

1 **DISCUSSION**

2 At the beginning of Evans's deposition, counsel for the
3 Defendants explained the deposition process. "You'll get a chance
4 to review the transcript in this case You'll get a chance
5 to read through and make any changes that you want to make."
6 (Decl. Evans Attach #1 Not. Lodgment Mot. Suppress Dep. 7:7-12,
7 Oct. 15, 2008.) When the deposition ended, counsel stated, "I
8 would agree to allow you 30 days to review that transcript, make
9 any changes you need to, and then sign it under penalty of perjury
10 and send it back to my office." (Id. at 55:10-13.) The process to
11 correct errors was explained to Evans. "What you can do is you can
12 mark out the incorrect statement and write in what you believe is
13 correct. And then you'll just -- there's usually a sheet that will
14 say what page and what line is changed, and you can write in that
15 there (Id. at 57:12-16.)

16 Evans claims that the October 15, 2008, deposition taken of
17 him should be suppressed because he has been prejudiced by
18 receiving an open copy of the transcript. (Mot. Suppress Dep.
19 Attach. #1 Mem. P.& A. 1-2.) Additionally, Plaintiff explains that
20 he misunderstood and did not recognize the importance of three
21 specific questions, so he refused to sign the deposition
22 transcript. (Mot. Suppress Dep. Attach. #2 Decl. Evans 2.) The
23 challenged questions are as follows:

24 Q. Was that in the Vista Detention Facility?
25 [Where and when injury occurred]; Q. So it
26 seemed like the doctors that you saw before
27 that orthopedic specialist did not know
28 exactly what was wrong with the knee?
Q. . . . is there any individual person who
you're saying treated you improperly having
to do with your medical care or delay of
surgery?

1 Id. at 2; see also Decl. Evans Attach #1 Not. Lodgment Mot.
2 Suppress Dep. 12, 16-17, 31-32. Evans filed a copy of the
3 deposition transcript, which he did not sign, along with a page
4 listing ten nonsubstantive revisions. (Id. at 58-9.)

5 Plaintiff cites section 2025(q)(1) of the California Code of
6 Civil Procedure as authority for his motion to suppress. (Not.
7 Mot. Suppress Dep. 2.) Section 2025(q)(1), however, has been
8 amended, and its provisions are now contained in section 2025.520
9 of the California Code of Civil Procedure. Like its predecessor,
10 section 2025.520(b) states that a deponent may "refuse to approve
11 the [deposition] transcript by not signing it." Cal. Civ. Proc.
12 Code § 2025.520(b)(West 2007). "[T]he deponent may change the form
13 or the substance of the answer to any question and may approve or
14 refuse to approve the transcript by means of a letter to the
15 deposition officer." Cal. Civ. Proc. Code § 2025.520(c)(West
16 2007). Evans refuses to approve his deposition transcript, which
17 does not affect its use. Cal. Civ. Proc. Code § 2025.520(f)(West
18 2007). "[O]n a seasonable motion to suppress the deposition,
19 accompanied by a meet and confer declaration under Section
20 2016.040, the court may determine that the reasons given for the
21 failure or refusal to approve the transcript require rejection of
22 the deposition in whole or in part." Cal. Civ. Proc. Code §
23 2025.520(g)(West 2007).

24 The California Code of Civil Procedure does not support
25 Evans's motion to suppress his deposition. First, the Plaintiff's
26 declaration is insufficient to constitute a "meet and confer"
27 declaration. Second, the reasons given for suppressing the
28 deposition do not warrant suppressing the deposition testimony.

1 Any misunderstanding by Evans can be explained at trial or, in the
2 context of a motion, in an explanatory declaration. Finally, and
3 more importantly, Plaintiff's Complaint seeks relief pursuant to 42
4 U.S.C. § 1983. His federal civil rights case is governed by the
5 Federal Rules of Civil Procedure. Fed. R. Civ. P. 1.

6 Before the 1993 Amendment to Rule 30(e), a deponent was
7 required to sign the transcript of deposition testimony. Fed. R.
8 Civ. P. 30 advisory committee notes on 1993 amendments; see also 7
9 James Wm. Moore et al., Moore's Federal Practice § 30App.08[1], at
10 30App.-22 (3d ed. 2008). The advisory committee notes explain the
11 rationale:

12 Various changes are made in this subdivision to
13 reduce problems sometimes encountered when depositions
14 are taken stenographically. Reporters frequently have
15 difficulties obtaining signatures -- and the return of
16 depositions -- from deponents. Under the revisions pre-
17 filing review by the deponent is required only if
18 requested before the deposition is completed. If review
19 is requested, the deponent will be allowed 30 days to
20 review the transcript and to indicate any changes in form
21 or substance. Signature of the deponent will be required
22 only if review is requested and changes are made.

23 Id. at 30App.-26 (quoting Fed. R. Civ. P. 30 advisory committee
24 notes on 1993 amendment to 30(e)).

25 Since 1993, the Federal Rules of Civil Procedure do not
26 require a deponent to review and sign a deposition transcript, but
27 Rule 30(e) provides an opportunity to do so upon a party's or the
28 deponent's request. Fed. R. Civ. P. 30 (e)(1)-(2). When review of
the transcript is requested, the deponent may make changes to its
form or substance but must provide a signed statement listing the
alterations and reasons for each change. Id. This must be done
within thirty days of being notified that the transcript has been
completed. Id. Changes made to a deposition transcript must have

1 a legitimate purpose. Hambleton Bros. Lumber Co. v. Balkin Enter.,
2 Inc., 397 F.3d 1217, 1224-1225 (9th Cir. 2005.) Nevertheless, the
3 fact that the deponent refuses to sign the deposition transcript
4 does not make it inadmissible. EEOC v. Nat'l Cleaning Contractors,
5 Inc., 90 Civ. 6398 (BSJ), 1996 U.S. Dist. LEXIS 7026, at *4
6 (S.D.N.Y. May 23, 1996).

7 If the deponent requested review but did not sign a statement
8 listing his requested changes within the thirty day period
9 allowed, the deposition officer must indicate in the certificate
10 that review was requested but no changes were received. Fed. R.
11 Civ. P. 30(e)(2); William W. Schwarzer et al, Cal. Prac. Guide:
12 Fed. Civ. Pro. Before Trial § 11:1598, at 11-213 to 14 (2008).

13 Evans also seeks to suppress the use of his deposition
14 testimony, pursuant to Rule 32(d)(4) of the Federal Rules of Civil
15 Procedure. (Mot. Suppress Dep. Attach. #1 Mem. P. & A. 2.) In
16 his supporting memorandum, he complains that "[w]hen Plaintiff
17 received [the] deposition[,], it was opened." (Id.) Rule 32(d)(4)
18 provides as follows: "An objection to how the officer transcribed
19 the testimony -- or prepared, signed, certified, sealed, endorsed,
20 sent, or otherwise dealt with the deposition -- is waived unless a
21 motion to suppress is made promptly after the error or
22 irregularity becomes known or, with reasonable diligence, could
23 have been known." Fed. R. Civ. P. 32(d)(4). Plaintiff claims he
24 has been prejudiced by the possibility of a person reading or
25 copying the open copy of the transcript that was delivered to him,
26 but Evans has not shown that any person has actually done so or
27 that prejudice has occurred as a result. This charge is an
28

1 insufficient basis to suppress the use of his deposition
2 testimony.

3 "The question of the admissibility of evidence at trial is
4 separate from that of suppressing the deposition" Cervin
5 v. W.T. Grant Co., 100 F.2d 153, 155 (5th Cir. 1938.) The issue
6 raised by Evans is whether to suppress the entire deposition, not
7 whether certain passages will be admissible at trial. Cervin, 100
8 F.2d at 155. Evans asks the Court to suppress his deposition
9 testimony because he "misunderstood the import of the questions.
10 (Mot. Suppress Dep. Attach. #1 P. & A. 2.) "When I realized the
11 error, I refused to sign the transcript." (Id.)

12 The deposition should not be suppressed in its entirety if any
13 part is admissible. Atchinson, T. & S.F. Ry. Co. v. Ritterbusch,
14 198 F. 46, 53. (8th Cir. 1912). Although Plaintiff argues that he
15 misunderstood certain questions, many others are not challenged.
16 Thus, complete suppression is not appropriate. Evans's ten minor
17 changes to the text of the transcript shows that the testimony has
18 not been impaired by failure to review and correct it. Even
19 partially completed depositions, where the witness refused to
20 answer some questions and lacked information needed to respond to
21 others, have been admissible in evidence. Re-Trac Corp. v. J. W.
22 Speaker Corp., 212 F. Supp. 164 (E.D. Wisc. 1962). Of course,
23 Evans retains the right to object to the admission of deposition
24 testimony at trial. For example, Rule 403 of the Federal Rules of
25 Evidence states that "[a]lthough relevant, evidence may be excluded
26 if its probative value is substantially outweighed by the danger of
27 unfair prejudice, confusion of the issues, or misleading the jury .
28 . . ." Fed. R. Evid. 403. Thus, even though Plaintiff refuses to

1 sign the transcript, the Court finds that his deposition should not
2 be suppressed. Evans's Motion [doc. no. 95] is **DENIED**.

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4 DATE: February 4, 2009



RUBEN B. BROOKS
United States Magistrate Judge

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6 cc: Judge Miller
7 All Parties of Record

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