

NORTH CAROLINA
FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 2638

BB&T BOLI PLAN TRUST, by and
through its Trustee,

Plaintiff,

v.

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,

Defendant.

**ORDER ON DEFENDANT'S 10.9
REQUEST**

1. **THIS MATTER** is before the Court on Defendant's December 6, 2017 North Carolina Business Court Rule ("BCR") 10.9 email request for a telephone conference (the "10.9 Request") concerning a discovery dispute that has arisen between the parties.

2. In particular, Defendant seeks an order striking the errata sheet¹ ("Errata Sheet") submitted by Plaintiff's employee, William Duncan Marley ("Mr. Marley"), or, in the alternative, a further deposition of Mr. Marley at Plaintiff's expense. Defendant requests this relief because Defendant contends that Mr. Marley's recently submitted Errata Sheet contained over sixty substantive changes to his deposition transcript, forty of which Defendant argues change "yes" answers to "no" or vice versa, all of which concern matters that relate to central issues in this litigation.

¹ "An attachment to a deposition transcript containing the deponent's corrections upon reading the transcript and the reasons for those corrections." *Errata Sheet*, Black's Law Dictionary (10th ed. 2014).

3. Plaintiff responded to Defendant's 10.9 Request on December 13, 2017, contending that Mr. Marley was confused by the questioning at his deposition, that Mr. Marley had recently stopped taking pain medication prescribed for an earlier knee surgery and was thus suffering pain during his deposition, and that Mr. Marley's substantive changes were fully permitted by and consistent with Rule 30(e) of the North Carolina Rules of Civil Procedure.

4. Having considered the parties' submissions, the arguments of counsel at the December 21, 2017 conference call held to address the 10.9 Request, and the relevant law, the Court concludes and orders as follows.

5. First, the plain language of Rule 30(e) permits a deponent to change his deposition transcript "in form or substance," so long as the deponent "sign[s] a statement reciting such changes and the reasons given by the deponent for making them." N.C. R. Civ. P. 30(e). Although Mr. Marley's substantive changes here appear to be unusual and extraordinary, the Court concludes that those changes are permitted under a plain reading of Rule 30(e), notwithstanding the position taken by a minority of federal courts that have concluded that substantive changes to a deposition transcript should not be allowed. *See, e.g., Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992) ("A deposition is not a take home examination.").

6. Accordingly, the Court denies Defendant's 10.9 Request to the extent it seeks to strike Mr. Marley's Errata Sheet. Nevertheless, Mr. Marley's original answers to the questions posed at his depositions that he subsequently

sought to correct will remain part of the record and may be used for impeachment or for any other relevant purpose.

7. The Court's denial of Defendant's 10.9 Request may raise the issue of whether the Court should consider Mr. Marley's Errata Sheet when ruling on Defendant's recently filed Motion for Summary Judgment (the "Motion"). *See, e.g., Carter v. W. Am. Ins. Co.*, 190 N.C. App. 532, 539, 661 S.E.2d 264, 270 (2008) ("[A] non-moving party cannot create an issue of fact to defeat summary judgment simply by filing an affidavit contradicting his prior sworn testimony."); *see also, e.g., United States ex rel. Robinson v. Ind. Univ. Health Inc.*, 204 F. Supp. 3d 1040, 1041 (S.D. Ind. 2016) (discussing the "sham affidavit doctrine" and its application to errata sheets). Whether the Court needs to consider this issue will hinge on whether either party seeks to rely upon the alterations to Mr. Marley's deposition testimony made in the Errata Sheet in prosecuting or defending against the Motion.

8. **IT APPEARS** to the Court that the parties are not yet in a position to advise the Court as to whether their arguments or positions in connection with the Motion will rely on the Errata Sheet.

9. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **ORDERS** as follows:

- a. Within their response brief and reply brief filed in connection with Defendant's Motion, respectively, the parties shall provide the Court with specific citations whenever they cite to Mr.

Marley's deposition testimony and, in particular, identify with specificity if the testimony cited appears on Mr. Marley's Errata Sheet.

- b. The parties shall each file a statement attached to their response and reply briefs on the Motion, respectively, advising whether the party relies upon Mr. Marley's Errata Sheet in advancing the party's arguments on the Motion.
- c. If either party relies on the Errata Sheet in advancing its position on the Motion, the parties shall file additional briefs addressing whether the Court should consider the Errata Sheet testimony when ruling on Defendant's Motion for Summary Judgment. Briefing shall be completed as follows:
 - i. Each party shall submit its initial brief, not to exceed 3,750 words, by February 13, 2018.
 - ii. Each party shall file a response brief, not to exceed 1,875 words, by February 23, 2018.
- d. The above-outlined additional briefing schedule shall not alter the existing briefing schedule relating to Defendant's Motion.
- e. Should either party rely upon the Errata Sheet in advancing that party's position on the Motion, the parties are to **TAKE NOTICE** that a hearing on whether the Court should consider the Errata Sheet testimony when ruling on Defendant's Motion will be held

on Thursday, March 1, 2018 at 10:00 AM in Courtroom 6370 of the Mecklenburg County Courthouse, 832 East Fourth Street, Charlotte, North Carolina in conjunction with the previously noticed hearing on Defendant's Motion for Summary Judgment.

SO ORDERED, this the 21st day of December, 2017.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Special Superior Court Judge
for Complex Business Cases