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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALEXIS BRONSON and CRYSTAL  
HARDIN, on behalf of themselves and all  
others similarly situated,

No. C 18-02300 WHA

Plaintiffs,

**ORDER DENYING MOTION  
TO STRIKE AND  
VACATING HEARING**

v.

SAMSUNG ELECTRONICS AMERICA,  
INC. and SAMSUNG ELECTRONICS CO.,  
LTD.,

Defendants.

For twenty years on the bench, I have tried to inform lawyers about the inherent ambiguity in a leading question premised on a negative, then ending in the word “correct?” or “right?” This motion perfectly illustrates the problem. At issue is the following question and answer during deposition testimony (Dkt. No. 142-5, Exh. 3, 162:5–7):

Q: Because you didn’t intend to have it fixed, right?

A: No.

Does the answer mean “No, that is not right” or does it mean “No, I did not intend to have it fixed”? Both answers — entirely opposite in meaning — are equally plausible. It is impossible to be sure. The response is inherently ambiguous. This ambiguity is *not* the fault of the witness. It is entirely the fault of counsel and the form of the question.

1 We all understand that counsel on adverse examination prefer leading questions. But  
2 the unambiguous way to ask a leading question anchored in a negative is in this form: “You  
3 didn’t intend to have it fixed, did you?” When, by contrast, the negative leading question ends  
4 with “correct?” or “right?” a “yes” or “no” answer will always be hopelessly ambiguous —  
5 always and forever, period.

6 When “correct?” or “right?” ends an *affirmative* leading question, no ambiguity occurs,  
7 as in “You intended to have it fixed, correct?” It’s the negative form that leads to trouble. The  
8 entrenched and recurring problem arises from the confluence of (i) the negative leading  
9 question, (ii) ending in “correct?” or “right?” and (iii) answered “yes” or “no.”

10 For twenty years as a trial judge, I have seen this error time and again. During many  
11 trials, out of the presence of the jury, I have alerted counsel to the problem. This unfortunate  
12 error spans the continent from big firms to small firms and even to the United States Attorney’s  
13 office. Some lawyers get the point and improve their form of question. Others, however, just  
14 cannot reform. Sometimes, summary judgment motions must be denied on this very ground.

15 \* \* \*

16 With this in mind, let’s turn to the mundane issue at hand, namely whether to allow a  
17 correction made by a deponent. The deponent seeks to change an answer as follows. For  
18 clarity, the prior answer is lined through and the change is underlined (Dkt. No. 142-5, Exh. 2;  
19 Exh. 3, 162:5–7):

20 Q: Because you didn’t intend to have it fixed, right?

21 A: ~~No.~~ I first wanted to see if they had the part.

22 It is unnecessary to recite the chronology relating to the correction at issue, for no issue  
23 is raised of timeliness or procedural entitlement of the witness to make a correction. The only  
24 issue raised is whether the particular change so reverses the meaning of the original testimony  
25 that the change should not be allowed under *Hambleton Bros. Lumber Co. v. Balkin*  
26 *Enterprises, Inc.*, 397 F.3d 1217, 1224–1226 (9th Cir. 2005). Unlike in *Hambleton*, however,  
27 the modifications here were not “changes offered solely to create a material factual dispute in a  
28 tactical attempt to evade an unfavorable summary judgment.” *Id.* at 1225. Here, the question

1 itself injected ambiguity, so it's hard to say the clarification radically alters the original answer.  
2 The corrected clarification will be allowed.

3 It would have been helpful, perhaps, if defending counsel had objected to the form of the  
4 question as ambiguous, but we are not concerned with admissibility at trial. We are merely  
5 concerned with the viability of a modification. The fault was with the examiner, not the  
6 witness. So, the modification is now permitted.

7 \* \* \*

8 The second change poses a separate problem. The line of questioning was as follows.  
9 For clarity, the prior answer is lined through and the change is underlined (Dkt. No. 142-5, Exh.  
10 2; Exh. 3, 103:7-13):

11 Q: So you assume they put in a new part to fix the  
12 on/off issue, right?

13 A: I did not assume that.

14 Q: You were paying for that, right?

15 A: Yes. I was paying for the repair of my on/off  
16 issue.

17 Q: And did it fix the on/off issue?

18 A: Yes.

19 The first question injected two separate points, a part plus a repair. The corrected answer was  
20 therefore permissible to specify which of the two was intended by the original answer, namely,  
21 the repair. This modification is also permitted.

22 For the foregoing reasons, defendants' motion to strike is **DENIED**. The hearing set for  
23 July 11 at 8:00 A.M. is hereby **VACATED**.

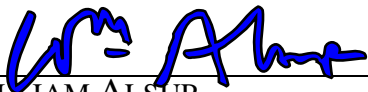
24 \* \* \*

25 My plea to trial lawyers is to eliminate the words "correct?" and "right?" from the end  
26 of your questions. While those endings work fine for affirmative points, they invite trouble for  
27 all negative points and, in the heat of battle, you may lose track of which is which. Instead, may  
28 I urge the narrowly-directed non-leading form ("Did you intend to have it fixed?") or, if you  
insist on a leading question to make a negative point, end with "Did you?" or "Did it?" or "Did

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they?” as the case may be (*e.g.*, “You didn’t intend to have it fixed, did you?”). Witnesses, jurors, and judges will appreciate the clarity.

Dated: July 3, 2019.

  
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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE