

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

Docket No. 9372

In the Matter of

1-800 CONTACTS, INC.,
a corporation

**COMPLAINT COUNSEL’S OPPOSITION TO MOTION TO STRIKE ERRATA TO
THE DEPOSITION TRANSCRIPT OF ERIC HOLBROOK**

INTRODUCTION

The Court should deny Respondent’s Motion to Strike Errata to the Deposition Transcript of Eric Holbrook. First, Complaint Counsel has no duty to obtain errata sheets on behalf of Respondent’s counsel. Second, the weight of authority does not support Respondent’s requested relief.

Complaint Counsel takes no position on whether the corrections submitted by Mr. Holbrook as errata to his deposition transcript (CX9024) are appropriate, although we briefly address the legal authorities cited by Respondent below. Complaint Counsel’s interest is in presenting the Court with a complete and accurate record, which counsels in favor of allowing Mr. Holbrook to correct his deposition transcript. Throughout this litigation, both parties have provided corrected versions of exhibits as necessary to ensure that the record is complete and accurate. For example, Respondent produced an amended version of RX0736, the Expert Report of Ronald C. Goodstein, on April 20, 2017, well after the parties’ joint stipulation on exhibits (JX2) was admitted into evidence. Complaint Counsel had no objection to the amendment. The same course is appropriate here. Any further clarification of Mr. Holbrook’s deposition

testimony can occur during Mr. Holbrook's examination, which will occur on Wednesday, April 26, 2017.

ARGUMENT

I. Respondent's Lack of Diligence Does Not Justify Striking the Errata

Responsibility for Respondent's failure to obtain the Holbrook Errata before April 23, 2017, lies entirely with Respondent. Respondent has been on notice of the Holbrook Errata at least since April 10, 2017, when Memorial Eye served upon Respondent a declaration by Eric Holbrook referring to the "errata sheet," in support of its renewed motion for *in camera* treatment. *See* Holbrook Decl. 12, 15, 18, Apr. 9, 2017 (attached here as Exhibit A). Respondent could have contacted the reporting service or Memorial Eye at that time—or at any time after Mr. Holbrook's deposition on January 12, 2017—to inquire about the Holbrook Errata, but apparently did not.

The ordinary practice, followed in this case, is for the court reporting service to provide any errata sheet to the counsel who appeared at the deposition. Here, the reporting service apparently represented to Memorial Eye on February 9, 2017, that it would "forward [Mr. Holbrook's] executed certification and errata sheet to all counsel of record." Email from Production Department, For The Record, Inc., to Anthony Hong (Feb. 9, 2017, 1:19 PM) (attached here as Exhibit B). Respondent seeks to blame Complaint Counsel for what appears to be an administrative mix-up between the reporting service and Respondent. That mix-up does not entitle Respondent to strike evidence from the record.

II. Complaint Counsel Was Not Obligated to Send the Holbrook Errata to Respondent

As Respondent has explained, Complaint Counsel received a copy of the Holbrook Errata from the reporting service on March 13, 2017, Resp. Motion at 2, as a result of Complaint Counsel's inquiry (on March 8, 2017) about the status of third-party witness review of deposition

transcripts. Email from Production Department, For The Record, Inc., to Teresa Martin, Litigation Support Specialist, Federal Trade Commission (Mar. 13, 2017, 8:53 AM) (attached here as Exhibit C). At the time, Complaint Counsel had no reason to suspect that the reporting service had failed to send the Holbrook Errata to Respondent. On April 23, 2017, Respondent asked Complaint Counsel whether Complaint Counsel had received any errata to the Holbrook deposition. Complaint Counsel sent the Holbrook Errata to Respondent that same day, upon realizing that the reporting service had not served Respondent.

Complaint Counsel did not “receive” the Holbrook Errata from non-party Memorial Eye. Complaint Counsel received the errata from the reporting service pursuant to ordinary practice, just as Complaint Counsel and Respondent have received final deposition transcripts directly from the reporting service throughout this litigation. Complaint Counsel owes no duty to Respondent to ask the reporting service on behalf of Respondent if the reporting service has sent Respondent its copies of final deposition transcripts or errata sheets. Paragraph 14 of the Scheduling Order, which addresses documents, not testimony, certainly creates no such duty. Respondent’s argument that the errata were “untimely produced” is baseless.

III. The Weight of Authority Does Not Support Respondent’s Requested Relief

As stated above, Complaint Counsel take no position at this time on the propriety of the changes listed in the Holbrook Errata. However, we do wish to inform the Court that Respondent’s motion omitted important legal authority regarding corrections to depositions.

First, the FTC Rules of Practice for Administrative Proceedings, which apply here, expressly permit corrections “as to form or substance” of transcribed deposition testimony. 16 C.F.R. § 3.33(f). Likewise, the Federal Rules of Civil Procedure, which may be consulted for guidance to supplement the FTC Rules, permit a deponent to make “changes in form or substance” to transcribed testimony. Fed. R. Civ. P. 30(e). Thus, by the plain language of FTC

Rule 3.33(f) and the analogous federal rule, errata do not exceed the scope of corrections permissible merely because they include substantive changes.¹

Moreover, the Federal Rule 30(e) case law cited by Respondent represents the minority view among federal courts. *See Walker v. George Koch Sons, Inc.*, No. 2:07cv274, 2008 WL 4371372, at *2 (S.D. Miss. Sept. 18, 2008) (describing the “minority view” of interpreting Rule 30(e) narrowly to allow “only corrective or non-substantive changes”). The majority rule is that “a deponent may make changes that contradict the original answers given, even if those changes are not supported by convincing explanations.” *Aetna Inc. v. Express Scripts, Inc.*, 261 F.R.D. 72, 75 (E.D. Pa. 2009); *see Wright & Miller, Federal Practice & Procedure* § 2118 & n.3 (explaining that Rule 30(e) allows a witness to make substantive changes even if the stated reasons seem inadequate, and collecting cases). Under the majority rule, all of the witness’s answers “remain a part of the record” and parties “are free to cross-examine the witness at trial on” any contradicting testimony. *Aetna*, 261 F.R.D. at 75; *see also Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000) (Posner, J.) (explaining that Rule 30(e) authorizes a witness to “change his deposition from what he said to what he meant” but also “requires that the original transcript be retained . . . so that the trier of fact can evaluate the honesty of the alteration”).² Thus, even if the Holbrook Errata contained contradictory statements, the proper remedy recognized by numerous federal courts would be to allow the trier

¹ Although it is not dispositive of the issue, Complaint Counsel notes that many of the changes in the Holbrook Errata appear to address minor clarifications and transcription errors. By way of example, Mr. Holbrook would clarify that he “did not yet have a title” at the time Memorial Eye was founded because he “was not yet working for the company.” Resp. Motion, Ex. A at 1 (clarifying CX9024, Holbrook Dep. 7:22-23). None of the changes listed in the Holbrook Errata address issues that are material to this case.

² *Thorn* also suggests that directly contradictory changes to a transcript may be disregarded on summary judgment, but that rule would not provide trial judges the general authority to strike any substantive errata changes. *See United States ex rel. Robinson v. Indiana Univ. Health Inc.*, 204 F. Supp. 3d 1040, 1043 (S.D. Ind. 2016) (explaining that *Thorn* permits a trial judge to disregard substantive, contradictory errata changes when considering summary judgment but does not disturb the general rule that Rule 30(e) allows changes in substance to deposition testimony).

of fact to consider both the original transcript and the errata, along with Mr. Holbrook's forthcoming trial testimony.

CONCLUSION

For these reasons, Respondent's Motion to Strike Holbrook Errata should be denied.

Dated: April 26, 2017

Respectfully submitted,

/s/ Daniel J. Matheson

Daniel J. Matheson

Kathleen M. Clair

Barbara Blank

Thomas H. Brock

Gustav P. Chiarello

Joshua B. Gray

Nathaniel M. Hopkin

Mika Ikeda

Aaron Ross

Charlotte S. Slaiman

Charles Loughlin

Geoffrey M. Green

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2075
Facsimile: (202) 326-3496
Email: dmatheson@ftc.gov

Counsel Supporting the Complaint

EXHIBIT A

REDACTED IN ENTIRETY

EXHIBIT B

From: Anthony Hong <awhong@lawgroupip.com>
Sent: Sunday, April 23, 2017 4:30 PM
To: Clair, Kathleen; 'Briers, Zachary'; Blank, Barbara
Subject: FW: 1/12/17 Holbrook Transcript for Review

Counsel

Please see the attached email exchange with For the Record in which it's confirmed that

1. Mr. Holbrook's errata sheet was submitted timely to For the Record and
2. For the Record indicated that it would forward the errata sheet to "all counsel of record."

In my experience, the court reporter forwards errata sheet to all counsel who've paid for a copy for a deposition transcript and that's what was promised here.

Best,

Anthony Hong

From: Depo [<mailto:depo@ftrinc.net>]
Sent: Friday, March 10, 2017 2:50 PM
To: Anthony Hong <awhong@lawgroupip.com>
Subject: Re: 1/12/17 Holbrook Transcript for Review

This is correct. Thanks for the follow-up.

Thanks,

Production Department
For The Record, Inc.
10760 Demarr Road
White Plains, Maryland 20695
301-870-8025 or 800-921-5555
301-870-8333 (fax)



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On 3/10/2017 3:35 PM, Anthony Hong wrote:

Hello

As we discussed today, my client Eric Holbrooke will submit his changes tomorrow, March 11, 2017, before midnight.

The 30th day of the deadline mentioned in your email falls on March 11th.

Your office had indicated today that submission by any time on March 11th by email (followed by the original) would work.

If this is not your understanding, please let me know by reply email immediately.

Regards,

Anthony Hong

From: Depo [<mailto:depo@ftrinc.net>]
Sent: Thursday, February 09, 2017 1:19 PM
To: awhong@lawgroupip.com
Subject: 1/12/17 Holbrook Transcript for Review

MEMORANDUM

TO: Eric Holbrook c/o Anthony Hong, Esq.
FROM: For The Record, Inc.
DATE: 2/9/17
RE: TRANSCRIPT READING AND SIGNING
DATE OF PROCEEDING: 1/12/17
CASE: 1-800 Contacts

Attached please find a password-protected, view-only* copy of your testimony in the above-referenced matter, as well as a pdf witness certificate/errata sheet. Print the certificate/errata file, then make any corrections to the errata sheet as you review the transcript, noting page and line numbers. All corrections and changes will become part of the sworn testimony in this case.

Upon review completion, please execute the witness certificate, and return the witness certificate and errata sheet to For The Record, Inc. We will forward your executed certification and errata sheet to all counsel of record.

Return the signed certificate and errata sheet to me no later than 30 days from receipt of this letter. Failure to return the signed transcript within the time allowed will result in the transcript being used as prepared by the reporter. See the applicable jurisdiction's rules of procedure for further guidance.

If you wish to purchase an official copy of this transcript for your permanent records, or if you have any other questions, please don't hesitate to contact our office. Thank you for your attention to this matter.

Thanks,

Production Department
For The Record, Inc.
10760 Demarr Road
White Plains, Maryland 20695
301-870-8025 or 800-921-5555
301-870-8333 (fax)

*You will not be able to print or save the transcript, as it is a view-only file for review purposes. Password will follow.

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EXHIBIT C

REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2017, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing documents to:

Gregory P. Stone
Steven M. Perry
Garth T. Vincent
Stuart N. Senator
Gregory M. Sergi
Munger, Tolles & Olson LLP
350 South Grand Avenue
50th Floor
Los Angeles, CA 90071
gregory.stone@mto.com
steven.perry@mto.com
garth.vincent@mto.com
stuart.senator@mto.com
gregory.sergi@mto.com

Justin P. Raphael
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
justin.raaphael@mto.com

Sean Gates
Charis Lex P.C.
16 N. Marengo Ave.
Suite 300
Pasadena, CA 91101
sgates@charislex.com

Counsel for Respondent 1-800 Contacts, Inc.

Dated: April 26, 2017

By: /s/ Daniel J. Matheson
Attorney

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

April 26, 2017

By: /s/ Daniel J. Matheson
Attorney