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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

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11 VIASAT, INC., etc.,
12 Plaintiff/Counter-Defendant,
13 v.
14 ACACIA COMMUNICATIONS, INC.,
15 Defendant/Counter-Claimant.

Case No.: 16cv463 BEN (JMA)

**ORDER REGARDING JOINT
MOTION FOR DETERMINATION OF
DISCOVERY DISPUTE NO. 3
[ECF No. 80]**

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18 Presently before the Court is Joint Motion for Determination of Discovery
19 Dispute No. 3 in which Defendant/Counter-Claimant Acacia Communications,
20 Inc. ("Acacia") moves to strike portions of the deposition errata submitted by
21 deponent Chandrasekar Raj. Plaintiff/Counter-Defendant ViaSat, Inc. ("ViaSat")
22 opposes the motion. [ECF No. 63.] As discussed further below, Acacia's motion
23 is GRANTED.

24 **A. Background Facts**

25 Chandrasekar Raj ("Raj") is the Director of Business Development for
26 ViaSat's Cleveland office. Mr. Raj was deposed by Acacia's counsel on October
27 13, 2017. On December 4, 2017, Raj submitted an errata sheet, making both
28 typographic and substantive changes to the deposition transcript. On December

1 18, 2017, Raj signed a declaration providing further explanations of the changes
2 in his errata sheet.

3 Acacia seeks the strike the following changes to Raj's testimony¹:

4 Q: So for this particular business, ViaSat Cleveland's
5 business . . . does this indicate to you that at the time you
6 sent this data sheet to ECI Tele[com], there was no NDA
[non-disclosure agreement] with ECI Tele?

7 A: . . . It looks like we shared the basic data sheet. **We**
8 **were told an NDA was being signed, and it was signed**
9 **with an effective date of March 14, 2011.**

10 (Joint Mot., Exs. 3 & 4, Raj Dep., 70:2-13 & Raj. Dep. Errata.)

11 Q: So that would mean at the time that you sent this
12 data, this product specification to them -- there was no
13 confidentiality obligation in place between ECI Tele and
14 ViaSat Cleveland?

15 MR. COCHRAN: Objection. Misstates prior testimony.

16 A: **We were told an NDA was being signed, and it**
17 **was in place effective March 14, 2011.** So this is a
18 product brief, a product spec that we can share. So that's
19 what we shared.

20 (*Id.*, 70:19-71:5.)

21 Q: Okay. Would it be fair to say that this is a product
22 specification ViaSat Cleveland was willing to share with
23 customers without a confidentiality obligation in place with
24 that customer?

25 A: ~~Would Via Sat -- I don't know, but at least for this~~
26 ~~program, it looks like it's okay to share, you know, the basic~~
27 ~~information that I have.~~ **No. This product information**
was shared with an NDA in effect.

28 ¹ Raj's additions are indicated in bold italics, and his deletions in strikethrough font.

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2 Q: Okay to share this product specification -- without an
3 NDA in place?

4 A: ~~Without a full NDA in place, correct.~~ **No, this**
5 **information was shared with an NDA in effect.**

6 Q: Without any NDA in place, correct?

7 A: ~~Without any NDA in place, yes.~~ **No, this**
8 **information was shared with an NDA in effect.**

9 (*Id.* at 71:15-72:5.)

10 Raj attests that after his deposition, he learned ViaSat “did in fact have an
11 NDA in place with ECI Telecom with an effective date of March 14, 2011.” (Raj
12 Decl., ¶ 4.) He thus made the above changes to his deposition transcript “[t]o
13 account for this fact and ensure that my deposition testimony was accurate.”

14 (*Id.*)

15 Acacia also seeks to strike the following changes:

16 Q: Do you know if ViaSat would have required an NDA
17 before sending this product specification, Exhibit 617, to a
18 customer or potential customer?

19 A: I cannot be sure, but, again, it depends on the
20 customer. ~~We may or may not have required an NDA~~
21 ~~before sending this document.~~ **We would require an NDA**
22 **in order to send this document.**

23 (*Joint Mot.*, Exs. 3 & 4, Raj Dep., 82:23-83:4 & Raj. Dep. Errata.)

24 Q: I guess put a different way: You don’t know that
25 ViaSat always required an NDA with a customer or
26 potential customer before sending them Exhibit 617. Fair?

27 A: ~~Yes.~~ **I believe we did require an NDA before**
28 **sending them this document.**

1 (Id. at 83:14-18.)

2
3 Q: Okay, but this is not the type of product specification
4 that ViaSat would always require an NDA before sending
5 to a third party . . . correct?

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7 MR. COCHRAN: Objection. Misstates prior
8 testimony.

9 A: ~~Possibly, because it's a product spec and it looks like~~
10 ~~a high-level document to me.~~ ***This form of production***
11 ***specification required an NDA.***

12 (Id. at 84:5-16.)

13 Q: So it's the kind of document that ViaSat has
14 distributed to third parties without requiring an NDA?

15 MR. COCHRAN: Objection. Misstates prior
16 testimony. Calls for speculation.

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18 A: ~~ViaSat Cleveland, you know, we may or may not~~
19 ~~have sent it without requiring NDA, and based on the~~
20 ~~document, it looks like it's a high-level product brief.~~ ***I do***
21 ***not believe this document was sent without knowing***
22 ***an NDA would be in effect.***

23 Q: So it looks like the kind of high-level product brief that
24 would not require an NDA before ViaSat Cleveland would
25 send it to a third party?

26 A: ~~Yes.~~ ***No.***

27 MR. COCHRAN: Objection. Misstates prior testimony.
28 Calls for speculation.

A: ~~Yes.~~ ***No.***

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2 (*Id.* at 85:7-86:2.) Raj states these changes are needed because during his
3 deposition, he confused two different product specifications, each with
4 “ECC66100” in the title. (Raj Decl., ¶ 3.) He explains:

5 One product specification was two pages, and was a
6 general, high-level product specification that was circulated
7 without an NDA in place. The other product specification,
8 which is the subject of my testimony on pages 83-86 of my
9 deposition transcript, was an 8-page product specification
10 that was not shown without an NDA in place. During my
11 deposition, I was questioned about the 8-page product
12 specification, but I believed that I was being asked
13 questions about the 2-page product specification. When I
14 reviewed my deposition transcript, I realized my mistake.”

15 (*Id.*) Acacia contends all of the above changes should be stricken because they
16 are contradictory to Mr. Raj’s original testimony. ViaSat states the changes are
17 needed to ensure “completeness” and “accuracy.” (Ex. 3.)

18 **B. Legal Standards**

19 Rule 30 of Federal Rules of Civil Procedure provides:

20 On request by the deponent or a party before the
21 deposition is completed, the deponent must be allowed 30
22 days after being notified by the officer that the transcript or
23 recording is available in which: (A) to review the transcript
24 or recording; and (B) if there are changes in form or
25 substance, to sign a statement listing the changes and the
26 reasons for making them.

27 Fed. R. Civ. P. 30(e). In 2005, the Ninth Circuit considered the scope of Rule
28 30(e) as a matter of first impression in *Hambleton Bros. Lumber Co. v. Balkin*
Enter., 397 F.3d 1217 (9th Cir. 2005). The court stated, “A statement of reasons
explaining corrections is an important component of errata submitted pursuant to
FRCP 30(e), because the statement permits an assessment concerning whether
the alterations have a legitimate purpose.” *Hambleton*, 397 F.3d at 1224-25.

1 The Ninth Circuit continued:

2 While the language of FRCP 30(e) permits corrections “in
3 form or substance,” this permission does not properly
4 include changes offered solely to create a material factual
5 dispute in a tactical attempt to evade an unfavorable
6 summary judgment. . . . The Tenth and Seventh Circuits
7 have interpreted FRCP 30(e) similarly. See, e.g., *Burns v.*
8 *Bd. of County Comm’rs*, 330 F.3d 1275, 1281-82 (10th Cir.
9 2003) (“We see no reason to treat Rule 30(e) corrections
10 differently than affidavits, and we hold that Burns’s attempt
11 to amend his deposition testimony must be evaluated
12 under [the sham affidavit doctrine.]”); accord *Garcia v.*
13 *Pueblo Country Club*, 299 F.3d 1233, 1242 n.5 (10th Cir.
14 2002) (“The Rule cannot be interpreted to allow one to
15 alter what was said under oath. If that were the case, one
16 could merely answer the questions with no thought at all
17 then return home and plan artful responses. Depositions
18 differ from interrogatories in that regard. A deposition is
19 not a take home examination.”) (quoting *Greenway v. Int’l*
20 *Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992)); *Thorn v.*
21 *Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir.
22 2000) (“We also believe, by analogy to the cases which
23 hold that a subsequent affidavit may not be used to
24 contradict the witness’s deposition, that a change of
25 substance which actually contradicts the transcript is
26 impermissible unless it can plausibly be represented as the
27 correction of an error in transcription, such as dropping a
28 ‘not.’”) (citations omitted). We agree with our sister circuits’
interpretation of FRCP 30(e) on this point, and hold that
Rule 30(e) is to be used for corrective, and not
contradictory, changes.

23 *Hambleton*, 397 F.3d at 1225-26.

24 As recently observed by U.S. Magistrate Judge Nancy J. Koppe of the
25 District of Nevada, district courts within the Ninth Circuit “have struggled to
26 interpret and apply” the “corrective, and not contradictory, changes” standard in a
27 uniform manner. *Ashcraft v. Welk Resort Group Corp.*, 2017 WL 5180421, at *1
28 (D. Nev. Nov. 8, 2017). Here, as in *Ashcraft*, the parties ask this Court to

1 interpret this standard differently, with each side’s position supported by varying
2 district court decisions within the Ninth Circuit. The Court agrees with Judge
3 Koppe’s analysis and conclusion that “courts should limit Rule 30(e) changes to
4 those correcting stenographic mistakes and, consequently, should bar parties
5 from using Rule 30(e) to change the testimony actually given.” *Id.* at *4. Other
6 cases in this district have applied Rule 30(e) in a similar manner. See, e.g.,
7 *Tourgeman v. Collins Fin. Servs., Inc.*, 2010 WL 4817990 (S.D. Cal. Nov. 22,
8 2010) (Sammartino, J.); *Azco Biotech Inc. v. Qiagen, N.V.*, 2015 WL 350567
9 (S.D. Cal. Jan. 23, 2015) (Bartick, J.); *Blair v. CBE Grp. Inc.*, 2015 WL 3397629
10 (S.D. Cal. May 26, 2015) (Gallo, J.). “Even though the text of Rule 30(e) allows
11 deponents to make changes ‘in form or substance,’ the rule does not allow a
12 deponent to alter what was said under oath because a deposition is not a take
13 home examination.” *Ashcraft*, 2017 WL 5180421 at *4 n.3; accord *Blair*, 2015
14 WL 3397629, at *10 (“The purpose of depositions is to determine the facts of the
15 case while the witness is under the scrutiny of examination. The purpose is
16 certainly not to find out how the witness answers questions with the ability to
17 calmly reflect on the responses for 30 days in collaboration with counsel.”).²

18 While the facts in *Hambleton* concerned what appeared to be “purposeful
19 rewrites” of deposition testimony “tailored to manufacture an issue of material
20 fact” for the purposes of avoiding summary judgment, found by the Ninth Circuit
21 to be akin to a “sham” affidavit, the holding of the case is not limited to those
22 facts. See, e.g., *Azco Biotech*, 2015 WL 350567 at *4. Furthermore, the Court
23 does not read *Hambleton* to apply only when a summary judgment motion is
24 pending. *Tourgeman*, 2010 WL 4817990 at *3.

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26 ² “A deponent may make a formal or substantive change to correct a stenographic mistake:
27 Should the reporter make a substantive error, *i.e.*, he reported ‘yes’ but I said ‘no,’ or a formal
28 error, *i.e.*, he reported the name to be ‘Lawrence Smith’ but the proper name is ‘Laurence
Smith,’ then corrections by the deponent would be in order.” *Ashcraft*, 2017 WL 5180421, at
*4 n.3 (citations and internal quotations omitted).

1 Interpreting Rule 30(e) in a manner which prohibits a deponent from
2 changing his deposition testimony regardless of whether the deponent truly
3 believes his testimony was mistaken is consistent with important policy
4 considerations. Again, depositions are different from interrogatories as they are
5 not a “take home examination.” *Garcia*, 299 F.3d at 1242 n.5. Additionally, an
6 attorney is precluded from coaching a witness during his deposition. “Allowing a
7 deponent to alter testimony through after-the-fact changes (potentially in
8 consultation with [his] attorney) would undermine these well-settled deposition
9 rules, effectively permitting the substitution of interrogatory answers for
10 deposition testimony and permitting attorneys to alter the deponent’s testimony.”
11 *Ashcraft*, 2017 WL 5180421, at *5 (citing *Greer v. Pacific Gas. & Elec. Co.*, 2017
12 WL 2389567, at *7 (E.D. Cal. June 1, 2017)). As such, the Court finds the
13 correct interpretation of *Hambleton* is that it limits the scope of Rule 30(e)
14 changes to corrections of stenographic errors, whether those corrections are of
15 form or substance, and that Rule 30(e) is not properly used to alter deposition
16 testimony provided under oath and correctly transcribed.

17 **B. Discussion**

18 **1. Raj Deposition Errata**

19 ViaSat contends the changes to Mr. Raj’s testimony are necessary for
20 “completeness” and “accuracy” reasons. (Joint Mot., Ex. 3.) Mr. Raj seeks to
21 correct his testimony in two areas of his deposition, both of which relate to
22 whether he shared ViaSat’s product specifications with or without an NDA in
23 place. In the first area of testimony (on pages 70 to 72 of his deposition
24 transcript), Raj seeks to change the transcript to reflect that he sent the product
25 specification referred to as “Exhibit 616”³ to ECI Telecom, a prospective client,
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28 ³ This product specification refers to a 6-page document entitled, “ECC66100 Series SD-FEC Encoder/Decoder Cores Product Specification.” See Joint Mot., Ex. 1.

1 with an NDA in effect, notwithstanding his testimony that it was “okay to share”
2 the information without an NDA in place. As set forth above, he attests he
3 learned after his deposition that ViaSat “did in fact have an NDA in place with
4 ECI Telecom with an effective date” prior to his sharing of the product
5 specification. (Raj Decl., ¶ 4.) Similarly, in the second area of testimony (on
6 pages 83 to 86 of his deposition transcript), Raj seeks to change the transcript to
7 read that ViaSat would require an NDA to be in place before sharing the product
8 specification referred to as “Exhibit 617,” despite his actual testimony that he
9 would have shared this product specification without an NDA.⁴ He explains that
10 he confused two different product specifications, each with “ECC66100” in the
11 title, and thought he was testifying about a 2-page product specification rather
12 than the 8-page product specification. (See Raj Decl., ¶ 3.) He makes this
13 assertion despite the fact he was shown Exhibit 617 during his deposition. (Raj.
14 Dep. at 83:3-5.)

15 The changes at issue are not permitted under Rule 30(e), as they are not
16 the result of any stenographic mistakes. Irrespective of whether the changes are
17 purposeful rewrites made to better suit the needs of ViaSat’s case or due to
18 honest mistakes by Mr. Raj at deposition, the changes are substantive and
19 directly contradict the testimony Raj provided under oath. “Changing ‘yes’ to ‘no’
20 and ‘correct’ to ‘no not correct’ are paradigmatic examples [of] contradiction,
21 rather than correction.” *Tourgeman*, 2010 WL 4817990 at *2; see also *Ashcraft*,
22 2017 WL 5180421, at *6 (“Rule 30(e) is not the proper vehicle for trying to alter
23 unfavorable deposition testimony regardless of whether the deponent truly
24 believes upon reflection that the testimony was wrong.”) Moreover, ViaSat’s
25 counsel was present at the deposition and had an opportunity to question Raj to
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28 ⁴ Exhibit 617 consists of an 8-page document entitled, “ECC66100.SD15 Turbo Product Code
Encoder/Decoder Cores Product Specification.” (Joint Mot., Ex. 2.)

1 clear up any inaccuracies. There is no indication that counsel asked any
2 clarifying questions or “attempt[ed] to rehabilitate his client regarding the
3 responses in dispute, although that is a major part of counsel’s role at the
4 depositions.” *Blair*, 2015 WL 3397629, at *10. Counsel may not prompt a
5 witness during a deposition, and should not be permitted to do so after the
6 deposition. *Id.* ViaSat’s contention that the Court should not strike the changes
7 in the errata sheet because documentary evidence corroborates the changes is
8 unavailing. “[W]hether other evidence supports the proposed changes is not the
9 standard under Rule 30(e).” *Azco Biotech*, 2015 WL 350567, at *4.

10 The Court notes that Mr. Raj is not precluded from later clarifying or
11 correcting any testimony he believes to be erroneous. “[I]f a party believes its
12 deponent gave false testimony under oath, it may so explain to the fact-finder
13 during the normal course of the litigation.” *Ashcraft*, 2017 WL 5180421, at *6.
14 Raj can file an affidavit or provide testimony at trial explaining his mistaken
15 deposition testimony and the reasons for any corrections. He “will have a full
16 opportunity to explain his mistaken testimony at summary judgment or trial. The
17 finder of fact will have the opportunity to decide [Mr. Raj’s] credibility and
18 reliability on the facts in question, and may ultimately decide that he was honestly
19 mistaken about certain facts when he gave his deposition testimony.” *Lewis v.*
20 *The CCPOA Benefit Trust Fund*, 2010 WL 3398521, at *4 (N.D. Cal. Aug. 27,
21 2010).

22 2. Prucnal Deposition Errata

23 ViaSat contends that should the Court strike Raj’s deposition errata, the
24 errata of Acacia’s witness, Dr. Paul Prucnal, should similarly be stricken. The
25 relevant portion of Dr. Prucnal’s deposition transcript reads as follows:

26 Q: Well, the trade secret doesn’t specify what the
27 demodulator is except that it’s a digital demodulator inside
28 an *adaptive equalizer*. Correct?

1 A: That's correct.
2 (Joint Mot., Ex. 8, Prucnal Dep., 112:11-15 [emphasis added].) Dr. Prucnal, in
3 his deposition errata, seeks to amend his answer as follows:

4 A: That's correct. **The trade secret doesn't specify**
5 **what the demodulator is except that it's a digital**
6 **demodulator that has certain features and is inside an**
7 **optical receiver.**

8 (Joint Mot., Ex. 10, Prucnal Dep. Errata.) As it turns out, there is an error in the
9 transcription of the question: "adaptive equalizer" was used instead of "optical
10 receiver." See Prucnal Video Dep., <https://d.warrenlex.com/2n51bQX> (as visited
11 Feb. 14, 2018); see *a/so* Joint Mot. at 18 n.11 ("Throughout this colloquy, the
12 reporter mistranscribed counsel for ViaSat's questions, substituting "adaptive
13 equalizer (another term in the case) for "optical receiver."). Acacia explains that
14 Dr. Prucnal's clarification was responsive to the actual transcript, that the
15 transcription error rendered the question "gibberish on a technical level," and that
16 Dr. Prucnal clarified his answer in order to ensure it was not "misinterpreted as
17 an admission to this gibberish." (Joint Mot. at 10.)

18 The deposition transcript should be corrected to reflect the actual text of the
19 question ("Well, the trade secret doesn't specify what the demodulator is except
20 that it's a digital demodulator inside an optical receiver. Correct?"), which would
21 render Dr. Prucnal's clarification in his deposition errata moot. Dr. Prucnal's
22 original answer ("That's correct.") should stand without modification.

23 **C. Conclusion**

24 For the reasons set forth above, Acacia's motion to strike is **GRANTED**.
25 The Court **STRIKES** the following portions of Mr. Raj's deposition errata sheet:
26 70:13, 71:3, 71:20-23, 72:3, 72:5, 83:3-4, 83:18, 84:14-16, 85:16-19, 85:23, and
27 86:2. The Court further **STRIKES** Dr. Prucnal's deposition errata sheet at
28 112:15. The parties shall ensure the transcript of Dr. Prucnal's deposition is

1 corrected as set forth above.

2 **IT IS SO ORDERED.**

3 Dated: February 15, 2018

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Honorable Jan M. Adler
United States Magistrate Judge

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