



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

In the Matter of

1-800 CONTACTS, INC.,  
a corporation,

Respondent.

Docket No. 9372

**RESPONDENT 1-800 CONTACTS, INC.’S MOTION TO STRIKE ERRATA  
TO THE DEPOSITION TRANSCRIPT OF ERIC HOLBROOK**

**I. INTRODUCTION**

On Sunday, April 23, 2017, Complaint Counsel produced to Respondent “errata” to the deposition transcript of Eric Holbrook, whom Complaint Counsel intend to call to testify this Wednesday. These errata previously were not produced to Respondent, and Complaint Counsel have informed Respondent that they intend to amend their trial exhibits to include the errata. The errata contain numerous substantive alterations to Mr. Holbrook’s sworn testimony that far exceed the scope of corrections allowed by Federal Rule of Civil Procedure 30(e). The errata should not be admitted into evidence or considered for any purpose.

**II. ARGUMENT**

**A. The Errata Contain Impermissible Alterations and Additions.**

Mr. Holbrook’s errata exceed the scope of corrections permissible under Rule 30(e). They consist of 56 putative corrections, but only 7 are “to correct a stenographic error.” (Ex. A.) The remaining 49 constitute substantive changes to allegedly “clarify the record” or “conform

with the facts.” (*Id.*) Indeed, 22 of the “corrections” add flatly contradictory statements to the sworn testimony. As just one example, when asked whether Memorial Eye had “the opportunity to negotiate the settlement agreement,” Mr. Holbrook responded “I guess technically, yes. We negotiated it with them.” (CX9024 at 65:14–17.) The errata would add the contradictory statement “But I wouldn’t call it a negotiation.” (Ex. A at 1.) Similarly, when asked whether his website was affiliated with a nationwide network of ECPs, Mr. Holbrook responded “no.” (CX9024 at 143:25–144:5.) The errata would change this response to “We had a large list of ECP contacts across the nation that we could direct customers to for eye exams . . . .” (Ex. A at 2.)

These substantive alterations are not permitted under Rule 30(e), which “cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. . . . A deposition is not a take home examination.” *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 n.5 (10th Cir. 2002) (quotation marks and citation omitted); *see also Jackson v. Teamsters Local Union 922*, 310 F.R.D. 179, 185 (D.D.C. 2015) (striking “substantive and material additions” from deposition errata); *Hambleton Bros. Lumber Co. v. Balkin Enterp’s, Inc.*, 397 F.3d 1217, 1226 (9th Cir. 2005) (“Rule 30(e) is to be used for corrective, and not contradictory, changes.”).

**B. The Errata Were Untimely Produced.**

In addition to being substantively improper, the errata were untimely produced. Mr. Holbrook’s deposition was conducted pursuant to Complaint Counsel’s subpoena. Complaint Counsel received the errata from the court reporter on March 13, 2017. They did not produce them to Respondent until April 23, 2017, days before Mr. Holbrook is scheduled to testify. Paragraph 14 of the Scheduling Order requires Complaint Counsel to produce to Respondent “copies of the documents received from non-parties . . . within three business days.”

**III. CONCLUSION**

For these reasons, the errata should be stricken and not considered for any purpose.

DATED: April 24, 2017

Respectfully submitted,

/s/ Steven M. Perry \_\_\_\_\_

Gregory P. Stone (gregory.stone@mto.com)  
Steven M. Perry (steven.perry@mto.com)  
Garth T. Vincent (garth.vincent@mto.com)  
Stuart N. Senator (stuart.senator@mto.com)  
Gregory M. Sergi (gregory.sergi@mto.com)  
Zachary Briers (zachary.briers@mto.com)  
MUNGER, TOLLES & OLSON LLP  
350 South Grand Avenue  
Los Angeles, California 90071  
Phone: (213) 683-9100  
Fax: (213) 687-3702

Justin P. Raphael (justin.rafael@mto.com)  
MUNGER, TOLLES & OLSON LLP  
560 Mission Street, 27<sup>th</sup> Floor  
San Francisco, California 94105

Chad Golder (chad.golder@mto.com)  
MUNGER, TOLLES & OLSON LLP  
1155 F Street NW, 7<sup>th</sup> Floor  
Washington, DC 20004

Sean Gates (sgates@charislex.com)  
CHARIS LEX P.C.  
16 N. Marengo Avenue, Suite 300  
Pasadena, California 91101  
Phone: (626) 508-1717  
Fax: (626) 508-1730

***Counsel for Respondent 1-800 Contacts, Inc.***

# EXHIBIT A

## Testimony Transcript Errata Sheet

WITNESS: Eric Holbrook

DATE: 1/12/17

CASE: 1-800 Contacts

<u>PAGE</u>	<u>LINE</u>	<u>CORRECTION</u>	<u>REASON FOR CHANGE</u>
7	22-23	When we began the company, I was not yet working for the company, so I did not yet have a title.	To clarify the record
24	2	Replace: "were" with "needed to be"	To clarify the record
27	16	For our former online business, we used a lot of online advertising, but I'm not sure if all of our online advertising could be classified as search advertising; I'm just not knowledgeable about what all is considered search advertising.	To clarify the record
33	11	[REDACTED]	To clarify the record
33	24	[REDACTED]	To clarify the record
35	7	[REDACTED]	To clarify the record
35	13	[REDACTED]	To correct stenographic error
35	21	Replace: "project" with "budget"	To correct stenographic error
37	2	Clarification: He had autonomy to spend what he deemed appropriate; however, in general, he did seek my approval for large, unanticipated expenditures.	To clarify the record
40	23	Add: Since ad text includes the domain name, all ads should have included one of the names.	To clarify the record
41	13	Add: It weakens our brand.	To clarify the record
41	21, 23-24	I misunderstood the question and corrected my answer on page 51, lines 18- 21 and page 52, lines 1- 3 and 8-10 and 12-13.	To correct the record
46	23	The letter was actually from Bryan Pratt to Elio Sanchez.	To correct the record
50	3	Delete: "to"	To correct stenographic error
51	16	Replace: "page 36, line 24" with "page 41, line 14"	To conform with the facts
53	13	Replace: "was searching on" with "entered a search term that included"	To clarify the record
55	9	[REDACTED]	To clarify the record
56	13	[REDACTED]	To clarify the record
56	22	[REDACTED]	To clarify the record
56	23	[REDACTED]	To correct stenographic error
58	6	Replace: "they" with "all requested emails"	To clarify the record
63	15	Replace: "the most important thing" with "very important"	To clarify the record
64	8	Add following "Court": "and Lens.com"	To clarify the record
65	17	Add: "But I wouldn't call it a negotiation."	To clarify the record
66	1	Add following "did": "technically"	To clarify the record
66	1	Replace: "procedural negotiation things" with "settlement process"	To clarify the record

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66	3	Add: "And we didn't benefit from it in any way except for bringing an end to the suit."	To clarify the record
67	8	Replace: "negotiations" with "subsequent drafts"	To clarify the record
69	22	Replace: "can tell you by that" with "can't tell you by the"	To correct stenographic error
70	10	Replace: "We didn't think it" with "We didn't think not using negative keywords"	To clarify the record
71	16	Replace sentence with: "To not implement negative keywords in the search engines."	To clarify the record
74	3	Replace: "phrase" with "match"	To clarify the record
74	4	Replace: "phrase" with "match"	To clarify the record
78	13	Replace: "So" with "Also"	To correct stenographic error
79	14	Replace: "we" with "our internet sites"	To clarify the record
83	20	Add: "Also, since your fixed costs don't increase much, your profit increases."	To clarify the record
123	14	I also spoke with Charlotte Slaiman with the FTC on or about June 19, 2015.	To correct the record
123	18	The first call was actually on or about June 19, 2015.	To correct the record
124	1	My first phone call with the FTC was actually on or about June 19, 2015 and was with Charlotte Slaiman.	To correct the record
124	6	This conversation was with Gus Chiarello which took place after my phone call with Charlotte Slaiman.	To correct the record
136	8	Delete: "on"	To correct stenographic error
140	15	Replace: "but take a message and"" with "a message would be taken and they would"	To conform with the facts
144	5	Add: "We had a large list of ECP contacts across the nation that we could direct customers to for eye exams, including a fourth ECP under the Better Vision, P.A corporation."	To conform with the facts
144	16	Add following "Yes": "along with the list of ECP contacts across the nation."	To conform with the facts
144	24	Replace: "lenses" with "lens prescriptions"	To clarify the record
149	13	[REDACTED]	To conform with the facts
152	6	Replace: "I had no idea" with "I don't recall"	To conform with the facts
152	7	Replace: "no idea" with "I don't recall"	To conform with the facts
155	3	My original testimony here was inaccurate; I was confused; the Counterclaims document did not request the filing of negative keywords.	To conform with the facts
155	6	My original testimony here was inaccurate; I was confused; the Counterclaims document did not request the filing of negative keywords.	To conform with the facts
155	20-25	My original testimony here was inaccurate; I was confused; the Counterclaims document did not request the filing of negative keywords.	To conform with the facts
162	19	Replace: "Ms. Clair" with "Mr. Briers".	To correct the record
185	6	Replace: "for 1-800 Contacts" with "in response to the 1-800 Contacts letters."	To clarify the record
185	18	However, I have no personal knowledge of whether we bid on our own tradenames or not.	To clarify the record
218	22	My answer was incorrect; I didn't understand the question. I recall that Memorial Eye's representatives did look through all the service notes and it was 1-800 Contacts that picked out the ones they felt showed possible confusion.	To conform with the facts
219	4	Add: "It was not based on the limited information I reviewed."	To conform with the facts

**CERTIFICATE OF SERVICE**

I hereby certify that on April 24, 2017, I filed the foregoing document 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 served via electronic mail a copy of the foregoing document on:

Daniel Matheson, *dmatheson@ftc.gov*  
*BC-1040-1800-SearchAdTeam-DL@ftc.gov*

DATED: April 24, 2017

By: /s/ Eunice Ikemoto  
Eunice Ikemoto

**CERTIFICATE FOR ELECTRONIC FILING**

I hereby 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.

DATED: April 24, 2017

By: /s/ Steven M. Perry  
Steven M. Perry  
Attorney

Notice of Electronic Service

**I hereby certify that on April 27, 2017, I filed an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Motion to Strike Errata to the Deposition Transcript of Eric Holbrook, with:**

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
Suite 110  
Washington, DC, 20580

Donald Clark  
600 Pennsylvania Ave., NW  
Suite 172  
Washington, DC, 20580

**I hereby certify that on April 27, 2017, I served via E-Service an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Motion to Strike Errata to the Deposition Transcript of Eric Holbrook, upon:**

Thomas H. Brock  
Attorney  
Federal Trade Commission  
TBrock@ftc.gov  
Complaint

Barbara Blank  
Attorney  
Federal Trade Commission  
bblank@ftc.gov  
Complaint

Gustav Chiarello  
Attorney  
Federal Trade Commission  
gchiarello@ftc.gov  
Complaint

Kathleen Clair  
Attorney  
Federal Trade Commission  
kclair@ftc.gov  
Complaint

Joshua B. Gray  
Attorney  
Federal Trade Commission  
jbgray@ftc.gov  
Complaint

Geoffrey Green  
Attorney  
Federal Trade Commission  
ggreen@ftc.gov  
Complaint

Nathaniel Hopkin  
Attorney  
Federal Trade Commission  
nhopkin@ftc.gov



## Complaint

Charles A. Loughlin  
Attorney  
Federal Trade Commission  
cloughlin@ftc.gov  
Complaint

Daniel Matheson  
Attorney  
Federal Trade Commission  
dmatheson@ftc.gov  
Complaint

Charlotte Slaiman  
Attorney  
Federal Trade Commission  
cslaiman@ftc.gov  
Complaint

Mark Taylor  
Attorney  
Federal Trade Commission  
mtaylor@ftc.gov  
Complaint

Gregory P. Stone  
Attorney  
Munger, Tolles & Olson LLP  
gregory.stone@mto.com  
Respondent

Steven M. Perry  
Attorney  
Munger, Tolles & Olson LLP  
steven.perry@mto.com  
Respondent

Garth T. Vincent  
Munger, Tolles & Olson LLP  
garth.vincent@mto.com  
Respondent

Stuart N. Senator  
Munger, Tolles & Olson LLP  
stuart.senator@mto.com  
Respondent

Gregory M. Sergi  
Munger, Tolles & Olson LLP  
gregory.sergi@mto.com  
Respondent

Justin P. Raphael  
Munger, Tolles & Olson LLP  
Justin.Raphael@mto.com  
Respondent

Sean Gates

Charis Lex P.C.  
sgates@charislex.com  
Respondent

Mika Ikeda  
Attorney  
Federal Trade Commission  
mikeda@ftc.gov  
Complaint

Zachary Briers  
Munger, Tolles & Olson LLP  
zachary.briers@mto.com  
Respondent

Chad Golder  
Munger, Tolles, and Olson  
chad.golder@mto.com  
Respondent

Julian Beach  
Munger, Tolles & Olson LLP  
julian.beach@mto.com  
Respondent

Aaron Ross  
Attorney  
Federal Trade Commission  
aross@ftc.gov  
Complaint

Thomas Dillickrath  
Attorney  
Federal Trade Commission  
tdillickrath@ftc.gov  
Complaint

Jessica S. Drake  
Attorney  
Federal Trade Commission  
jdrake@ftc.gov  
Complaint

W. Stuart Hirschfeld  
Attorney  
Federal Trade Commission  
shirschfeld@ftc.gov  
Complaint

David E. Owyang  
Attorney  
Federal Trade Commission  
dowyang@ftc.gov  
Complaint

Henry Su  
Attorney  
Federal Trade Commission  
hsu@ftc.gov

Complaint

Steven Perry  
Attorney