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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, WEST DISTRICT

MSG FORUM, LLC, a Delaware Limited Liability Company,

Plaintiff,

v.

CITY OF INGLEWOOD, a municipal corporation; SUCCESSOR AGENCY TO THE INGLEWOOD REDEVELOPMENT AGENCY; THE INGLEWOOD PARKING AUTHORITY; CITY OF INGLEWOOD CITY COUNCIL; MAYOR JAMES T. BUTTS, JR., in his individual and representative capacity; MURPHY'S BOWL LLC; and DOES 1-25, inclusive,

Defendants.

AND RELATED CROSS-ACTIONS

CASE NO. YC072715

CITY OF INGLEWOOD'S NOTICE OF MOTION AND MOTION TO STRIKE THE PURPORTED ERRATA TO MELANIE MCDADE-DICKENS'S DEPOSITION TRANSCRIPT AND MSG FORUM, LLC'S SECOND SUPPLEMENTAL INTERROGATORY RESPONSES

[*Filed Concurrently with Declarations of Jason H. Tokoro and John Harris; [Proposed] Order*]

Reservation ID: 109991449157
Date: August 11, 2020
Time: 8:30 a.m.
Dept.: N

Assigned for All Purposes to:
Hon. Craig D. Karlan, Dept. N

Action Filed: March 5, 2018

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TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 11, 2020 at 8:30 a.m., or as soon thereafter as the matter may be heard in Department N the above-entitled Court, located at 1725 Main Street, Santa Monica, California, Defendant City of Inglewood ("Defendant" or "City") will, and hereby does, move the Court to strike both the purported errata to Melanie McDade-Dickens's ("McDade") July 15, 2019 deposition transcript (the "Errata"), as well as the portions of Plaintiff MSG Forum, LLC's ("MSG") Second Supplemental Responses and Objections to the City's Special Interrogatories, incorporating those Errata.

This Motion is made pursuant to Evidence Code § 353, Code of Civil Procedure § 2025.520, and *D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1 (1974), on the grounds that the Errata is untimely because it was submitted 24 days *after* the parties' stipulated deadline, and on the grounds that the Errata include sham changes which contradict McDade's prior deposition testimony in an attempt to help MSG oppose summary judgment. MSG's Second Supplemental Responses incorporating McDade's Errata should similarly be stricken on the grounds that they are fraudulent and are an attempt by MSG to manufacture factual issues that don't exist.

This Motion is based on this Notice of Motion, the Declarations of Jason H. Tokoro and John Harris and exhibits thereto, all other documents submitted in support of Defendant's Motion, all matters in the Court's file, other matters subject to judicial notice, and any other matters that may be properly brought to the Court's attention at or before the hearing on this Motion.

DATED: October 28, 2019

Respectfully submitted,

MILLER BARONDESS, LLP

By: _____

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FEDERAL RULES

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Keenly aware that it stands on the precipice of losing its fraud claims, MSG Forum, LLC ("MSG") is relying on perjury from City of Inglewood ("City") employee Melanie McDade-Dickens ("McDade"). MSG seeks to manufacture a fact dispute to oppose summary judgment by using an untimely errata letter it procured from McDade containing "changes" to her July 15, 2019 deposition transcript. These changes, which are 148 in number and flatly contradict McDade's sworn testimony, are fraudulent and untimely and should be stricken. MSG's Second Supplemental Interrogatory Responses incorporating these changes should similarly be stricken.

On September 10, 2018, McDade gave a deposition in which she testified that she had no knowledge concerning the key issues in this case—she claimed to know nothing about the Parking Lease Termination, to have never heard the Mayor discuss a "tech park" on the proposed ENA site, and to have learned about the Clippers coming to Inglewood along with the rest of the world when the ENA was publicly announced in June 2017. McDade was deposed for a second time on July 15, 2019 and confirmed that she did not have any changes to her prior deposition. Without exception, McDade's testimony at her second deposition was consistent with her prior testimony—namely that she knew nothing about and was not involved in the Clippers ENA.

At the end of both depositions, McDade, the City, MSG and Murphy's Bowl agreed on the record that McDade would have 30 days to serve errata to her deposition transcript. McDade did not serve errata to either of these depositions by the agreed upon deadline. McDade reviewed and signed the transcript for her first deposition without any corrections.

Despite testifying consistently in two depositions separated by nearly a year in time, McDade now wants to reverse course. Her 180-degree turnabout comes after events that are relevant to this matter. On July 1, 2019, the City placed McDade on paid administrative leave after receiving credible information from City staff that McDade had violated important City policies and potentially committed fraud which, if substantiated, could lead to criminal prosecution. This malfeasance was connected to personal financial pressures relating to McDade's purchase of a home. After learning of the City's investigation into these matters,

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McDade engaged criminal defense attorney Carl Douglas, and later changed her previous testimony to align herself with MSG, against the City of Inglewood.

On September 12, 2019, following two secret, unilateral purported extensions from MSG, McDade served errata for her second deposition (the "Errata"). The Errata is comprised of 148 substantive changes and completely contradicts her sworn testimony on multiple material points.

That is not how discovery works. McDade—and MSG—were bound by stipulation and California law to make any necessary corrections to her testimony within 30 days of receiving the transcript. McDade's failure to do so is dispositive. Per the Code of Civil Procedure, when a deponent fails to correct her testimony "within the allotted period," the unaltered transcript "shall be given the same effect as though it had been approved." Cal. Civ. Proc. Code § 2025.520(f). MSG's attempt unilaterally—and secretly—to extend McDade's deadline fails. The City and Murphy's Bowl *did not agree* to extend the 30-day stipulation, and *MSG could not grant an extension to the stipulation without all parties' consent.*

The number, extent and substance of the Errata confirm its illegitimacy. Rather than correcting errors in the transcript, McDade seeks to rewrite and controvert her sworn testimony. This is a bald-faced attempt by McDade to provide MSG with false evidence to support its fraud claim and oppose the City's motion for summary judgment. Less than two weeks after McDade served the Errata, *and only three days before the City filed its summary judgment motion*, MSG served its Second Amended Responses, contending that McDade's deposition changes constituted "new evidence" in support of its claims.[1]

McDade's Errata, and the Second Amended Responses incorporating the Errata, are fooling no one: they are merely MSG's latest attempt to game the system through the abandonment of sworn testimony at the eleventh-hour. Specifically, the McDade Errata is obviously designed to corroborate the testimony of MSG's Irving Azoff, who is the only MSG witness to controvert the Mayor and whose testimony is therefore critical to MSG's fraud claim.

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[1] MSG has incorporated references to McDade's sham deposition errata in each of its Second Amended Responses. (*See, e.g.,* Declaration of Jason H. Tokoro ("Tokoro Decl.") Ex. L at Amended Response Nos. 1–63.)

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There is only one plausible explanation for McDade's sudden flip and MSG's "new" evidence: They are in cahoots. From the timing and substance of the Errata, and with the change of counsel, they are working together to block the Clippers arena. While the exact nature of their collaboration is not yet fully known, *i.e.*, whether money or other consideration or promises changed hands, these shenanigans should not be permitted to affect these court proceedings and, specifically, not the pending motion for summary judgment.

We know they're working together. As set forth in the accompanying declaration of John Harris, the attorney for the City of Inglewood handling the internal investigation of McDade, McDade's own attorney, Carl Douglas, stated that McDade is working with MSG. Specifically, Mr. Douglas told Mr. Harris:

> You guys [the City] ought to treat my client [McDade] nice. MSG is going to be her best friend. I'm going to have her recant her deposition testimony.

And Mr. Douglas also told Mr. Harris that "I want you to tell the Mayor."

McDade's employment issues with the City are completely unrelated to the MSG litigation, and they would have stayed that way had her attorney, Carl Douglas, not contrived to connect them. The Court should strike McDade's perjurious Errata and order that her prior deposition testimony stands unaltered. The Court should also strike MSG's Second Amended Responses to the extent they incorporate McDade's Errata.

II. BACKGROUND

A. McDade's First Deposition – September 10, 2018

McDade has been a City employee since 2011 and has been the Executive Assistant to the Mayor and City Manager since 2016. MSG noticed McDade's deposition in this case, which occurred on September 10, 2018. (Tokoro Decl. ¶¶ 3–4 & Exs. A–B.) McDade was represented by counsel for the City, Miller Barondess, LLP, at the deposition. (*Id.* ¶ 4.) McDade testified about her job duties, her understanding and knowledge of the contracts at issue, the City's involvement in negotiations between MSG and the Kroenke Group for overflow parking, and MSG's acquisition of The Forum. (*See id.* ¶ 5 & Ex. B at 15:9–24; 19:4–12; 46:11–47:16; 49:8–18; 50:5–51:1; 60:17–61:14.)

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McDade testified that she did not have any knowledge of or involvement in the termination of a parking lease between MSG and the City (*id.* Ex. B at 61:1–14); she had never heard the Mayor discuss a technology park or "Silicon Beach" in Inglewood (*id.* at 62:1–9); and that the first time she learned that the Clippers might be coming to Inglewood was around the time of the public announcement of the ENA in June 2017 (*id.* at 62:10–13).

After the deposition concluded, McDade reviewed her deposition transcript and signed it without making any changes. (*Id.* ¶ 6 & Ex. C.)

B. McDade Is Put On Administrative Leave And Retains Separate Counsel

In June 2019, the City received credible reports that McDade had engaged in certain conduct while employed by the City. The City responded by placing McDade on administrative leave and engaged outside counsel to conduct an investigation. Soon thereafter, McDade hired her own separate counsel, Douglas Winter. (Tokoro Decl. ¶¶ 7–8.) To preserve McDade's privacy, this brief does not address the details of her conduct. Suffice it to say that it was serious enough to require the City to immediately place her on leave and to have her escorted from City Hall.

C. McDade's Second Deposition – July 15, 2019

On July 15, 2019, McDade sat for a second deposition. She was represented by her new counsel, Mr. Winter. (Tokoro Decl. ¶ 9.) At the outset of the deposition, McDade confirmed that she had reviewed her prior deposition testimony and did not want to change any of it. (*Id.* ¶ 10 & Ex. D at 104:1–6.) Consistent with her prior testimony, McDade testified that she did not recall the Mayor ever talking about building a "technology park" in Inglewood and that she did not become aware of the ENA and the Clippers' possible move to Inglewood until around the time it was publicly announced in June 2017. (*Id.* ¶ 11 & Ex. D at 149:17–20 & 183:8–22.)

At the end of the deposition, MSG, the City, McDade and Murphy's Bowl stipulated on the record that deposition errata were due 30 days after McDade's receipt of the transcript:

> **Ms. Smith [for MSG]:** Okay. So we have a stipulation in place about the errata—relieving the court reporter of her statutory duties. We say within 30 days, we would expect—receipt of the trial transcript, we would receive errata from the witness. And the rest would be deemed final if that's okay, or if you want to take time, you can let us know. We also have a protective order in place.
> . . .

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Mr. Winter [for McDade]: Okay. Perfect. Then so stipulated.
Ms. Smith: Okay. Great.
Mr. MacDonald [for Murphy's Bowl]: So stipulated.
Mr. Tokoro [for the City]: So stipulated. (*Id.* Ex. D at 427:8–428:22.)

McDade received the transcript for her second deposition on July 19, 2019. (*Id.* ¶ 13 & Ex. E.) Thus, according to the parties' stipulation, McDade's deadline to make changes was August 19, 2019—thirty days from receipt of the transcript.[2] McDade did not serve any corrections to her deposition transcript on or before the deadline of August 19, 2019. (*Id.* ¶ 14.)

D. McDade Is Being Investigated By The City

Upon learning that the City was conducting an investigation into the matters that led to her being placed on administrative leave, McDade terminated Doug Winter and hired a new lawyer, criminal defense attorney Carl Douglas, on or about August 21, 2019. It was Mr. Douglas who represented McDade at a September 4, 2019 interview conducted as part of the City's investigation into her conduct. During the interview, Mr. Douglas threatened: "You guys [the City] ought to treat my client [McDade] nice. MSG is going to be her best friend. I'm going to have her recant her deposition testimony." (Declaration of John Harris ¶¶ 2–4.)

E. McDade Serves Her Untimely Errata

On September 16, 2019, the City received a copy of a letter sent by Mr. Douglas to counsel for MSG. (Tokoro Decl. ¶ 17 & Ex. F.) The letter, dated September 12, 2019, stated that "on September 12, 2019, [McDade] signed her July 15, 2019 deposition transcript under penalty of perjury, after making" certain changes to it. (*Id.*) The letter—which was signed by Mr. Douglas, not McDade—purported to make 148 changes to 83 pages of the transcript of McDade's second deposition. (*See id.*)

Because the Errata was sent more than three weeks *after* the deadline for McDade to correct her transcript, it is untimely under the parties' stipulation. When the City objected to the purported changes as untimely, MSG disclosed for the first time that it had communicated with

[2] Thirty days from July 19, 2019 is Sunday, August 18, 2019. Where a discovery deadline falls on a non-business day, the deadline is extended until "the next court day closer to the trial date." Cal. Civ. Proc. Code § 2016.060.

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Messrs. Winter and Douglas without including Defendants, and that MSG had purported to unilaterally extend McDade's deadline to serve corrections to her transcript—all without the City's or Murphy's Bowl's knowledge or consent. (*Id.* ¶¶ 18–22 & Exs. G–I.)

F. The City Learns Of McDade's "Deal" With MSG

Since then, the City has obtained two email chains evidencing the purported "extension":

The first email chain contains correspondence between MSG and Doug Winter. It appears that on or about August 14, 2019—just four days before McDade's deadline to correct errors in her deposition transcript—Mr. Winter called MSG's attorneys to ask for an extension. (Tokoro Decl. ¶ 21 & Ex. H.) MSG purported to unilaterally grant McDade a ten-day extension. (*Id.*) Neither McDade nor MSG consulted with Defendants about this extension, nor did they notify the City or Murphy's Bowl that the purported extension had been given. (*Id.*)

The second email chain consists of correspondence between MSG and Carl Douglas. On August 26, 2019, Mr. Douglas emailed MSG's attorneys to ask for another extension of McDade's deadline to serve deposition corrections. (*Id.* ¶ 22 & Ex. I.). MSG purported unilaterally to extend McDade's deadline, this time until September 13, 2019. (*Id.*) Again, neither McDade nor MSG consulted or notified Defendants about the purported extension. (*Id.*)

The City and Murphy's Bowl were not copied on any of these communications between MSG and McDade's lawyers and were unaware of the purported extensions. This violation of the agreed-upon stipulation is all the more egregious given the fact that Mr. Douglas was in direct communication with the City—including regarding its personnel investigation of McDade—and had ample opportunity to inform the City.

G. McDade's Errata Substantively Contradicts Her Sworn Testimony And Is An Attempt To Help MSG Oppose Summary Judgment

McDade's ostensible changes are not only untimely, they are also diametrically opposed to McDade's deposition testimony. On 48 occasions, McDade seeks to change a "no" to a "yes," and at least 59 of the changes seek to substitute detailed answers containing new information for earlier testimony professing lack of knowledge or an inability to recall. Not once does McDade point to a typographical or transcription error. (*See, e.g.,* Tokoro Decl. Ex. F.) Rather, the

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untimely Errata seeks *only* to change the *substance* of McDade's testimony. For example:

Cite	Prior Testimony	Revised Testimony
149:17–20	Q: Ms. McDade-Dickens, have you ever heard Mayor Butts discuss a plan to build a technology park in Inglewood? A: Not that I recall.	Q: Ms. McDade-Dickens, have you ever heard Mayor Butts discuss a plan to build a technology park in Inglewood? A: Yes.
151:6–12	Q: Have you ever heard the Mayor talk about building a tech park or developing a tech park on land located at Century and Prairie in Inglewood? A: No, specific location, no. Q: You never heard him discuss a specific location with respect to a tech park? A: No.	Q: Have you ever heard the Mayor talk about building a tech park or developing a tech park on land located at Century and Prairie in Inglewood? A: Yes. Q: You never heard him discuss a specific location with respect to a tech park? A: Yes.
154:14–155:3	Q: And did you become aware at some point in time that the lease agreement between MSG and the City of Inglewood was terminated? A: Yes. Q: How did you learn of that? A: I guess just talks, just various conversation, talks.	Q: And did you become aware at some point in time that the lease agreement between MSG and the City of Inglewood was terminated? A: Yes. Q: How did you learn of that? A: Listening to the Mayor speak with Irving Azoff while riding in his car on a Sunday.
166:5–10	Q: And Ms. McDade-Dickens, before that meeting you mentioned where you learned that MSG had terminated its lease, did you ever discuss the idea of MSG terminating its parking lease with the City with anyone? A: No.	Q: And Ms. McDade-Dickens, before that meeting you mentioned where you learned that MSG had terminated its lease, did you ever discuss the idea of MSG terminating its parking lease with the City with anyone? A: Yes.
183:17–22	Q: Before [June 15, 2017,] had you ever heard that the Clippers were interested in coming to Inglewood? A: No.	Q: Before [June 15, 2017,] had you ever heard that the Clippers were interested in coming to Inglewood? A: Yes.
287:8–13	Q: Okay. But did the Mayor tell you at some time that he told the Clippers he could make a permanent deal for MSG for parking? A: No. Q: No? A: No, he did not.	Q: Okay. But did the Mayor tell you at some time that he told the Clippers he could make a permanent deal for MSG for parking? A: Yes. Q: No? A: Yes.

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Cite	Prior Testimony	Revised Testimony
289:12–17	Q: So did the Mayor ever tell you at any point in time that he wanted the Clippers to pay $1.5 million for the ENA? A: No. Q: No? A: No.	Q: So did the Mayor ever tell you at any point in time that he wanted the Clippers to pay $1.5 million for the ENA? A: Yes. Q: No? A: Yes.
351:15–21	Q: Have you ever talked to [the Mayor] about what he said to Mr. Azoff to cause MSG to terminate its parking lease with the City? A: No.	Q: Have you ever talked to [the Mayor] about what he said to Mr. Azoff to cause MSG to terminate its parking lease with the City? A: Yes.

MSG immediately sought to capitalize on McDade's changed testimony. On September 17, 2019—less than a week after McDade served her Errata—MSG argued to the Discovery Referee that McDade's changed testimony established that the City and Murphy's Bowl had failed to disclose relevant communications. (Tokoro Decl. Ex. J at 48:13–57:19.)

MSG has also used McDade's Errata to challenge the City's discovery responses and document productions. In a recent reply memorandum on a motion to compel the City, MSG argued that McDade's changed testimony justified sweeping discovery into the communications of every single City employee. (*See id.* ¶ 25.) In that same reply—filed just eight days after McDade served her Errata—MSG attempted to use McDade's revised "tech park" testimony as a hook to get discovery about potential property developments in Inglewood that have nothing to do with The Forum or the ENA site. (*Id.*) At the September 27, 2019 hearing on its motion to compel, MSG reiterated its claim that McDade's changed testimony justified the incredibly expansive discovery now sought. (*See id.* ¶ 26 & Ex. K at 22:19–25:22.)

Within two weeks after McDade served her purported Errata, MSG amended its interrogatory responses to incorporate her changes. (*Id.* ¶ 27 & Ex. I.) For example, MSG now claims that McDade's changed testimony supports its fraudulent inducement claim because it corroborates MSG's previously uncorroborated claim that the Mayor told MSG's Irving Azoff the ENA Property would be used to build a "tech park." (*Id.* Ex. I at 21:26–22:3.)

H. <u>MSG Has A History Of Trying To Manufacture Fact Issues In This Case</u>

Tellingly, MSG waited to serve its second amended interrogatory responses until

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September 24, 2019, *just three days before the City filed its second motion for summary judgment.* (Tokoro Decl. ¶ 27.) These changes are MSG's *second attempt* to manufacture a factual dispute by changing its discovery responses on the eve of a motion for summary judgment being filed. (*Id.* ¶¶ 28–32 & Exs. M–O.) Before the City filed its first summary judgment motion on May 17, 2019, MSG pulled a similar stunt. (*Id.* ¶¶ 28–32 & Exs. M–O.)

MSG's fraud claim as framed in the Complaint alleges that the Mayor represented to Azoff that he needed MSG to terminate its Parking Lease "because he had a tenant for the technology park 'on the hook.'" (*See* First Amended Complaint ¶ 162.) But that assertion was a latter-day invention. When Azoff sat for deposition on July 31, 2018, he testified that the Mayor pointedly refused to reveal anything about the developer's identity, even though Azoff "specifically asked [the Mayor if the developer] was one of . . . the big tech companies." (Tokoro Decl. Ex. M at 86:4–21.) MSG's December 18, 2018 interrogatory responses were consistent with Azoff's testimony, admitting that when the Mayor "told [MSG] that he needed [MSG] to terminate the Parking Lease . . . [he] refused to disclose to [MSG] who the developer was or what purpose the land would be used for." (*Id.* Ex. N at 21:13–18.)

At some point, MSG realized how problematic its interrogatory responses were. On May 16, 2019—mere hours before the City filed its first summary judgment motion—MSG served supplemental and amended responses. (*Id.* ¶¶ 29–32 & Ex. O.) Rather than stick to its previous admissions, MSG did what it's attempting to do now—change its discovery responses to avoid inconvenient truths. Its altered responses backtracked from Azoff's sworn testimony to flip the script and assert that the Mayor affirmatively represented to Azoff that he needed the City Lots "for a tech park." (*Id.* Ex. O at 20:10–21.) MSG's amended responses were an obvious attempt by MSG to impose on the Court by manufacturing a factual dispute to thwart summary judgment.

As explained below, McDade's outrageous and untimely Errata—and MSG's attempts to capitalize on it—are not permitted under California law.

III. LEGAL STANDARD

Evidence Code § 353 authorizes a party to object to, or move to strike, inadmissible evidence. The admissibility of corrections to deposition transcripts is governed in part by Code of

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Civil Procedure § 2025.520, which provides deponents with no more than 30 days to correct the form or substance of their testimony "*unless the attending parties and the deponent agree* on the record or otherwise in writing to a longer . . . time period." Cal. Civ. Proc. Code § 2025.520(b) (emphasis added).

The "attending parties" at McDade's July 2019 deposition were (1) the City, (2) Murphy's Bowl, (3) MSG and (4) McDade. Each of those four parties stipulated on the record that any corrections would be due from McDade within 30 days after she received her deposition transcript. (*See* Tokoro Decl. Ex. D at 427:8–428:22.)

Therefore, the 30-day time period for the submission of McDade's corrections could not be extended unless each of those four parties, *including the City and Murphy's Bowl*, agreed to an extension of time on the record or in writing. *See* Cal. Civ. Proc. Code § 2025.520(b). Where a deponent does not make corrections within the allotted time period, the unaltered transcript must "be given the same effect as though it had been approved." *Id.* § 2025.520(f).

IV. ARGUMENT

A. The Court Should Strike McDade's Errata Because It Is Untimely

1. All parties attending McDade's July 15, 2019 deposition stipulated to a 30-day deadline to submit corrections.

McDade had 30 days from receipt of her deposition transcript to make any changes. That 30-day deadline was imposed by the Code of Civil Procedure and by stipulation of the parties on the record at the end of her deposition. Cal. Civ. Proc. Code § 2025.520(b). (Tokoro Decl. Ex. D at 427:8–428:22.) McDade's failure to serve timely corrections to her transcript within the 30-day limit rendered her unaltered deposition testimony final. *See* Cal. Civ. Proc. Code § 2025.520(f) (where deponent fails to sign transcript or submit corrections within 30 days, "the deposition shall be given the same effect as though it had been approved").

Under the Code and the parties' stipulation, McDade had until August 19, 2019, to serve her corrections. Instead of complying with that deadline, McDade waited until September 12, 2019 to serve 148 changes to her transcript. (*Id.* Ex. F.) McDade's purported changes, served 24 days late, are undeniably untimely. As such, the Court should strike McDade's Errata and hold

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that her July 15, 2019 deposition transcript stands unaltered and final.

2. MSG cannot unilaterally extend the 30-day deadline without the City's and Murphy's Bowl's consent.

MSG has taken the position that the McDade Errata should be allowed because MSG *secretly and unilaterally* purported to grant two extensions to the 30-day stipulated deadline. (*See* Tokoro Decl. Ex. G.) MSG cites no authority for this proposition. Instead, it claims that as the noticing party, it "had no obligation to notify or seek the City's approval for extensions of time sought by [McDade's] counsel to sign and correct the transcript." (*Id.*)

MSG is wrong: Code of Civil Procedure § 2025.520(b) states that the 30-day period for corrections may not be extended "unless the *attending parties* and the deponent agree on the record or otherwise in writing to a longer . . . time period." Cal. Civ. Proc. Code § 2025.520(b) (emphasis added). It is also not how a *stipulation* works—no one party gets to unilaterally modify a stipulation on his or her own.

All of the parties attending McDade's deposition, including the City and Murphy's Bowl, stipulated on the record to a 30-day deadline for the submission of errata. That deadline could not be changed unless all parties, including the City and Murphy's Bowl, agreed to extend it in writing. Because the City and Murphy's Bowl never did so—and in fact did not even know an extension was being discussed between McDade and MSG—McDade's Errata is untimely.

B. <u>The Court Should Strike The Errata As An Improper Attempt To Manufacture A Factual Dispute For MSG To Avoid Summary Judgment</u>

In addition to McDade *missing her deadline by 24 days*, the Errata constitutes an improper attempt to help MSG avoid summary judgment through tactical rewrites of McDade's prior testimony. Although a deponent may change "the form or the substance of the answer to a question" during the period allowed for corrections, courts need not blindly accept sham errata. *See* Cal. Civ. Proc. Code § 2025.520(b).

Courts may disregard shifting stories and manipulated facts presented for the first time on the eve of summary judgment. *D'Amico v. Bd. of Med. Exam'rs*, 11 Cal. 3d 1, 21 (1974). In *D'Amico*, the court rejected a defendant's attempt to avoid summary judgment by submitting a

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declaration that contradicted its previous discovery admissions. *Id.* at 11. The court reasoned that when an "admission becomes relevant to the determination, on [a] motion for summary judgment, of whether or not there exist triable issues of *fact*," courts should consider the credibility of that admission. *Id.* at 22. Because the defendant's earlier admissions against interest had a comparatively higher credibility value than the later-filed declaration, the court held that the earlier admissions were "entitled to and should receive a kind of deference not normally accorded evidentiary allegations in affidavits." *Id.*

California courts have subsequently applied *D'Amico* to "bar[] a party opposing summary judgment from filing a declaration that purports to impeach his or her own prior sworn testimony." *Scalf v. D. B. Log Homes, Inc.*, 128 Cal. App. 4th 1510, 1522 (2005). Thus, "[a]dmissions or concessions made during the course of discovery govern and control over contrary declarations lodged [in opposition to] a motion for summary judgment." *Visueta v. Gen. Motors Corp.*, 234 Cal. App. 3d 1609, 1613 (1991).

Importantly, *D'Amico*'s application hinges on the credibility of the contradictory evidence submitted—not the vehicle used to get that evidence before the court. *D'Amico*, 11 Cal. 3d at 22. Thus, the rule bars not only contradictory affidavits, but also contradictory corrections to deposition transcripts introduced in an attempt to avoid summary judgment. In *Gray v. Reeves*, 76 Cal. App. 3d 567 (1977), defendants moved for summary judgment, arguing plaintiff's deposition testimony proved plaintiff's claims were time-barred. *Id.* at 572. In opposition, plaintiff submitted changes to his deposition transcript that contradicted the testimony forming the basis for the motion. *Id.* at 573–74. The court rejected plaintiff's corrections, holding:

> *There is no reason to [distinguish] between an attempt to counter an admission by affidavit and an attempt to counter an admission by changing the content of an answer given by a party directly in the deposition*, especially where there is no assertion the original answer was incorrectly transcribed or the question was misleading or ambiguous. In both [cases] the credibility of the parties is held up for examination by the contradicting statements, the first of which constitutes a reliable admission against interest. The trial court may accept the first and reject the later of these contrary positions.

Id. at 574 (emphasis added).

This rationale is applicable to instances in which a non-party witness attempts to submit

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deposition changes that contradict her sworn testimony. Parties and non-party witnesses alike swear to the same oath and are subject to the same standards of honesty and truthfulness. Under the reasoning in *D'Amico* and *Gray*, the main consideration is the credibility of the purported corrections. Whether a party deponent or a non-party witness, the credibility of the changes should be "held up for examination by the contradicting statements," and in both cases, the earlier admission against interest will have a comparatively higher credibility value. *See Gray*, 76 Cal. App. 3d at 574; *D'Amico*, 11 Cal. 3d at 22.

Similarly, when a witness is deposed multiple times over the course of a year and gives consistent sworn testimony on each occasion, the credibility of the consistent testimony clearly outweighs that of any attempt by the witness to recant his or her statements on the eve of summary judgment. Any other conclusion would allow dishonest litigants to avoid summary judgment by procuring fraudulent deposition errata from witnesses who have already been deposed. This is exactly what MSG is doing now.

Federal authority analyzing the propriety of deposition changes submitted under Federal Rule of Civil Procedure 30(e) are in accord. "Because of the similarity of California and federal discovery law, federal decisions have historically been considered persuasive absent contrary California decisions." *Vasquez v. Cal. Sch. of Culinary Arts, Inc.*, 230 Cal. App. 4th 35, 42–43 (2014) (citation omitted). The Ninth Circuit and California District Courts uniformly refuse to allow "purposeful rewrites [of deposition testimony] tailored to manufacture an issue of material fact." *Hambleton Bros. Lumber Co. v. Balkin Enters. Inc.*, 397 F.3d 1217, 1225 (9th Cir. 2005).

Standing alone, the sheer number of changes McDade attempts to make to her transcript is evidence that the Errata is fraudulent—courts have stricken deposition errata containing a mere fraction of the changes attempted by McDade. *See Lewis v. The CCPOA Benefit Tr. Fund*, No. C-08-03228-VRW (DMR), 2010 WL 3398521, at *3 (N.D. Cal. Aug. 27, 2010) ("Defendants submitted 38 changes – a significant number made more striking by the fact that 24 of the changes were about-face reversals from 'yes' to 'no,' or vice versa . . . ."); *see also Hambleton Bros. Lumber Co.*, 397 F.3d at 1225 (discussing the "extensive nature" of an errata sheet containing 27 changes). Worse still, McDade does not provide any valid justification for her extensive rewrites.

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McDade's assertion that the changes are corrective—a clearly inaccurate characterization of the Errata—is not an explanation establishing why the changes to her testimony were necessary. *See Tourgeman v. Collins Fin. Servs., Inc.*, No. 08-CV-1392 JLS (NLS), 2010 WL 4817990, at *2 (S.D. Cal. Nov. 22, 2010) ("Changing 'yes' to 'no' and 'correct' to 'no not correct' are paradigmatic examples [of] contradiction, rather than correction.").

Here, McDade's purported changes are extensive, substantial, substantive and directly contradict her sworn testimony concerning contentious matters at the center of this case. Unlike the defendant in *D'Amico* who submitted a declaration contradicting a mere three admissions made in prior testimony, or the *Gray* plaintiff who attempted only to change his deposition testimony concerning the date he discovered his injury, McDade is trying to completely rewrite her sworn deposition testimony. Her rewrites are a fraud on the court and should be stricken.

C. Policy Considerations Support Striking McDade's Errata

"Whatever the nature of the evidence, truth is an ascendant value in litigation. . . . Transparent prevarication is not an acceptable basis for decision." *Roddenberry v. Roddenberry*, 44 Cal. App. 4th 634, 654 (1996). Thus, as a matter of policy, California courts reject "testimony tailored by financial expediency rather than by truth." *Id.* This policy underlies *D'Amico* and its progeny, which allow courts to consider the credibility of evidence that ostensibly demonstrates the existence of a triable issue of fact. *D'Amico*, 11 Cal. 3d at 22.

California courts recognize that "[t]he taking of a deposition is one of the most efficient and necessary proceedings known to the law in aid of the court and in furtherance of the ends for which the court was created." *Ahern v. Superior Court*, 112 Cal. App. 2d 27, 30 (1952) (citation omitted). They provide the only pre-trial means to "determine the facts of the case while the witness is under the scrutiny of examination." *Blair v. CBE Group Inc.*, Civil No. 13-CV-00134-MMA (WVG), 2015 WL 3397629, at *10 (S.D. Cal. May 26, 2015). Allowing witnesses to submit errata changes that significantly alter and contradict sworn testimony through after-the-fact changes would "effectively permit[] the substitution of interrogatory answers for deposition testimony and permit[] attorneys to alter the deponent's testimony." *ViaSat, Inc. v. Acacia Commc'ns, Inc.*, Case No.: 16cv463 BEN (JMA), 2018 WL 899250, at *4 (S.D. Cal. Feb. 15,

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2018) (citation omitted).

Allowing McDade's Errata to stand would be the precise payoff MSG was hoping for when, in July, it enlisted McDade to oppose summary judgment. Giving effect to McDade's Errata would not only benefit MSG and harm the City—it would harm the judicial system as a whole. It would send the message that depositions are not a tool for discovering the truth, but a means for unscrupulous litigants to game the system. As a matter of policy and precedent, MSG cannot be allowed to attack the Court's truth-finding function by colluding with McDade to manufacture fraudulent testimony.

D. Allowing McDade's Errata To Stand Would Prejudice The City

Given the infirmities of McDade's proposed changes to her deposition testimony, the Court should strike her Errata and hold that her original deposition testimony stands unaltered. The fact that McDade may be subject to cross-examination and impeachment at trial is insufficient to remedy the harm that would be done by allowing her free license to manufacture issues of fact for MSG's use in opposition to the City's pending summary judgment motion.

Any and all of MSG's Second Supplemental Responses which incorporate McDade's fraudulent Errata, directly or indirectly by reference, suffer the same substantive infirmities as the changed testimony and should also be stricken.

V. CONCLUSION

For the foregoing reasons, the Court should grant this Motion and strike (1) McDade's purported Errata such that her original deposition testimony stands unaltered, and (2) MSG's Second Supplemental Responses incorporating McDade's Errata.

DATED: October 28, 2019

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 1999 Avenue of the Stars, Suite 1000, Los Angeles, CA 90067.

On October 28, 2019, I served true copies of the following document(s) described as:

CITY OF INGLEWOOD'S NOTICE OF MOTION AND MOTION TO STRIKE THE PURPORTED ERRATA TO MELANIE MCDADE-DICKENS'S DEPOSITION TRANSCRIPT

on the interested parties in this action as follows:

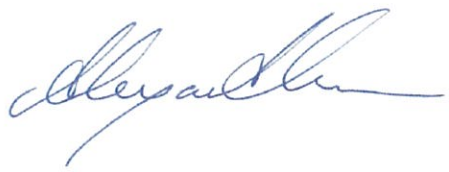
SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address aalamango@millerbarondess.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY ELECTRONIC SERVICE: I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at www.onelegal.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 28, 2019, at Los Angeles, California.



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