

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

04 27 2017  
586539

In the Matter of

1-800 CONTACTS, INC.,  
a corporation,

Respondent.

Docket No. 9372

ORIGINAL

**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. The

The FTC is a federal agency that enforces federal trade regulation laws. It is located in Washington, D.C. and has 11 regional offices. The FTC is headed by five commissioners, one of whom is the chair. The FTC is an independent agency, meaning it is not part of any executive department. The FTC is responsible for enforcing the Federal Trade Commission Act, which prohibits unfair and deceptive trade practices. The FTC also has the authority to issue orders to cease and desist from such practices. The FTC is a key player in the protection of consumers and the promotion of competition in the marketplace.

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 21bst- 0 Td bsorsrann-98.37T3 Td [(co)1

### 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

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# 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

**Notice of Electronic Service**





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