provide information to the Commission. Even if her internal report falls into the

category of protected action found in subdivision (iii) she does not qualify for protection because she did not make a simultaneous report to the Commission.

Petitioner relies on *Somers v. Digital Realty Trust, Inc.*, 850 F.3d 1045 (9th Cir. 2017), and *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015), to support her claim of ambiguity. Both circuit courts, in split-panel decisions, hinged their decision on the fact that applying the statutory "whistleblower" definition to the anti-retaliation provision would extremely limit the scope of subdivision (iii); thus, subdivision (iii) is superfluous and the statute is ambiguous. *Somers*, 850 F.3d at 1050; *Berman*, 801 F.3d at 152.

Petitioner's argument fails for two reasons. First, this argument fails to recognize Congress' unambiguous intent to protect whistleblowers from retaliation for three specific types of conduct. *Asadi*, 720 F.3d at 625. Subdivision (i) protects the whistleblower from retaliation for the act that actually made them a whistleblower. *See* § 78u-6(h)(1)(A)(i) ("No employer may discharge . . . a whistleblower . . . because of any lawful act done by the whistleblower – (i) in providing information to the Commission"). Subdivision (ii) protects the whistleblower from retaliation for cooperating with the Commission after providing information to the Commission. *See* § 78u-6(h)(1)(A)(ii) ("No employer may discharge . . . a whistleblower . . . because of any lawful act done by the whistleblower . . . (ii) in initiating, testifying in, or assisting in any investigation . . . of the Commission based upon or related to such information."). Subdivision (iii) "protects whistleblowers from retaliation, based not on the individual's disclosure of

information to the SEC but, instead, on that individual's other possible required or protected disclosure(s)." *Asadi*, 720 F.3d at 627; *see* § 78u-6(h)(1)(A)(iii) ("No employer may discharge . . . a whistleblower . . . because of any lawful act done by the whistleblower . . . (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . .). Each subdivision of § 78u-6(h)(1)(A) protects a specific type of conduct by the whistleblower.

Second, as the dissent in *Berman* pointed out, even if subdivision (iii) has an extremely limited effect, there is "no support for the proposition that when a plain reading of a statutory provision gives it an 'extremely limited' effect, the statutory provision is impaired or ambiguous." 801 F.3d at 158 (Jacobs, J., dissenting). Subdivision (iii) does indeed have a limited scope, but this does not create ambiguity. Congress recognized a gap in the anti-retaliation provision and filled that gap with subdivision (iii). The *Asadi* court showed the need for subdivision (iii) with an example of an employee who simultaneously reports a violation of the securities law to her supervisor and to the Commission. 720 F.3d at 627. If her supervisor, unaware of the report to the Commission, fires her for the internal report, she would not be protected by subdivisions (i) or (ii). *Id.* She would, however, be protected by subdivision (iii) because she made a report to the Commission, and her internal report was protected by Sarbanes-Oxley. *Id.* Subdivision (iii) only provides protection in limited circumstances, but it is not superfluous because it serves a purpose. Subdivision (iii) serves to protect those who make simultaneous reports, both internally and to the Commission. Petitioner did not make a

simultaneous report to the Commission, so Petitioner's internal report is not entitled to protection under subdivision (iii).

In spite of the clear need to protect whistleblowers who make simultaneous reports, the Ninth Circuit held Dodd-Frank was ambiguous because "[e]mployees are not likely to report in both ways, but are far more likely to choose reporting either to the SEC or reporting internally." *Somers*, 850 F.3d at 1049. However, the unlikelihood of simultaneous reporting does not diminish the need to protect individuals who do make simultaneous reports. Congress' choice to ensure protection for a small subset of whistleblowers who simultaneously report internally is not ambiguous.

As a last ditch effort to find ambiguity in the Act, Petitioner relies on the *Berman* court's reasoning that Dodd-Frank is ambiguous because Congress added subdivision (iii) to the anti-retaliation provision at the last minute. 801 F.3d at 155. The court in *Berman* posed two questions to support its idea that adding subdivision (iii) at the last minute created ambiguity. *Id.* First, "[w]hen [Congress] at the last minute, inserted subdivision (iii) within [the anti-retaliation provision], did they expect subdivision (iii) to be limited by the statutory definition of 'whistleblower'[?]" *Id.* If Congress did not "expect subdivision (iii) to be limited by the statutory definition of 'whistleblower,'" it would have removed the definition from the statute. Congress could have just as easily removed the requirement for a report to the Commission by removing the words "to the Commission" from the statutory definition, but it did not. The second question posed by the court is, did

Congress "expect *employees* to be protected by subdivision (iii) whenever they report violations internally, without reporting to the Commission?" *Id.* (emphasis added). First, the court conveniently used the term "employee," disregarding Congress's use of the term "whistleblower" in the operative clause of the anti-retaliation provision. 15 U.S.C. § 78u-6(h)(1)(A). Second, if Congress wanted to protect "employees" rather than "whistleblowers," the term "whistleblower" would have been removed from the operative clause of the anti-retaliation provision. Congress did not create ambiguity in Dodd-Frank by adding subdivision (iii) at the last minute.

Dodd-Frank's plain language unambiguously limits its incentives and protections to individuals who make a report to the Commission. If the text is plain and unambiguous, then the inquiry is over and the statute must be applied according to its terms. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). This Court must apply Dodd-Frank according to its terms, and hold that Petitioner is not a whistleblower because she did not provide information to the Commission.

B. Even if this court finds Dodd-Frank's language is ambiguous, The SEC regulation is not entitled to *Chevron* deference.

The SEC regulation is not entitled to *Chevron* deference for two reasons. First, Dodd-Frank's text is unambiguous. When the text is unambiguous, "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." *Chevron*, 467 U.S. at 842–43. Second, even if there was ambiguity in Dodd-Frank's text, the Court need not give deference to the SEC's unreasonable interpretation of the Act. *Id.* The SEC regulation is not a reasonable interpretation of Dodd-Frank because it creates ambiguity by directly

contradicting the text, directly contradicts itself, and removes the distinction between Sarbanes-Oxley and Dodd-Frank.

1. The SEC regulation is not a reasonable interpretation of Dodd-Frank because the interpretation directly contradicts Dodd-Frank's plain language and creates ambiguity.

First, the SEC regulation is not a reasonable interpretation of Dodd-Frank because it directly contradicts the statutory definition of whistleblower. Dodd-Frank's whistleblower definition requires a report "to the Commission," 15 U.S.C § 78u-g(a)(6), but the SEC regulation confers whistleblower status upon individuals who do not make a report "to the Commission." 17 C.F.R. 240.21F-2(b)(1)(ii). This contradiction is unreasonable.

Second, the SEC regulation is not a reasonable interpretation of Dodd-Frank because applying the regulation creates ambiguity within the Act. Integrating the SEC regulation into Dodd-Frank's text requires either (1) ignoring the words "to the Commission" in the statutory definition, or (2) giving the word "whistleblower" different meanings in different sections of the Act. Both of these options violate canons of statutory construction. Ignoring the words "to the Commission" renders the phrase surplusage, and this Court has been "'reluctant to treat statutory terms as surplusage' in any setting." *Duncan*, 533 U.S. at 174 (quoting *Babbit*, 515 U.S. at 698).

Conversely, to avoid creating textual surplusage, the term "whistleblower" would require different meanings in the definition section and the anti-retaliation section. The Ninth Circuit supported two meanings for the term "whistleblower"

stating "[t]erms can have different operative consequences in different contexts." *Somers*, 850 F.3d at 1049. In this situation, "whistleblower" having two meanings would produce an absurd result. The term "whistleblower" appears thirty-six times in the relevant section of Dodd-Frank, 15 U.S.C. § 78u-6, but the SEC regulation only redefines "whistleblower" "[f]or the purposes of the anti-retaliation protections." 17 C.F.R. § 240.21F-2(b). The anti-retaliation provision contains only two of Dodd-Frank's thirty-six uses of the term "whistleblower." *See* 15 U.S.C. § 78u-6. The regulation does not specify whether this new class of whistleblowers would be eligible for any other whistleblower incentives or protections provided by the Act. This Court stresses the "basic canon of statutory construction that identical terms within an Act bear the same meaning" to prevent this absurd result. *Cowart*, 505 U.S. at 479. Multiple definitions of "whistleblower" within Dodd-Frank would be nonsensical. Moreover, there is no need for the regulation's new definition because the statutory definition of whistleblower can be used consistently throughout the entire Act. To avoid creating ambiguity, this Court should not give deference to the SEC regulation.

2. The SEC regulation is not a reasonable interpretation of Dodd-Frank because it inconsistently defines the term "whistleblower."

The SEC regulation is not reasonable because the interpretation is inconsistent and contradicts itself. In 17 C.F.R. § 240.21F-2(b)(1), the SEC regulation adopts a broader definition of "whistleblower" that does not require a report to the Commission. However, 17 C.F.R. § 240.21F-9, which details the procedures for submitting a report to the Commission, explicitly requires an

employee report to the Commission to garner whistleblower status. Specifically, 17 C.F.R. § 240.21F-9 provides, "To be considered a whistleblower under [the Dodd-Frank anti-retaliation provision], you must submit your information about a possible securities law violation by either of these methods: (1) Online, through the Commission's Web site . . . ; or (2) By mailing or faxing a Form . . . to the SEC Office." One section of the regulation bestows whistleblower status on an individual who does not report a securities violation to the Commission while another section simultaneously grants whistleblower status only to an individual who makes a report to the Commission. As the *Asadi* court stated, "The SEC's inconsistency in defining the term 'whistleblower' for purposes of the Dodd-Frank whistleblower-protection provision does not strengthen [Petitioner's] position that the SEC's regulation 'reasonably effectuate[s] Congress' intent.'" 720 F.3d at 630 (quoting *Texas v. United States*, 497 F.3d 491, 506 (5th Cir. 2007)). If the SEC regulation does not "reasonably effectuate Congress' intent," it cannot be a reasonable interpretation of the Act and does not warrant *Chevron* deference.

3. The SEC regulation removes any distinctions between the Sarbanes-Oxley and Dodd-Frank whistleblower protections.

Finally, the SEC regulation is not a reasonable interpretation because it renders the Sarbanes-Oxley anti-retaliation provision moot. Sarbanes-Oxley requires whistleblowers exhaust all administrative remedies before initiating litigation. 18 U.S.C. § 1514A(b)(1). Dodd-Frank does not require any administrative action. Instead, it requires whistleblowers make a report to the Commission. 15 U.S.C. § 78u-6(a)(6). The SEC regulation would render anyone who qualifies for

protection under Sarbanes-Oxley concurrently eligible for Dodd-Frank protection, but does not require exhausting administrative remedies *or* a report to the Commission. 17 C.F.R. 240.21F-2(b). The SEC regulation allows litigants to circumvent steps Congress made mandatory before pursuing litigation. Moreover, Dodd-Frank has a six-year statute of limitations, 15 U.S.C. § 78u-6(h)(1)(B)(iii), while Sarbanes-Oxley only has a six-month statute of limitations, 18 U.S.C. § 1514A(b)(2)(D). Dodd-Frank also provides for damages in the form of double back pay, 15 U.S.C. § 78u-6(h)(1)(C)(ii), while Sarbanes-Oxley does not. 18 U.S.C. § 1514A(c)(2). The SEC regulation would render the Sarbanes-Oxley anti-retaliation provision moot because employees would only sue under Dodd-Frank rather than Sarbanes-Oxley to reap the benefits of Dodd-Frank's statute of limitations and double back pay. As the Ninth Circuit pointed out in *Somers*, "Reporting to the SEC brings a higher likelihood of a problem being addressed, along with an increased risk of employer retaliation, whereas internal reporting may be less efficient but safer." 850 F.3d at 1049–50. This is precisely why Congress provided different requirements and different remedies for Dodd-Frank whistleblowers and Sarbanes-Oxley whistleblowers. Reporting to the SEC brings an increased risk of employer retaliation, so Dodd-Frank rewards that risk with a longer statute of limitations and double back pay. The SEC regulation is unreasonable because removes the distinction between Dodd-Frank and Sarbanes-Oxley, thus this Court should not accord the SEC regulation deference.

So as to not upset the statutory scheme intended by Congress, this Court should not defer to the SEC regulation. The regulation provides an unreasonable interpretation of the statute, and *Chevron* instructs that the Court should not give deference to an agency's unreasonable interpretation. 467 U.S. at 842–43.

This Court should affirm the decision of the Thirteenth Circuit Court of Appeals and hold that Petitioner is not a Dodd-Frank whistleblower because she did not make a report to the Commission.

II. KARL WOODWARD'S SUBSTANTIVE DEPOSITION CHANGES SUBMITTED THROUGH AN ERRATA SHEET WERE AUTHORIZED UNDER THE PLAIN TEXT OF FEDERAL RULE OF CIVIL PROCEDURE 30(E).

This Court should affirm the decision of the Thirteenth Circuit Court of Appeals and hold that Karl Woodward's ("Woodward") substantive deposition changes were authorized under the plain text of Federal Rule of Civil Procedure 30(e). This Court should also affirm the Thirteenth Circuit's decision not to reopen Woodward's deposition because his changes do not render his deposition testimony useless or incomplete.

Federal Rule of Civil Procedure 30(e) provides clear directions for changing a deposition transcript. Fed. R. Civ. P. 30(e). The rule states that before the deposition is completed a deponent or party may request that the deponent be allowed thirty days to review the deposition transcript and, if necessary, submit changes to the deposition. Fed. R. Civ. P. 30(e). The rule further stipulates that "if there are any changes in form *or substance* . . . [the deponent must] sign a

statement listing the changes and the reasons for making them." Fed. R. Civ. P. 30(e) (emphasis added).

In interpreting Rule 30(e), most courts agree a deponent can, and should, change any necessary form and transcription errors. A. Darby Dickerson, *Deposition Dilemma: Vexatious Scheduling and Errata Sheets*, 12 Geo. J. Legal Ethics 1, 55-56 (1998). However, courts generally split on the issue of whether substantive, contradictory changes are permitted under the language of Rule 30(e). Most courts interpret Rule 30(e) broadly, placing no restrictions on the type or quantity of deposition changes, even if the changes contradict the original answers or the reasons for the changes are unconvincing. *See Pina v. Children's Place*, 740 F.3d 785, 792 (1st Cir. 2014); *Podell v. Citicorp Diners Club*, 112 F.3d 98, 103 (2d Cir. 1997). A smaller sect of courts interpret Rule 30(e) narrowly, only allowing changes for typographical or stenographical errors. *See Trout v. First Energy Generation Corp.*, 339 Fed. Appx. 560, 565 (6th Cir. 2009); *Thorn v. Sundstrand Aero. Corp.*, 207 F.3d 383, 389 (7th Cir. 2000).

This Court directs that the Federal Rules of Civil Procedure be given their plain meaning. *Business Guides, Inc. v. Chromatic Communs. Enters.*, 498 U.S. 533, 540 (1991). Accordingly, the only proper interpretation of Rule 30(e) is the broad interpretation because the plain text of Rule 30(e) allows for changes "in form *or substance*" and places no limitations on the type of substantive changes allowed in deposition testimony. Therefore, the Thirteenth Circuit correctly held that Rule 30(e) allowed Woodward to make substantive changes to his deposition.

A. This Court should apply the plain meaning of Federal Rule of Civil Procedure 30(e) which allows for substantive changes to a deposition.

This Court directs that "we give the Federal Rules of Civil Procedure their plain meaning." *Business Guides,* 498 U.S. at 540; *see, e.g.*, *Pavelic & LeFlore v. Marvel Entm't Group, Div. of Cadence Indus. Corp.*, 493 U.S. 120, 123 (1989) (applying the plain meaning to Rule 11; "Our task is to apply the text, not to improve upon it."); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n. 9 (1980) (applying the plain meaning to Rule 3); *Marek v. Chesny*, 473 U.S. 1, 9 (1985) (applying the plain meaning to Rule 68). As with a statute, the judicial inquiry is complete if the court finds "the text of the Rule to be clear and unambiguous." *Business Guides*, 498 U.S. at 540–41; *Pavelic & LeFlore*, 493 U.S. at 123; *see Connecticut Nat'l Bank*, 503 U.S. at 253 ("When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."). Additionally, this Court further instructs courts to "disfavor interpretations of statutes that render language superfluous." *Id.*

The plain language of Rule 30(e) allows deponents to make "changes in form *or substance*." Fed. R. Civ. P. 30(e) (emphasis added). Black's Law Dictionary defines "substance" as "a matter concerning the merits or critical elements, rather than mere formalities." *Substance*, BLACK'S LAW DICTIONARY (10th ed. 2014). "Form" is defined as "the outer shape, or configuration of something, as distinguished from its substance or matter." *Form*, BLACK'S LAW DICTIONARY (10th ed. 2014). Similarly, the Merriam-Webster dictionary defines "substance" as "a fundamental or characteristic part or quality" of something, *Substance*, MERRIAM-

WEBSTER DICTIONARY (11th ed. 2016), as opposed to "form" which is "the shape and structure of something." *Form*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2016). The terms' plain meanings demonstrate Rule 30(e) permits two distinct types of changes. Applying the plain-meaning statutory canon to Rule 30(e), the Rule's plain text allows for *both* stenographic errors by the court reporter (form changes) *and* material changes to the deposition testimony (substance changes). Any interpretation other than the plain meaning would render the words "form" or "substance" superfluous within the Rule – a Clear violation of this court's commandment to disfavor interpretations of statutes that render language superfluous. *Connecticut Nat'l Bank*, 503 U.S. at 253.

The courts applying the broad, plain-meaning interpretation of Rule 30(e), characterized as the traditional or majority view, note "that the Rule places no limitations on the type of changes that may be made by a witness before signing th[e] deposition" so long as the deponent timely submits the changes and reasons for the changes. *Allen & Co. v. Occidental Petroleum Corp.*, 49 F.R.D. 337, 340 (S.D.N.Y. 1970) (holding that "[t]he Rules are to be liberally construed" so that "the witness may make changes of any nature, no matter how fundamental or substantial); *see also Summerhouse v. HCA Health Serv. of Kan.*, 216 F.R.D. 502, 504–05 (D. Kan. 2003) (noting that "the language describing the breadth of permitted changes has remained essentially unaltered since the adoption of the Federal Rules of Civil Procedure in 1937"). Substantive changes are allowed, "even if the changes contradict the original answers or even if the deponent's reasons for

making the changes are unconvincing." *Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981) (citing *Allen*, 49 F.R.D. at 340).

In *Lugtig*, the foremost broad-interpretation case, the court allowed the deponent to make sixty-nine substantive changes in his deposition transcript. 89 F.R.D. at 641. Based on the application of the plain meaning of Rule 30(e), the court found that the deponent could make changes that contradicted the deponent's original answers, even if those changes were supported by unconvincing explanations, so long as the deponent submitted the changes within thirty days and provided reasons for the changes. *Id.* The court acknowledged deponent's "changes were substantive[,] not corrections of typographical or transcription errors." *Id.* In thirty of the sixty-nine changes, the deponent retracted his original responses and instead stated that "he either did not know the answer, did not remember, or did not understand the question." *Id.* For other responses, a "yes" answer was changed to "no" and vice-versa. *Id.* The court observed that Rule 30(e) specifically authorizes substantive changes without placing any limits on the nature of the changes. *Id.* (citing *Allen*, 49 F.R.D. at 340).

Since the *Lugtig* decision, two circuits and over a dozen district courts have followed the direction mandated by this Court to apply the plain meaning to the Federal Rules of Civil Procedure. Resultantly, the broad intention courts have held that the plain text of Rule 30(e) allows for material, contradictory changes to depositions via errata sheets because the Rule allows for changes "in form *or substance*." *See e.g., Podell*, 112 F.3d at 103 (holding that the language of Rule 30(e)

places no limits on the types of changes that a deponent can make to deposition testimony, even where such changes materially alter deposition testimony); *Pina*, 740 F.3d at 791–92 ("Rule 30(e) does not limit a party to the correction of stenographic errors; it permits changes 'in form or substance) (emphasis in original); *Hawthorne Partners v. AT&T Tech.*, 831 F. Supp. 1398, 1406 (N.D. Ill. 1993) ("A witness can make changes that contradict the original answers, and the reasons given need not be convincing."); *Foutz v. Town of Vinton*, 211 F.R.D. 293, 295 (W.D. Va. 2002) (rejecting the narrow interpretation by finding that "the better reasoned decisions interpret FRCP 30(e) broadly so as to allow proposed deposition changes to be admitted into evidence"); *Deloach v. Philip Morris Cos., Inc.*, 206 F.R.D. 568, 573 (M.D.N.C. 2002) (rejecting defendants' reading of Rule 30(e), which would strike all but typographical errors, as too narrow); *Cultivos Yadran S.A. v. Rodriguez*, 258 F.R.D. 530, 533 (S.D. Fla. 2009) (adopting the "majority view interpreting Rule 30(e) broadly" because it is in line with the plain language of the rule); *Holland v. Cedar Creek Mining, Inc.*, 198 F.R.D. 651, 653 (S.D.W. Va. 2001) ("[T]he rule itself clearly recognizes that a deponent may make any 'changes in form or substance'"); *Tingley Sys., Inc. v. CSC Consulting, Inc.*, 152 F. Supp. 2d 95, 120 (D. Mass. 2001) ("[T]he express language of Rule 30(e) allows a deponent to change the substance of his answers."); *Purdee v. Pilot Travel Ctrs., LLC*, No. CV407-028, 2007 U.S. Dist. LEXIS 78783, *3 (S.D. Ga. 2007) ("There is no merit to defendant's contention that a deponent cannot make substantive changes to her testimony by way of Rule 30(e) errata corrections[.]")

Courts espousing the broad, plain-meaning interpretation of Rule 30(e) ordinarily implement one of two safeguards, discussed *infra*, to protect Rule 30(e) against abuse. The first safeguard mandates that both the original answer and the revised answer remain a part of the record. *See Lugtig*, 89 F.R.D. at 641. The second safeguard allows the court to reopen the deposition if the changes make the deposition useless or incomplete without further testimony. *Id.* at 642. Given that the broad, plain-meaning interpretation of Rule 30(e) follows this Court's instruction and protects against abuse by providing two safeguards, this Court should hold Rule 30(e) allows for substantive, even contradictory, changes to deposition testimony.

1. Applying the broad, plain-meaning interpretation to Rule 30(e) furthers the purpose of discovery.

Not only does the broad interpretation of Rule 30(e) comport with this Court's instruction to apply the plain meaning to the Federal Rules of Civil Procedure, the broad interpretation also "furthers the purpose of the discovery process." *Reilly v. TXU Corp.*, 230 F.R.D. 486, 490 (N.D. Tex. 2005). Reading Rule 30(e) to allow for substantive, contradictory changes to deposition testimony allows the parties "to elicit the true facts of a case before trial" which is the very essence of the discovery process. *Id.* Additionally, "[a]llowing a witness to change his deposition before trial eliminates the likelihood of deviations from the original deposition in his testimony at trial." *Lugtig*, 89 F.R.D. at 641. The broad, plain-meaning interpretation of Rule 30(e) is an efficient procedure to reduce surprises at trial, thereby "secur[ing] the

just, speedy, and inexpensive determination of every action and proceeding" – the fundamental purpose of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 1.

2. This court should reject the narrow interpretation of Rule 30(e) because it violates the plain-meaning canon of statutory interpretation and renders the term "substance" superfluous.

While appellant's policy reasons for applying a narrow interpretation of Rule 30(e) may seem convincing, the simple truth is that the narrow interpretation of the Rule is not grounded in law. Every narrow-interpretation case cites to the language in *Greenway v. International Paper Co.* for its policy justification. 144 F.R.D. 322, 325 (W.D. La. 1992). The *Greenway* court stated, "The Rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. . . . A deposition is not a take home exam." *Id.* at 325. However, the *Greenway* court fails to cite to *any* case law or legislative history to support its decision to incorrectly narrow the scope of changes allowable under Rule 30(e).

The *Greenway* court, and every court to cite to the case since, defied this Court's order to apply the plain meaning to the Federal Rules of Civil Procedure. The plain text of Rule 30(e) allows for changes "in form *or substance*." The narrow interpretation forbids *all* substantive changes, even corrective changes – changes clearly contemplated by the literal language of Rule 30(e). The narrow interpretation resultantly violates a cardinal canon of statutory interpretation because if only typographic or stenographic form changes are allowed, the term "substance" is meaningless and utterly superfluous. While a deposition should not

be "a taken home examination," *Greenway*, 144 F.R.D. at 325, the broad approach implements adequate safeguards to prevent abuse while still allowing for legitimate substantive changes clearly contemplated under the plain text of Rule 30(e). *Reilly*, 230 F.R.D. at 490.

B. Woodward timely submitted his deposition changes and provided reasons for the changes, thereby satisfying the two procedural requirements stipulated by the plain text of Rule 30(e).

Applying the plain-meaning canon of statutory interpretation, as instructed by this Court, Rule 30(e) lists only two requirements to make form or substance changes to a deposition: (1) the changes must be made within thirty days after the deponent receives notice that the deposition transcript is available; and (2) the deponent must provide reasons for any changes. Fed. R. Civ. P. 30(e). Accordingly, a witness who "wishes to invoke the privilege accorded deponents by Rule 30(e) . . . must comply with the instructions which the Rule gives for making changes in deposition testimony." *Lugtig*, 89 F.R.D. at 641; *see United States ex. rel Burch v. Piqua Engineering*, 152 F.R.D. 565, 566–67 (S.D. Ohio 1993) (holding that, under Rule 30(e), "changed deposition answers of any sort are permissible, even those which are contradictory or unconvincing, as long as the procedural requirements set forth in the Rule are also followed").

A deponent wishing to change his or her testimony "must state the specific reason for the particular change." *Sanford v. CBS, Inc.*, 594 F. Supp. 713, 715 (N.D. Ill. 1984). "General conclusory reasons" will not suffice, nor will claiming the reasons are either explicit or reasonably implied from the circumstances. *Id.* While

Rule 30(e) requires specific reasons for each change, the Rule does not "require a judge to examine the sufficiency, reasonableness, or legitimacy of the reasons for the changes." *Lugtig*, 89 F.R.D. at 641; *Colin v. Thompson*, 16 F.R.D. 194, 195 (W.D. Mo. 1954) (stating that whether the deponent's "reasons are good or not will not impair his right to make the changes"). Therefore, "the reasons need not be convincing," but, per the plain language of Rule 30(e), a reason for every change must be present. *Id.*; *Hawthorne*, 831 F. Supp. at 1406. A deponent satisfies the Rule's "reasons" requirement then by simply including the reasons for the deposition changes. *See Lugtig*, 89 F.R.D. at 641; *Sanford*, 594 F. Supp. at 715.

Generally, courts that allow substantive, contradictory deposition changes "insist on strict adherence to the technical requirements of Rule 30(e)." *Holland*, 198 F.R.D. at 653. The court in *Duff v. Lobdell-Emery Manufacturing Co.* expounded that "[t]he rule is not onerous, for the reasons given need not be convincing, but there must be a reason for every change." 926 F. Supp. 799, 804 (N.D. Ind. 1996) (citing *Hawthorne*, 831 F. Supp. at 715). Since the deponent's errata sheet did not provide any reason for the substantive changes to his deposition testimony, the court granted the plaintiff's motion to strike. *Id.* Likewise, the defendant in *Holland* "failed to follow the rule" that he must give reasons for the substantive deposition changes he wished to make. 198 F.R.D. at 653. Notwithstanding the court's finding that the defendant's substantive changes were permissible and timely under Rule 30(e), the court still granted the plaintiff's motion to exclude changes to the defendant's deposition because "[n]o specific reasons accompan[ied]

his changes." *Id.* The *Purdee* court similarly struck two of the plaintiff's deposition changes because the plaintiff "fail[ed] to provide a reason for the alteration[s]," despite a finding that "it [was] permissible for plaintiff to submit an errata sheet that substantively change[d] her answers, even if those changes contradict[ed] her previous testimony." 2007 U.S. Dist. LEXIS 78783, at *6.

First, Petitioner does not dispute the timeliness of Woodward's corrections, nor would she have any grounds to dispute that the corrections were filed within the thirty-day deadline. The district court reviewed the deposition transcript and the errata sheet and found the corrections were "timely delivered to the court reporter under Rule 30(e)(1)." R. at 7. During the Thirteenth Circuit's review, the court noted "Woodward submitted a notarized errata sheet that indicated revisions to his deposition" within one week of receiving notice from the court reporter that the transcript was available. R. at 14. The record presents no additional facts to suggest that Woodward's deposition was in any way untimely. Woodward's changes, therefore, satisfy the first requirement for alterations to a deposition.

Second, under the broad, plain-meaning interpretation of Rule 30(e), Woodward's deposition changes are allowed as long as reasons for his changes are given, regardless of whether his reasons are sufficient, reasonable, or legitimate. Woodward provided reasons for his deposition revisions in an affidavit attached to the notarized errata sheet. Woodward explained that he wished to revise two of his answers because of a recent conversation he had with Sentinel's general counsel and CFO Karen Crowder. During their conversation, Crowder reminded Woodward

of a meeting management held to address the allegations that Foster fabricated quotations for the Ally's Organics IPO article. Woodward additionally stated he had forgotten about the meeting while giving his original testimony because of his preoccupation with his spouse's recovery from knee surgery. Therefore, Woodward's mere act of providing reasons for his substantive changes to his deposition testimony via an errata sheet satisfies the second requirement for alterations to a deposition.

Since Woodward satisfied both requirements for making substantive changes to his deposition testimony, as stipulated by the plain language of Rule 30(e), the Thirteenth Circuit correctly found that Woodward's changes were admissible.

C. Two extensive safeguards protect Rule 30(e) from potential abuse.

Since the plain-meaning interpretation of Rule 30(e) potentially allows for abuse of the rule, courts have read two significant safeguards into Rule 30(e) so as to prevent a crafty deponent from altering what was said under oath. First, both the original answers and the amended answers remain a part of the record. *See Usiak v. New York Tank Barge Co.*, 299 F.2d 808, 810 (2d Cir. 1962). Second, the deposition may be reopened if the changed responses render the original testimony incomplete or useless without further questioning. *See Allen*, 49 F.R.D. at 341.

1. Both Woodward's original deposition responses and his revised responses remain a part of the record nullifying any claims Rule 30(e) abuse.

While Rule 30(e) authorizes a deponent to substantively change a deposition answer, "nothing 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; *Titanium Metals Corp. v. Elkem Mgmt., Inc.*, 191 F.R.D. 468, 472 (W.D. Pa. 1998) (declining to strike changes to deposition testimony, but ordering that original answers remain a part of the record along with the changes). In fact, since "[a]ny out-of-court statement by a party is an admission," a deponent's "original answer should [be] admitted [into evidence]" even when the deponent amends the deposition testimony. *Usiak*, 299 F.2d at 810; *see also Podell*, 112 F.3d at 103. "Of course, the [deponent] would then be free to introduce the amended answer and explain the reasons for the change." *Usiak*, 299 F.2d at 810. The safeguard requiring both the original and revised answer to be admitted into evidence protects against abuse because "a witness may be impeached with his contradictory answers." *Foutz*, 211 F.R.D. at 295. By allowing both answers to be available, the trier of fact "should be able to discern the artful nature of the changes" and determine the truth from either the original or revised answer. *Elwell v. Conair, Inc.*, 145 F. Supp. 2d 79, 87 (D. Me. 2001). The instruction of Rule 30(e) stating that the changes be made in "a statement listing the changes and the reasons for making them" implies the changes do not supplant the original answers, but rather serve as an addendum to the deposition transcript. Fed. R. Civ. P. 30(e).

In addition to the Rule's text and case law supporting the implementation of this safeguard, policy also supports the conclusion that requiring both the original deposition answer and the revised answer sufficiently safeguard Rule 30(e) from abuse when courts correctly interpret the Rule using the plain-meaning canon.

> The witness who changes his or her testimony on a material matter between the giving of the deposition and appearance at the trial may be impeached by the former answers, and the crossexaminer and the jury are likely to be keenly interested in the reasons for changing the testimony. There is no apparent reason why the witness who has a change of mind between the giving of the deposition and its transcription should be treated differently.

Wright & Miller, Federal Practice & Procedure, § 2118. Deponents will not frivolously change deposition responses because doing so would highlight an element of the deponent's testimony that may have gone unnoticed by the trier of fact. The safeguard, thus, vehemently shields Rule 30(e) from abuse since the deponent knows "the original answers as well as the changes and the reasons will be subject to examination by the trier of fact." *Lugtig*, 89 F.R.D. at 642.

Courts applying the proper, broad interpretation to Rule 30(e) generally mandate both versions be included in the record to protect Rule 30(e) from abuse. For example, in *Podell*, the Second Circuit agreed that Rule 30(e) placed no limitations on the types of changes the plaintiff could make to his deposition, but the plaintiff "was not entitled to have his altered answers take the place of the original ones[.]" 112 F.3d at 103. After reviewing his deposition, the plaintiff "drew lines through the damaging responses" and tried to supplant his initial answers for answers which would have raised a genuine issue of material fact. *Id.* Instead, the Second Circuit held that both the plaintiff's original answers and revised answers became "part[s] of the record generated during discovery" and the district court could rely on either set of responses when granting summary judgment. *Id.*

Neither Woodward nor Sentinel claim that Woodward's revised answers from the errata sheet supplant his original deposition testimony. Unlike the deponent in *Lugtig*, who drew lines through the deposition he wished to replace with the revised answers, Woodward's errata sheet did not indicate in any way that he sought to replace his original testimony with his revised answers. In fact, the first words of his revised answers, "And" and "But," demonstrate that his revised answers follow from a previous sentence instead of serving as a substitute for the original answers. Since Woodward's revised answers do not displace his original answers, both answers remained a part of the record and the district court judge was free to consider both answers when it granted Petitioner's motion for summary judgment. Therefore, the safeguard served its stated purpose to protect Rule 30(e) from abuse.

2. While Rule 30(e) allows for a deposition to be reopened, Woodward's revisions to his testimony do not warrant reopening his deposition.

The second safeguard built into Rule 30(e) to protect against abuse allows the party who took the deposition to reopen the deposition if the changes "make the deposition incomplete or useless without further testimony." *Lugtig*, 89 F.R.D. at 642 (citing *Allen*, 49 F.R.D. at 341); *see also Colin*, 16 F.R.D. at 195 (holding that if the revised answers "destroy the usefulness of the deposition . . ., then the deposition will not have been finalized, and the [deponent] will be subject to further examination."). If a court chooses to reopen the deposition, the re-questioning allowed is limited in scope. *Reilly*, 230 F.R.D. at 491. The deposing counsel can only "ask questions which were made necessary by the changed answers, questions about the reasons the changes were made, and questions about where the changes

originated, whether with the deponent or his attorney." *Lugtig*, 89 F.R.D. at 642; *Reilly*, 230 F.R.D. at 491.

When deciding whether to reopen a deposition courts look to the number and types of changes made to the deposition. In *Lugtig,* the court found that sixty-nine substantive changes warranted reopening the deposition because the changes were so significant they caused the deposition to be incomplete or useless without further testimony. 89 F.R.D. at 641. In thirty of the sixty-nine changes, the deponent retracted the original statement and "instead stated that he either did not know the answer, did not remember, or did not understand the question." *Id.* For other questions, the deponent changed a "yes" answer to a "no" answer and vice versa. *Id.* The deponent also changed several figures provided in his original testimony. *Id.* Given the breadth of changes deponent wished to make to his testimony, the court allowed the deposing counsel to reopen the deposition, but only allowed follow up questions made necessary by the changed answers. *Id.* at 642.

Similarly, the *Reilly* court found that even when applying the broad interpretation of Rule 30(e) to allow for substantive, contradictory changes, reopening the deposition was the appropriate remedy due to the number and significance of the changes. 230 F.R.D. at 491. The deponent submitted an errata sheet containing 107 changes which substantively altered the original deposition testimony. *Id.* at 487. For several responses the deponent changed a "no' response to a "yes" response and expanded on the original answer. *Id.* The court in *Tingley* found that twenty-two corrections in the deponent's testimony "materially alter[ed]

the answers such as to render those portions of the deposition incomplete without further testimony." 152 F. Supp. 2d at 121. Likewise, the *Foutz* court found nineteen pages of proposed deposition changes substantive enough to necessitate reopening the deposition. 211 F.R.D. at 295. Contrarily though, the *Hawthorne* court found that forty-one changes in a deposition of more than 500 pages was not such a large amount of changes as to render the deposition incomplete or useless. 831 F. Supp. at 1407. Accordingly, the *Hawthorne* court refused to reopen the deposition. *Id.*

Most recently, the First Circuit in *Pina* held that the district court did not abuse its discretion by refusing to reopen a deposition because the deponent's four page errata sheet "constituted clarification or corrections consistent with [the deponent's] original testimony." 740 F.3d at 792. Plaintiff pointed to three changes in the deponent's testimony which she claimed were material changes. *Id.* In one instance, the deponent changed his answer to a question about whether persons reapplying to work at the defendant-store were interviewed from "Yes, sometimes" to "Yes, when we have a qualified applicant and an open position." *Id.* The court noted that the deponent's revised answers included statements addressing the same subject matter as his original testimony, but provided further clarification. *Id.* Accordingly, the changes to deponent's testimony did not warrant reopening the deposition. *Id.*

Given the exceptionally limited number and non-contradictory nature of the deposition changes Woodward submitted in his errata sheet, Woodward's deposition

should not be reopened. According to the record, Woodward only submitted two changes to his deposition testimony from his entire deposition. This number falls drastically short of 69, 107, or 22 – the number of changes previous courts have found worthy of reopening the deposition. Even if the courts did not consider the types of changes, the sheer number of changes submitted in *Lugtig*, *Reilly*, and *Tingley* would warrant reopening the depositions because so many changes would render the deposition useless without further testimony. However, a mere two changes in Woodward's deposition does not have any material effect on the cumulative total of Woodward's deposition.

The types of changes Woodward submitted on his errata sheet equally do not warrant reopening his deposition. Unlike the blatantly contradictory responses in *Lugtig* and *Reilly*, which changed "yes" responses to "no" responses and vice versa, Woodward's changed responses are not contradictory to his original responses. When asked why Sentinel fired Petitioner, Woodward originally responded that Petitioner "was just too hard to get along with," that "many of her co-workers were afraid of her," and that "her personality was so abrasive." Woodward's revisions in his errata sheet did not contradict his original responses, but rather further expanded on the reasons why Petitioner was fired. Based on his original response, there were multiple reasons why Petitioner was fired. Woodward's revision simply clarified that the accusation of fabricated quotations was an additional factor Sentinel management considered when contemplating Petitioner's termination. The two changes Woodward included on his errata sheet more closely resemble the three

changes allowed, without reopening the deposition, by the First Circuit in *Pina*. The essences of the *Pina* responses were the same after the revisions, as are the essences of Woodward's revised responses.

Accordingly, this Court should affirm the decision of the Thirteenth Circuit and hold that Woodward's substantive deposition changes were authorized under the plain text of Rule 30(e). This Court should also affirm the Thirteenth Circuit's decision not to reopen Woodward's deposition because his changes do not render his deposition testimony useless or incomplete.

CONCLUSION

For the foregoing reasons, this Court should affirm the Thirteenth Circuit's decision holding that (1) Petitioner is not a whistleblower under Dodd-Frank and therefore does not qualify for the Act's anti-retaliation protection; and that (2) Woodward's substantive deposition changes are allowed under Rule 30(e) and the changes do not warrant reopening Woodward's deposition.

APPENDIX

TABLE OF CONTENTS

App. A

15 U.S.C. § 78u-6

Dodd-Frank Wall Street Reform and Consumer Protection Act

Relevant Provisions Below

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§78u–6. Securities whistleblower incentives and protection

(a) Definitions

In this section the following definitions shall apply:

(1) Covered judicial or administrative action

The term "covered judicial or administrative action" means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000.

(2) Fund

The term "Fund" means the Securities and Exchange Commission Investor Protection Fund.

(3) Original information

The term "original information" means information that—

(A) is derived from the independent knowledge or analysis of a whistleblower;

(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and

(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

(4) Monetary sanctions

The term "monetary sanctions", when used with respect to any judicial or administrative action, means—

(A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and

(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

(5) Related action

The term "related action", when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the

original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

(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.

(h) Protection of whistleblowers

(1) Prohibition against retaliation

3. (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.

App. B

17 C.F.R. 240.21F-2

Securities and Exchange Commission Regulations

Whistleblower Status and Retaliation Protections

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§ 240.21F-2 Whistleblower status and retaliation protection.

(a) Definition of a whistleblower. (1) You are a whistleblower if, alone or jointly with others, you provide the Commission with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.

(2) To be eligible for an award, you must submit original information to the Commission in accordance with the procedures and conditions described in §§240.21F- 4, 240.21F-8, and 240.21F-9 of this chapter.

(b) Prohibition against retaliation: (1) For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if:

(i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and;

(ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).
The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.

(2) Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), including any rules promulgated thereunder, shall be enforceable in an action or proceeding brought by the Commission.

App. C

Federal Rule of Civil Procedure 30(e)

Review by the Witness; Changes

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(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.

2017 ALA Moot Court Competition Certification of Compliance

The undersigned counsel certifies that the Respondent's Brief complies with the word limitation specified in Rule C(3)(d) of the ALA Moot Court Competition Rules. The Respondent's Brief contains 11,465 words, including all sections and pages. The word count function for Microsoft Word was relied upon for totaling the number of words in the Respondent's Brief.

Team 9:

_____/s/_____

Counsel for the Respondent