

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

LAURA LYNN HAMMETT,

Plaintiff,

-v-

PORTFOLIO RECOVERY ASSOCIATES,
LLC.

Defendants.

Civil Action No.: 4:21-cv-00189-LPR

**DEFENDANT PORTFOLIO RECOVERY ASSOCIATES, LLC'S RESPONSE IN
OPPOSITION TO PLAINTIFF'S MOTION TO SETTLE THE RECORD**

Defendant, Portfolio Recovery Associates, LLC ("PRA" or "Defendant"), by counsel, submits this response in opposition to Plaintiff's Motion to Settle the Record to Correct Errors and Omissions in the Transcript of the December 1, 2021 Hearing (hereinafter "Motion"). (Dkt. No. 267.) Plaintiff's Motion should be denied for the following reasons:

INTRODUCTION

1. Plaintiff alleges the December 1, 2021 hearing transcript ("Hearing Transcript") contains four errors: (1) the complete omission of "significant" dialogue between the Court and Ms. Hammett wherein the Court described how it would rule on confidentiality designations; (2) the amount of PRA's highest offer of judgment being either misspoken by Ms. Hammett or incorrectly reflected by the court reporter; (3) a response of "agreed" by Ms. Hammett instead of "disagreed" was noted on an issue; and (4) the statement "a hundred documents" should instead read "hundreds of documents" on the transcript. (Dkt. No. 267 at 2.)

2. PRA opposes only Ms. Hammett’s attempt to “correct” her first alleged error, that a dialogue defining confidentiality was excluded from the transcript. PRA takes no formal position regarding the remaining alleged errors, as Ms. Hammett concedes the transcript may accurately reflect misstatements she actually made (*id.* at 3), and these requested changes are not material regardless. *See* Fed. R. App. P. 10(e)(2) (“If anything *material* to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected ...”) (emphasis added); *United States v. Thomas*, No. 21-cr-93, 2022 U.S. Dist. LEXIS 100206, at *13 (D. Minn. June 6, 2022) (“[E]ven assuming that there was an error in the transcript and that Defendant said ‘rewind’ instead of ‘remind,’ that is not the kind of material error that would concern this Court with the need to correct or modify the record.”); *Bell v. Dyck O’Neal, Inc.*, No. JKB-22-849, 2023 U.S. Dist. LEXIS 12531, at *2-3 (D. Md. Jan. 20, 2023) (denying motion to alter transcript where movant “has not shown how those issues are material to the present appeal.”).

3. With respect to Ms. Hammett’s claim that a detailed colloquy regarding confidentiality was wholly excluded from the Hearing Transcript and her corresponding request that a paraphrased version of this claimed discussion – theoretically helpful to her appellate efforts – be inserted into the record, the Motion should be denied as: (1) the allegedly missing dialogue did not occur, certified transcripts are entitled to a statutory presumption of accuracy, Plaintiff bears the burden of overcoming this presumption of accuracy by clear evidence, and self-serving representations that a party’s memory differs from (and is superior to) the certified transcript are not sufficient to carry this burden; and (2) even if Ms. Hammett demonstrated that the transcript was inaccurate (a burden she cannot and does not carry), she concededly cannot meet her obligation of proffering an accurate version of this allegedly missing dialogue from a transcript required to demonstrate “verbatim” proceedings on the record.

4. For these reasons, as stated more thoroughly below, Plaintiff's Motion must be denied.

ARGUMENT

5. Ms. Hammett's Motion should be denied because: (1) a certified transcript is statutorily entitled to a presumption of accuracy, and Ms. Hammett's self-serving claimed recollection of a missing discussion fails to provide the "clear evidence" required to rebut this presumed accuracy; and (2) Ms. Hammett has failed to provide "clear evidence" of the missing dialogue's verbatim content, and 28 U.S.C. § 753(b) precludes the inclusion of the concededly non-accurate, paraphrased content attempted to be included in the transcript.

6. *First*, Plaintiff's Motion should be denied because a certified transcript is entitled to a statutory presumption of accuracy, Plaintiff bears the burden of overcoming that statutory presumption, and a movant's assertion that the transcript does not comport with her memory is insufficient evidence to overcome this presumption. A "certified transcript is 'deemed prima facie a correct statement of the testimony taken and proceedings had.'" *United States v. Harris*, 966 F.3d 755, 763 (8th Cir. 2020) (quoting 28 U.S.C. § 753(b)). "It is the burden of the party seeking correction of the transcript to provide 'clear evidence' of the claimed error." *United States v. Swinton*, No. 6:15-CR-06055, 2019 U.S. Dist. LEXIS 26865, at *2 (W.D.N.Y. Feb. 20, 2019).

7. To overcome the statutory presumption that a transcript is accurate and carry the burden required to change the content of a certified transcript, a party must do "far more than state that a transcript does not comport with the recollection of... the movant[,]" which is all Ms. Hammett does here. *United States v. Zichettello*, 208 F.3d 72, 97 n.11 (2d Cir. 2000); *United States v. Hill*, 859 F. App'x 652, 653 (4th Cir. 2021) ("A [party's] bald assertion of error is insufficient to overcome the statutory presumption that the transcript is correct."); *Williams v.*

Sprint/United Mgmt. Co., No. 03-2200-JWL, 2008 U.S. Dist. LEXIS 104231, at *32 (D. Kan. Dec. 19, 2008) (“Mere assertions that the record is wrong are not sufficient to overcome [28 U.S.C. § 753(b)’s] presumption.”).

8. As is the case here, a movant’s claimed “‘sound recollection’ of the testimony is insufficient to overcome the statutory presumption that the transcript is correct.” *Harris*, 966 F.3d at 763 (quoting *Davis v. United States*, Nos. 1:08-CV-531-T, 1:05-CR-206-T, 2009 U.S. Dist. LEXIS 48467, 2009 WL 1628882, at *7 (W.D.N.C. June 10, 2009)); *Swinton*, 2019 U.S. Dist. LEXIS 26865, at *2 (“Defendant contends that the transcript does not comport with his recollection of what was said during the relevant portions of the trial. However, Defendant has failed to overcome the statutory presumption of accuracy.”); *United States v. Evans*, No. 15-16, 2016 U.S. Dist. LEXIS 125959, at *2 (D. Minn. Sept. 15, 2016) (“Evans has not presented evidence to set aside the presumption of correctness given to the official transcript. Rather, the alleged errors or omissions are merely instances where Evan’s recollection of what was said at trial disagrees with what is memorialized in the transcript.”); *Bell*, 2023 U.S. Dist. LEXIS 12531, at *2 (denying motion to alter transcript where movant “provides only affidavits from her and her co-appellant attesting to the inaccuracy of the transcript and audio recording. That is not enough.”); *Thomas*, 2022 U.S. Dist. LEXIS 100206, at *13 (the “example Defendant provided in support of his motion is insufficient to overcome the presumption of correctness the transcript is afforded by 28 U.S.C. § 753(b). Defendant relies on his memory of what was said at the hearing in his assertion that the transcript contains an error.”); *Goldsberry v. United States*, No. 4:19-cv-00950, 2019 U.S. Dist. LEXIS 198321, at *3-5 (E.D. Mo. Nov. 15, 2019) (“Petitioner offers no evidence, other than his own statements, to support his contention that the transcripts were altered or inaccurate... Petitioner is unable to overcome the statutory presumption of a transcript’s correctness and

accuracy.”); *Davey v. United States*, 3:17-cv-00556-RJC, 2021 U.S. Dist. LEXIS 187708, at *21-22 (W.D.N.C. Sept. 30, 2021) (“Petitioner has provided nothing to support his conclusory and unsubstantiated assertion that the Court made prejudicial statements that were not properly recorded in the transcript. Petitioner’s failure to provide anything more cannot overcome the presumption that the certified transcript is accurate.”).

9. Plaintiff has not provided “clear evidence” demonstrating an error in the Hearing Transcript and has thus failed to carry her burden of proof in overcoming the statutory presumption that the Hearing Transcript is correct and accurate. Put plainly, the confidentiality dialogue described by Ms. Hammett did not occur. (**Ex. A** (Mitchell Decl.) ¶¶ 3-4.) Ms. Hammett’s self-serving statements that she remembers the broad strokes of a conversation which would theoretically benefit her appeal prospects are insufficient to carry this burden.

10. Ms. Hammett’s objective in filing the instant Motion is clear. She believes the inclusion of this supposed dialogue better positions an attempt at the appellate level to demonstrate an “abuse of discretion” in the “allowing [of] impermissible confidentiality to PRA.” (Dkt. No. 268 at 3.)

11. However, the “purpose of rule 10(e) is to ensure that the record on appeal accurately reflects the proceedings in the trial court (thereby allowing us to review the decision that the trial court made in light of the information that was actually before it), not to enable the losing party to add new material to the record in order to collaterally attack the trial court’s judgment.” *United States v. Elizalde-Adame*, 262 F.3d 637, 641 (7th Cir. 2001). The attempted inclusion of a conversation which never took place in the appellate record does not ensure the Eighth Circuit has an accurate reflection of proceedings before it and is merely an effort to manufacture a favorable

backdrop for arguments to be asserted in her appeal.¹ The Court should reject that effort and deny Plaintiff's Motion.

12. **Second**, even assuming Ms. Hammett had carried her burden of demonstrating the Hearing Transcript was inaccurate, Ms. Hammett concedes she cannot articulate the specifics of the allegedly omitted dialogue, requiring denial of her Motion. A motion under Fed. R. App. P. 10(e) must "state affirmatively how a correct transcript would read." *Zichettello*, 208 F.3d at 97, n. 11. Where it is "not possible to ascertain the exact words used," it is appropriate for the district court to "conclude[] that the transcript could not be amended." *United States v. Franklin*, 250 F.3d 653, 663 (8th Cir. 2001). A decision not to amend a transcript without knowledge of the "exact words used" will be upheld by an appeals court absent a showing by the movant that the "district court falsified the record, []or that the district court's interpretation was plainly unreasonable." *Id.*

13. Plaintiff concedes she cannot "quote [the Court] verbatim" in identifying the allegedly omitted conversation discussing confidentiality and instead wishes that her "paraphrased recollection of the missing language" be included in the Hearing Transcript. (Dkt. No. 268 at 3; Dkt. No. 267 at 2.) Pursuant to 28 U.S.C. § 753(b), proceedings "shall be recorded verbatim" in the transcript, meaning exactly the same words as were used originally.

14. Ms. Hammett makes no effort to provide "clear evidence" of a verbatim, accurate record which differs from the certified transcript provided by the Court reporter. Ms. Hammett cannot insert a concededly inaccurate version of proceedings in order to enhance her prospects for a successful appeal.

¹ This effort appears to be part of Ms. Hammett's litigation playbook, as it is not the first time she has claimed that a transcript did not accurately reflect proceedings in a trial court and made significant efforts to change the content of that transcript in anticipation of appellate proceedings. *See* Dkt. Nos. 133-134, 136 ¶¶ 4, 11, 18-19, 22.

15. For the foregoing reasons, Ms. Hammett's Motion to alter the content of a certified hearing transcript should be denied.

CONCLUSION

For the foregoing reasons, PRA respectfully requests that: (1) Plaintiff's Motion be denied; and (2) for such other and further relief as this Court deems appropriate and just.

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*Attorney for Defendant Portfolio Recovery
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2023, a true and exact copy of the foregoing was filed with the Court's CM/ECF system and sent via email and first class mail, postage prepaid, a copy of the same to the following individual:

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/s/ David S. Mitchell, Jr.

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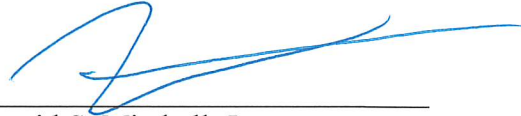
DECLARATION OF DAVID S. MITCHELL, JR.

I, David S. Mitchell, Jr., make this declaration pursuant to 28 U.S.C. § 1746:

1. I am over the age of 18 and otherwise competent to make this Declaration.
2. I submit this declaration based on my personal knowledge and in support of Portfolio Recovery Associates, LLC's Opposition to Plaintiff's Motion to Settle the Record to Correct Errors and Omissions in the Transcript of the December 1, 2021 Hearing ("Motion").
3. I attended the December 1, 2021 telephonic status conference proceeding as an attorney on behalf of Portfolio Recovery Associates, LLC in the above-captioned matter.
4. I have no recollection of the allegedly omitted "dialogue defining confidentiality" – as described in pages 2-3 of her Motion (Dkt. No. 267) and Plaintiff's corresponding brief and affidavit – taking place.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury under the laws of the United States that the foregoing statements are true and correct to the best of my personal knowledge.

Executed on September 18, 2023



David S. Mitchell, Jr.