

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

1-800 Contacts, Inc.

Docket No. D09372



**ORIGINAL**

**NON-PARTY MOTION TO QUASH AND/OR LIMIT SUBPOENA DUCES TECUM**

UNITED STATES OF AMERICA  
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1-800 Contacts, Inc.

Docket No. D09372

**NON-PARTY MOTION TO QUASH AND/OR LIMIT SUBPOENA DUCES TECUM**

Pursuant to 16 C.F.R. § 3.34 and Rule 3.34(c) of the Rules of Practice for Adjudicative Proceedings before the United States Federal Trade Commission, WebEyeCare, Inc. ("WEC"), a non-party to this proceeding, files the following Motion to Quash and/or Limit Subpoena.

**I. INTRODUCTION**

On October 4, 2016, WEC was served with a Subpoena Duces Tecum issued on October 4, 2016 at the behest of Complainant Federal Trade Commission ("FTC" or "Complainant"). (A copy of the Subpoena is attached as Exhibit A).

The Subpoena calls for the search of records from January 1, 2002 to the present, a period of *almost fifteen* years – seven of which WEC was in existence – of records (including electronically stored records) that are related to information that broadly includes, but is not limited to, WEC's prior correspondence with 1-800 Contacts, WEC's product and sales information, and WEC's marketing and advertising practices. These requests of a non-party might potentially involve thousands of records, while arguably only those records pertaining to WEC's communications with 1-800 Contacts and use of paid search advertising to bid on 1-800 Contacts keywords are actually relevant to the FTC's claims against 1-800 Contacts. In addition, WEC is an extremely small business with less than ten employees, none of whom would typically be dedicated to gathering the requested information. The value of any relevant

information is far outweighed by the burden and expense that will be placed on WEC if it is required to respond to this Subpoena.

WEC moves to quash or limit the Subpoena on three main grounds. First, the Subpoena is overly broad and unduly burdensome; seeks materials which are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; and requests records already in Respondent 1-800 Contacts' possession or more readily attainable from other sources. Second, many of the requested documents are confidential and proprietary and/or are considered trade secrets, and therefore should be protected from discovery, particularly from its competitors like 1-800 Contacts. Third, assuming that the scope of the Subpoena was even manageable, and the responsive documents were relevant and not privileged, the timing of the Subpoena and the short time frame for response makes full and adequate compliance impossible.

## **II. ARGUMENT**

### **A. Overview**

First, and importantly, WEC is not a party to this proceeding, and has no direct interest in its outcome. The Subpoena would be burdensome even if issued against a party. Because it is issued against a non-party, it is unreasonably burdensome, and should be either quashed in its entirety or dramatically limited.

Like a federal court, an Administrative Law Judge in an FTC proceeding should quash or limit any subpoena that is unduly burdensome or requires the disclosure of privileged or confidential and proprietary information, or information rising to the level of trade secrets. 16 C.F.R. §3.31(c)(1)(iii) (use of subpoena and other discovery methods "shall be limited by the Administrative Law Judge" where the "burden and expense of the proposed discovery outweigh its likely benefit"); 16 C.F.R. §3.31 (c)(2) (authorizing Administrative Law Judge to "enter a

protective order denying or limiting discovery to preserve" a privilege); Fed. R. Civ. P. 45(c)(3) (a court "shall quash or modify the subpoena if it ...requires disclosure of privileged or other protected matter ... [or] subjects a person to undue burden"). Moreover, an Administrative Law Judge has the power to modify the subpoena and limit the scope of permissible discovery. 16 C.F.R. §3.31(d)(1) (authorizing Administrative Law Judge to "deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense"); *see also* Fed. R. Civ. P. 26(c) (court may grant a protective order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense). *See also* *Murphy v. Deloitte & Touche Group Ins. Plan*, 619 F.3d 1151, 1163 (10th Cir., 2010) (discovery has "never been a license to engage in an unwieldy, burdensome and speculative fishing expedition.").

Information is not discoverable if it is not relevant. Fed. R. Civ. P. 26(b)(1). Further "discovery in Commission adjudicatory proceedings under Part 3 of the Commission's Rules is limited to matters that are relevant to the allegations of the Commission's complaint, to the relief proposed therein, or to the Respondent's defenses," none of which is at issue in this Discovery Motion. See 16 C.F.R. 93.31.

Moreover, discovery requests are overbroad, even if some responsive information is conceivably relevant, when only a fraction of the millions of documents requested are relevant *Nugget Hydroelectric L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 438-39 (9th Cir. 1992). The Subpoena in this case calls for the production of probably thousands of pages of documents, *by a non-party*, which Complainant has not shown to be entirely relevant. These efforts would require significant resources from WEC, which is a small business without employees in place to be able to produce the requested documents. These requests would create a heavy burden on the owners

of WEC to either figure out how to produce the requested documents themselves, or hire external resources to produce such information at a very high cost. Simply put, responding to these requests is an unreasonable and monumental undertaking that could not be completed within the time allotted, if at all. Accordingly, the burden and expense required to comply with Complainant's Subpoena far outweighs any benefit that Complainant could hope to obtain.

Therefore, WEC respectfully requests that the Subpoena should be quashed, or at least should be limited in several significant respects.

**B. General Objections to Scope of Subpoena**

1. WEC objects to Complainant's Subpoena to the extent that it seeks to impose obligations on WEC that exceed or modify the requirements of the FTC's Rules of Practice, the FTC's governing regulations, and other applicable rules of procedure.

2. WEC objects to Complainant's Subpoena on the grounds that it is overbroad and seeks the production of documents that are neither relevant to the subject matter of this proceeding, nor reasonably calculated to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Respondent. Specifically, Complainant seeks information that is wholly unrelated to WEC's use or attempted use of 1-800 Contacts keywords, which therefore exceeds the scope of FTC's inquiry and the claims at issue against 1-800 Contacts.

3. WEC objects to Complainant's Subpoena on the grounds that it is duplicative and harassing because the Subpoena seeks information and documents that are or should be in Respondent's possession, custody, or control.

4. WEC objects to Complainant's Subpoena to the extent it seeks documents that are protected by the attorney-client privilege, work product doctrine, the common interest privilege, and other applicable privileges, immunities, and duties of confidentiality belonging to WEC.

5. WEC objects to Complainant's Subpoena on the grounds that it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of WEC, including commercially sensitive information.

**C. Specific Objections to Document Requests**

WEC asserts the following specific objections to the categories of documents the Subpoena requires to be produced:

**1. All Documents Relating to communications with 1-800 Contacts related to Negative Keywords.**

Some or all of this requested information is or should already be in 1-800 Contacts' possession and control, and is therefore more readily obtainable from Respondent. Notwithstanding the foregoing, this requested information is neither objected to nor is it required to be quashed, provided, however, Complainant affords WEC ample opportunity to produce.

**2. For each Negative Keyword you have implemented during the Relevant Period, Documents Sufficient to Show the first date on which You instructed a Search Engine to implement such a Negative Keyword (and, if applicable, whether the Negative Keyword was implemented as an exact, phrase, or broad match), and Documents Sufficient to Show any dates on which You instructed a Search Engine to cease implementing such a Negative Keyword.**

WEC incorporates by reference all of its general objections set forth in Section II.B above. WEC further objects because this request is overly broad, not reasonably limited in time or scope, and unduly burdensome. This request further seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence. Specifically, WEC's use of negative keywords other than using 1-800 Contacts search terms is not relevant to the FTC's investigation into 1-800 Contacts' bidding practices or its claims against 1-800 Contacts. This request also seeks information that is highly confidential and proprietary to WEC, namely WEC's strategies with respect to keyword advertising.

Notwithstanding the foregoing objections, provided it affords ample opportunity to produce, WEC is able to provide, on a confidential basis, data related specifically to WEC's use of 1-800 Contacts search terms in negative keyword advertising.

**3. All Documents Relating to communications with 1-800 Contacts regarding any actual litigation or threatened litigation, including but not limited to Documents Relating to the settlement of such actual litigation or threatened litigation.**

WEC incorporates by reference all of its general objections set forth in Section II.B above. WEC further objects to the fact that some or all of the requested information is or should already be in 1-800 Contacts' possession and control, and it is therefore more readily obtainable from 1-800 Contacts. Requiring WEC to search for records that involve communications *with* 1-800 Contacts is an undue and unnecessary burden that would impose needless costs on non-party WEC.

**4. All Documents Relating to communications with 1-800 Contacts related to the enforcement of any provision in an agreement between You and 1-800 Contacts settling actual litigation or threatened litigation.**

WEC incorporates by reference all of its general objections set forth in Section II.B above. WEC further objects to the fact that some or all of the requested information is or should already be in 1-800 Contacts' possession and control, and it is therefore more readily obtainable from 1-800 Contacts. Requiring WEC to search for records that involve communications *with* 1-800 Contacts is an undue and unnecessary burden that would impose needless costs on non-party WEC.

**5. Documents Sufficient to Show Your marketing strategies, marketing plans, and search advertising strategies, including but not limited to changes in such strategies over time.**

WEC incorporates by reference all of its general objections set forth in Section II.B above. Notwithstanding these objections, WEC has no documents to produce that are responsive to this request.

**6. For each contact lens product UPC or SKU number that the Company sells, Documents Sufficient to Show the style level or product code, a description of the product, all classification variables, and product descriptors, and package size, and Documents Sufficient to Show on a weekly basis:**

- a. Retail price**
- b. Sales revenue**
- c. Total promotional discount**
- d. Average shipping charge; and**



**e. Unit sales (i.e., quantity of each item sold).**

WEC incorporates by reference all of its general objections set forth in Section II.B above. WEC further objects because this request is overly broad, not reasonably limited in time or scope, and unduly burdensome. Indeed, requesting information derived over a period of years to be broken down to weekly basis would be unduly burdensome even for a party, much a less a non-party like WEC. This request further seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence. Specifically, WEC's sales revenue, promotional discounts, shipping charges, or pricing information derived from sources other than using 1-800 Contacts search terms is not relevant to the FTC's investigation into 1-800 Contacts' bidding practices or its claims against 1-800 Contacts. This request also seeks information that is highly confidential and proprietary to WEC, namely sales revenue, discounts, shipping fees, and sales figures.

Notwithstanding the foregoing objections, provided it has ample opportunity to produce, WEC will attempt to provide the following information, broken down on an average annual basis:

- (i) a list of products and names;
- (ii) retail prices;
- (iii) on a confidential basis, sales revenue by product for orders that were captured using 1-800 Contacts search terms marketing during the approximately two-week period of time in 2010 in which WEC used 1-800 Contacts search terms (the "Restricted Period");
- (iv) on a confidential basis, promotional discounts by product for all orders that were captured from 1-800 Contacts search terms marketing during the Restricted Period;

(v) on a confidential basis, shipping charges by product for all orders that were captured from 1-800 Contacts search terms marketing during the Restricted Period; and

(vi) on a confidential basis, unit sales by product for all orders that were captured from 1-800 Contacts search terms marketing during the Restricted Period.

**7. For each of the past five years, Documents Sufficient to Show for contact lens sales the annual contribution margins, net revenue; cost of goods sold; credit card fees; and variable selling general and administrative costs for the following channels:**

- a. Online;**
- b. Telephone or mail-order;**
- c. In-store; and**
- d. Other (identify “Other” channels).**

WEC incorporates by reference all of its general objections set forth in Section II.B above. WEC further objects because this request is overly broad and unduly burdensome. This request further seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence. Specifically, WEC’s contribution margins, net revenue, cost of goods sold, credit card fees, and other costs from advertising channels unrelated to using 1-800 Contacts search terms is not relevant to the FTC’s investigation into 1-800 Contacts’ bidding practices or its claims against 1-800 Contacts. This request also seeks information that is highly confidential and proprietary to WEC, namely sales revenue, fees, and other costs.

Notwithstanding the foregoing objections, provided it affords ample opportunity to produce, WEC will attempt to provide, on a confidential basis, contribution margins, net revenue, cost of goods sold, credit card fees, and other costs specifically related to sales generated from the use 1-800 Contacts search terms marketing during the Restricted Period.

**8. Documents Sufficient to Show all Keywords Relating to contact lenses organized by search advertising Campaign and Ad Group, including Negative Keywords, and dates on which each keyword, or negative keyword, was added, and, if applicable, removed, paused, or re-started. For reach Keyword listed, Documents Sufficient to Show the following information, on a daily basis: (provide responses separately for reach Campaign and Ad Group even in the event that the same Keyword was used in multiple Campaigns and Ad Groups.)**

- a. Impressions;**
- b. Clicks;**
- c. Clickthrough rate (CTR);**
- d. Maximum cost per click bid;**
- e. Keyword Matching Option (e.g. exact match, phrase match, or broad match);**
- f. Cost per click;**
- g. Cost per Action;**
- h. Cost per impression;**
- i. Cost USD;**
- j. Average ad rank;**
- k. Conversion rate; and**
- l. Conversion value**

WEC incorporates by reference all of its general objections set forth in Section II.B above. WEC further objects because this request is overly broad, not reasonably limited in time or scope, and unduly burdensome. Indeed, Complainant is requesting non-party WEC to organize all keywords used by each advertising campaign and ad group for an unlimited period of time, broken down to a *daily basis*. Such requests would require WEC to perform incredibly time intensive tasks that would be considered overbroad and unduly burdensome even to a party. This request further seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence. Specifically, all keywords WEC ever used in all advertising campaigns WEC ever conducted, as opposed to only keywords and ad campaigns that included

the use of 1-800 Contacts search terms, which may in fact be relevant to the FTC's investigation into 1-800 Contacts' bidding practices or its claims against 1-800 Contacts. This request also seeks information that is highly confidential and proprietary to WEC, namely keywords used and the corresponding success rates.

Notwithstanding the foregoing objections, provided it affords ample opportunity to produce, WEC will attempt to provide, on a confidential basis, the data requested in (a) – (l) that WEC maintains that is specific to WEC's use of 1-800 Contacts search terms during the Restricted Period.

**9. For reach of the past five years, submit a complete copy of the Company's referral data for contact lenses kept in web logs, Google Analytics, bid management software, or any other similar software tool, or provided to the Company by any Affiliate or marketing or advertising agency, including all raw data, any data analysis, and all information concerning the URL.**

WEC incorporates by reference all of its general objections set forth in Section II.B above. WEC further objects because this request is overly broad and unduly burdensome. This request further seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence. Specifically, WEC's referral data for contact lenses derived from advertising channels unrelated to using 1-800 Contacts search terms is not relevant to the FTC's investigation into 1-800 Contacts' bidding practices or its claims against 1-800 Contacts. This request also seeks information that is highly confidential and proprietary to WEC, namely all referral data for contact lenses.

Notwithstanding the foregoing objections, provided it affords ample opportunity to produce, WEC will attempt to provide, on a confidential basis, referral data related to WEC's use of 1-800 Contacts search terms marketing during the Restricted Period.

**10. For each of the past five years, submit documents or data sufficient to show sales or conversions of contact lenses associated with referral data identified in**

**Specification 9.**

WEC incorporates by reference all of its general objections set forth in Section II.B above. WEC further objects because this request is overly broad and unduly burdensome. This request further seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence. Specifically, WEC's sales or conversions of contact lenses based on referrals for contact lenses derived from advertising channels unrelated to using 1-800 Contacts search terms is not relevant to the FTC's investigation into 1-800 Contacts' bidding practices or its claims against 1-800 Contacts. This request also seeks information that is highly confidential and proprietary to WEC, namely sales or conversions of contact lenses associated with its referral data for contact lenses.

Notwithstanding the foregoing objections, provided it affords ample opportunity to produce, WEC will attempt to provide, on a confidential basis, sales or conversions associated with the referral data disclosed in response to Specification 9 (i.e. information related to WEC's use of 1-800 Contacts search terms marketing during the Restricted Period).

**D. Unreasonable Time Periods**

As noted above, the Subpoena seeks documents generated or received over at least a five year period, and in many cases, up to almost fifteen years. The amount of effort, time and expense necessary to respond to the Subpoena grows in proportion to the length of time covered by the Subpoena. WEC requests that if it is required to respond to it, the Subpoena be expressly limited to the Restricted Period.

Moreover, while the time period covered by the Subpoena is too long, the time allotted to WEC to respond is too short. If compliance is required, WEC should be granted significantly more time to provide responsive information.

**E. The Existing Protective Order Does Not Adequately Protect WEC**

As set forth above, many of the documents requested by the Subpoena contain sensitive and confidential information. WEC would be competitively disadvantaged if such information were disclosed to WEC's competitors, including 1-800 Contacts. If such information is to be disclosed, it should be subject to a protective order more narrow than the one already in effect.

A Protective Order was issued in this proceeding on August 8, 2016. WEC was not invited to participate in the drafting of that Order. While the Protective Order places some restrictions on certain categories of documents, the Order does not adequately protect WEC. Therefore, a more stringent protective order should be put in place here. In particular, the Protective Order should make abundantly clear that the disclosure of any confidential information shall be deemed "Attorneys Eyes Only," thus preventing 1-800 Contacts employees and personnel from obtaining, whether directly or indirectly, information that is highly sensitive to WEC's business practices.

**F. The FTC Should Reimburse Non-Party WEC for Its Expenses**

In the event WEC is required to produce information responsive to the Subpoena, even if its scope is narrowed considerably, the cost of production will be substantial, requiring the work of numerous employees – including high level employees and officers – reviewing, organizing, and copying thousands and thousands of documents. Further, WEC has incurred and will continue to incur legal expenses contesting the scope of the Subpoena. Under Fed. R. Civ. P. 45, the issue is whether the subpoena imposes expenses on a non-party, and if so, whether those expenses are significant. If they are, the court must protect the non-party by requiring the party seeking discovery to bear at least enough of the expense to render the remainder "non-significant." *Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001). At a minimum, Complainant FTC must be required to bear some of the expense of production and the costs incurred in responding to many of the overly broad and largely irrelevant requests.

### **III. CONCLUSION**

For the foregoing reasons, non-party WEC respectfully requests that the Administrative Law Judge quash, modify, or limit the Subpoena. If the Subpoena is not quashed in its entirety (1) WEC should not be required to produce documents outside of the Restricted Period; (2) the overly broad document requests should be narrowed considerably; (3) WEC should not be required to produce confidential information, but if required to do so, only under a more narrowly-drawn protective order; and (4) Complainant FTC should reimburse WEC's expenses related to responding to the Subpoena.

### **IV. CERTIFICATE OF CONFERENCE**

Chad Nold, counsel for non-party WEC, spoke by phone with Gus Chiarello and Charlotte Slaiman, counsel for Complainant FTC, on October 12, 2016 and again on October 13, 2016, in an attempt to resolve any disputes concerning the Subpoena that is the subject of the

foregoing motion. Though the parties were able to find some common ground that could lead to further progress, the parties were unable to resolve the ultimate disputes during these phone conferences, thus necessitating this motion.

WHEREFORE, PREMISES CONSIDERED, WEC respectfully requests the Subpoena Duces Tecum be quashed and/or limited, and that it be awarded its reasonable attorney's fees and costs, as well as such other relief, both legal and equitable, to which it may show itself justly entitled.

Dated: October 14, 2016

Respectfully Submitted,

SAPER LAW OFFICES, LLC

/s/Daliah Saper

Daliah Saper

Chad Nold

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312-527-4100

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chad@saperlaw.com

***Attorneys for Non-Party,  
WebEyeCare, Inc.***



**CERTIFICATE OF SERVICE**

I certify that on October 14, 2016, I electronically filed a document entitled “Motion to Quash and/or Limit Subpoena Duces Tecum” with the Federal Trade Commission using the FTC E-Filing System, which will send notification of such filing to all counsel of record as well as the following:

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

Dated: October 14, 2016

By: /s/ Daliah Saper  
Daliah Saper

**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: October 14, 2016

By: /s/ Daliah Saper  
Daliah Saper

# EXHIBIT A



# SUBPOENA DUCES TECUM

Provided by the Secretary of the Federal Trade Commission, and  
Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

1. TO WebEyeCare c/o Daliah Saper, Esq. Saper Law Offices, LLC 505 N Lasalle, Suite 350 Chicago, IL 60654	2. FROM  UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION
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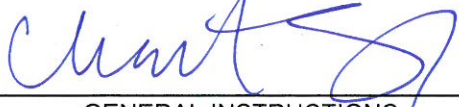
This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION  Federal Trade Commission c/o Charlotte Slaiman, Esq. 400 7th Street, SW Washington, DC 20024	4. MATERIAL WILL BE PRODUCED TO Charlotte Slaiman, Esq. <hr/> 5. DATE AND TIME OF PRODUCTION October 21, 2016 at 10:00am
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6. SUBJECT OF PROCEEDING  In the Matter of 1-800 Contacts, Inc., Docket No. 9372
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7. MATERIAL TO BE PRODUCED  Documents & materials responsive to the attached Subpoena Duces Tecum Requests for Production
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8. ADMINISTRATIVE LAW JUDGE  The Honorable D. Michael Chappell  Federal Trade Commission Washington, D.C. 20580	9. COUNSEL AND PARTY ISSUING SUBPOENA Daniel Matheson, or designee Federal Trade Commission 400 7th Street, SW Washington, DC 20024 (202) 326-2075
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DATE SIGNED 10/4/2016	SIGNATURE OF COUNSEL ISSUING SUBPOENA 
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## GENERAL INSTRUCTIONS

### APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

### MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

### TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

**RETURN OF SERVICE**

*I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)*

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

via FedEx

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*on the person named herein on:*

October 4, 2016

(Month, day, and year)

Charlotte Slaiman

(Name of person making service)

Attorney

(Official title)

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

In the Matter of

1-800 CONTACTS, INC.,  
a corporation

Docket No. 9372

COMPLAINT COUNSEL'S SUBPOENA *DUCES TECUM* ATTACHMENT  
TO WEB EYE CARE

Pursuant to the Federal Trade Commission's Rule of Practice, 16 C.F.R. § 3.34, and the Definitions and Instructions set forth below, Complaint Counsel hereby requests that the Company produce all documents, electronically stored information, and other things in its possession, custody, or control responsive to the following requests:

1. All Documents Relating to communications with 1-800 Contacts related to Negative Keywords.
2. For each Negative Keyword You have implemented during the Relevant Period, Documents Sufficient to Show the first date on which You instructed a Search Engine to implement such a Negative Keyword (and, if applicable, whether the Negative Keyword was implemented as an exact, phrase, or broad match), and Documents Sufficient to Show any dates on which You instructed a Search Engine to cease implementing such a Negative Keyword.
3. All Documents Relating to communications with 1-800 Contacts regarding any actual litigation or threatened litigation, including but not limited to Documents Relating to the settlement of such actual litigation or threatened litigation.
4. All Documents Relating to communications with 1-800 Contacts related to the enforcement of any provision in an agreement between You and 1-800 Contacts settling actual litigation or threatened litigation.
5. Documents Sufficient to Show Your marketing strategies, marketing plans, and search advertising strategies, including but not limited to changes in such strategies over time.
6. For each contact lens product UPC or SKU number that the Company sells, Documents Sufficient to Show the style level or product code, a description of the product, all classification variables and product descriptors, and package size, and Documents Sufficient to Show on a weekly basis:

- a. Retail price;
- b. Sales revenue;
- c. Total promotional discount;
- d. Average shipping charge; and
- e. Unit sales (*i.e.*, quantity of each item sold).

7. For each of the past five years, Documents Sufficient to Show for contact lens sales the annual contribution margins, net revenue; cost of goods sold; credit card fees; and variable selling, general, and administrative costs, for the following channels:

- a. Online;
- b. Telephone or mail-order;
- c. In-store; and
- d. Other (identify “Other” channels).

8. Documents Sufficient to Show all Keywords relating to contact lenses organized by search advertising Campaign and Ad Group, including Negative Keywords, and the dates on which each keyword, or negative keyword, was added, and, if applicable, removed, paused, or re-started. For each Keyword listed, Documents Sufficient to Show the following information, on a daily basis (provide responses separately for each Campaign and Ad Group even in the event that the same Keyword was used in multiple campaigns and ad groups.)

- a. Impressions;
- b. Clicks;
- c. Clickthrough Rate (CTR);
- d. Maximum Cost Per Click Bid;
- e. Keyword Matching Option (e.g., exact match, phrase match, or broad match);
- f. Cost Per Click;
- g. Cost Per Action;
- h. Cost Per Impression;
- i. Cost USD;
- j. Average Ad Rank;
- k. Conversion Rate; and
- l. Conversion Value

9. For each of the past five years, submit a complete copy of the Company’s referral data for contact lenses kept in web logs, Google Analytics, bid management software, affiliate marketing software, or any other similar software tool, or provided to the Company by any Affiliate or marketing or advertising agency, including all raw data, any data analysis, and all information concerning the referring URL.

10. For each of the past five years, submit documents or data sufficient to show sales or conversions of contact lenses associated with the referral data identified in Specification 9.

For the purpose of these Requests, the following definitions and instructions apply without regard to whether the defined terms used herein are capitalized or lowercase and without regard to whether they are used in the plural or singular forms:

### **DEFINITIONS**

1. The terms “Web Eye Care,” “Company,” “You,” or “Your” mean Web Eye Care, Inc., its directors, officers, trustees, employees, attorneys, agents, accountants, consultants, and representatives, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, consultants, and representatives of its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, and partnerships and joint ventures.
2. The term “1-800 Contacts” means Respondent 1-800 Contacts, Inc., its directors, officers, trustees, employees, attorneys, agents, accountants, consultants, and representatives, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, consultants, and representatives of its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, and partnerships and joint ventures.
3. The term “Ad Group” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product: a collection of advertisements that “contains one or more ads which target a shared set of keywords.” See <https://support.google.com/adwords/answer/6298>.
4. The term “Ad Rank” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product: “A value that’s used to determine [an advertiser’s] ad position (where ads are shown on a page) and whether [an advertiser’s] ads will show at all.” See <https://support.google.com/adwords/answer/1752122?hl=en>.
5. The term “Affiliate” means any Person other than 1-800 Contacts which attempts to generate online sales for 1-800 Contacts in exchange for a commission on such online sales.
6. The terms “and” and “or” have both conjunctive and disjunctive meanings.
7. The term “Campaign” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product: “[a] set of ad groups (ads, keywords, and bids) that share a budget, location targeting, and other settings.” See <https://support.google.com/adwords/answer/6304?hl=en>.
8. The term “Click” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product. See <https://support.google.com/adwords/answer/31799?hl=en>.
9. The term “Clickthrough rate” (CTR) has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product: “the

number of clicks [an] ad receives divided by the number of times [the] ad is shown.” See <https://support.google.com/adwords/answer/2615875?hl=en>.

10. The term “Competitor” includes the Company, and means any person engaged in the business of selling contact lenses to consumers.
11. The term “Computer Files” includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Company should produce Documents that exist in machine-readable form, including Documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off company premises. If the Company believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with Complaint Counsel’s need for Documents and information, you are encouraged to discuss a possible modification to this instruction with the Complaint Counsel identified on the last page of this request. Complaint Counsel will consider modifying this instruction to:
  - a. exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Respondent;
  - b. limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain specifications identified by Complaint Counsel; or
  - c. include other proposals consistent with Commission policy and the facts of the case.
12. The term “Containing” means containing, describing, or interpreting in whole or in part.
13. The terms “Conversion Rate” and “Conversion Value” have the same meanings that Google ascribes to these terms in the ordinary course of business in connection with its AdWords product. See <https://support.google.com/adwords/answer/2684489?hl=en>; <https://support.google.com/adwords/answer/6095947?hl=en>.
14. The terms “Cost per Click”, “Cost Per Action,” “Cost Per Impression,” and “Cost USD” have the same meaning that Google ascribes to these terms in the ordinary course of business in connection with its AdWords product.
15. The terms “Discuss” or “Discussing” mean in whole or in part constituting, Containing, describing, analyzing, explaining, or addressing the designated subject matter, regardless of the length of the treatment or detail of analysis of the subject matter, but not merely referring to the designated subject matter without elaboration. A document that “Discusses” another document includes the other document itself.



16. The term “Documents” means all Computer Files and written, recorded, and graphic materials of every kind in the possession, custody, or control of the Respondent. The term “Documents” includes, without limitation: electronic mail messages; electronic correspondence and drafts of documents; metadata and other bibliographic or historical data describing or Relating to documents created, revised, or distributed on computer systems; copies of documents that are not identical duplicates of the originals in that Person’s files; and copies of documents the originals of which are not in the possession, custody, or control of the Respondent.

Unless otherwise specified, the term “Documents” excludes (a) bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely transactional nature; (b) architectural Plans and engineering blueprints; and (c) documents solely Relating to environmental, tax, human resources, OSHA, or ERISA issues.

17. The term “Documents Sufficient to Show” means both documents that are necessary and documents that are sufficient to provide the specified information. If summaries, compilations, lists, or synopses are available that provide the information being requested, these may be provided in lieu of the underlying documents.
18. The terms “each,” “any,” and “all” mean “each and every.”
19. The term “Impression” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/6320?hl=en>.
20. The term “Keyword” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product: “[w]ords or phrases describing [an advertiser’s] product that [the advertiser] choose[s] to help determine when and where [the advertiser’s] ad can appear” in response to an internet search by an end user. *See* <https://support.google.com/adwords/answer/6323?hl=en>.
21. The term “Keyword Matching Option” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/2497836?hl=en>.
22. The term “Maximum Cost Per Click Bid” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/6326?hl=en>
23. The term “Negative Keyword” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product: “[a] type of keyword that prevents [and advertiser’s] ad from being triggered by certain words or phrases.” *See* <https://support.google.com/adwords/answer/105671?hl=en>.
24. The term “Person” includes the Company, and means any natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity engaged in commerce.

25. The terms “Relate” or “Relating to” mean in whole or in part Discussing, constituting, commenting, Containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.
26. The term “Search Engine” means a computer program, available to the public without charge, to search for and identify websites on the World Wide Web based on a User Query.
27. The term “Technology Assisted Review” means any process that utilizes a computer algorithm to limit the number of potentially responsive documents subject to a manual review. A keyword search of documents with no further automated processing is not a Technology Assisted Review.
28. The term “User Query” means data entered into a computer by an end user of a Search Engine for the purpose of operating the Search Engine.

**INSTRUCTIONS**

1. Unless otherwise indicated, each request covers documents and information dated, generated, received, or in effect from January 1, 2002, to the present.
2. The Company need not produce responsive documents that the Company has previously produced to the Commission in relation to the prior investigation of 1-800 Contacts, FTC No. 141-0200. **The Company must produce all other responsive documents, including any otherwise responsive documents that may have been produced by the Company to the Commission in relation to any other investigation conducted by the Commission.**
3. This request for documents shall be deemed continuing in nature so as to require production of all documents responsive to any specification included in this request produced or obtained by the Company up to fifteen (15) calendar days prior to the date of the Company's full compliance with this request.
4. Except for privileged material, the Company will produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. The Company should submit any appendix, table, or other attachment by either attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, the Company will not redact, mask, cut, expunge, edit, or delete any responsive document or portion thereof in any manner.
5. Unless modified by agreement with Complaint Counsel, this subpoena requires a search of all documents in the possession, custody, or control of the Company including, without limitation, those documents held by any of the Company's officers, directors, employees, agents, representatives, or legal counsel, whether or not such documents are on the premises of the Company. If any person is unwilling to have his or her files searched, or is unwilling to produce responsive documents, the Company must provide the Complaint Counsel with the following information as to each such person: his or her name, address, telephone number, and relationship to the Company. In addition to hard copy documents, the search must include all of the Company's electronically stored information.
6. Form of Production. The Company shall submit all documents as instructed below absent written consent signed by Complaint Counsel.
  - a. Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original documents:
    - i. Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and applicable metadata and information as described in subparts (a)(iii) and (a)(iv).
    - ii. Submit emails in image format with extracted text and the following metadata and information:

<b>Metadata/Document Information</b>	<b>Description</b>
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.
To	Recipient(s) of the email.
From	The person who authored the email.
CC	Person(s) copied on the email.
BCC	Person(s) blind copied on the email.
Subject	Subject line of the email.
Date Sent	Date the email was sent.
Time Sent	Time the email was sent.
Date Received	Date the email was received.
Time Received	Time the email was received.
Attachments	The Document ID of attachment(s).
Mail Folder Path	Location of email in personal folders, subfolders, deleted items or sent items.
Message ID	Microsoft Outlook Message ID or similar value in other message systems.

- iii. Submit email attachments in image format, or native format if the file is one of the types identified in subpart (a)(i), with extracted text and the following metadata and information:

<b>Metadata/Document Information</b>	<b>Description</b>
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.
Parent ID	The Document ID of the parent email.

Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- iv. Submit all other electronic documents in image format, or native format if the file is one of the types identified in subpart (a)(i), accompanied by extracted text and the following metadata and information:

<b>Metadata/Document Information</b>	<b>Description</b>
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Originating Path	File path of the file as it resided in its original environment.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.

Hash	The Secure Hash Algorithm (SHA) value for the original native file.
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- v. Submit documents stored in hard copy in image format accompanied by OCR with the following information:

<b>Metadata/Document Information</b>	<b>Description</b>
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.

- vi. Submit redacted documents in image format accompanied by OCR with the metadata and information required by relevant document type in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above. Additionally, please provide a basis for each privilege claim as detailed in Instruction 6.
- b. Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats such as CSV files, with all underlying data un-redacted and all underlying formulas and algorithms intact.
- c. If the Company intends to utilize any electronic search terms, de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact Complaint Counsel to discuss whether and in what manner the Company may use such software or services when producing materials in response to this subpoena.
- d. Produce electronic file and image submissions as follows:
- i. For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure;
  - ii. For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats; and

- iii. All documents produced in electronic format shall be scanned for and free of viruses prior to submission. Complaint Counsel will return any infected media for replacement, which may affect the timing of the Company's compliance with this subpoena.
  - iv. Encryption of productions using NIST FIPS-compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.<sup>1</sup>
  - e. Each production shall be submitted with a transmittal letter that includes the FTC matter number; production volume name; encryption method/software used; passwords for any password protected files; list of custodians and document identification number range for each; total number of documents; and a list of load file fields in the order in which they are organized in the load file.
7. All documents responsive to these requests:
- a. Shall be produced in complete form, unredacted unless privileged, and in the order in which they appear in the Company's files;
  - b. Shall be marked on each page with corporate identification and consecutive document control numbers when produced in image format;
  - c. Shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black and white photocopying or conversion to TIFF format of any document (e.g., a chart or graph) makes any substantive information contained in the document unintelligible, the Company must submit the original document, a like-color photocopy, or a JPEG format image);
  - d. Shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original documents; and
  - e. Shall be accompanied by an index that identifies (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's documents. Complaint Counsel will provide a sample index upon request.
8. If any documents are withheld from production based on a claim of privilege, the Respondent shall provide, pursuant to 16 C.F.R. § 3.38A, a schedule which describes the nature of documents, communications, or tangible things not

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<sup>1</sup> The National Institute of Standards and Technology (NIST) issued Federal Information Processing Standard (FIPS) Publications 140-1 and 140-2, which detail certified cryptographic modules for use by the U.S. Federal government and other regulated industries that collect, store, transfer, share, and disseminate sensitive but unclassified information. More information about FIPS 140-1 and 140-2 can be found at <http://csrc.nist.gov/publications/PubsFIPS.html>.

produced or disclosed, in a manner that will enable Complaint Counsel to assess the claim of privilege.

9. If the Company is unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by the Company to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation “est.” If there is no reasonable way for the Company to make an estimate, provide an explanation.
10. If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company’s document retention policy but the Company has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify Persons having knowledge of the content of such documents.
11. The Company must provide Complaint Counsel with a statement identifying the procedures used to collect and search for electronically stored documents and documents stored in paper format. The Company must also provide a statement identifying any electronic production tools or software packages utilized by the company in responding to this subpoena for: keyword searching, Technology Assisted Review, email threading, de-duplication, global de-duplication or near-de-duplication, and
  - a. if the Company utilized keyword search terms to identify documents and information responsive to this subpoena, provide a list of the search terms used for each custodian;
  - b. if the Company utilized Technology Assisted Review software;
    - i. describe the collection methodology, including: how the software was utilized to identify responsive documents; the process the company utilized to identify and validate the seed set documents subject to manual review; the total number of documents reviewed manually; the total number of documents determined nonresponsive without manual review; the process the company used to determine and validate the accuracy of the automatic determinations of responsiveness and nonresponsiveness; how the company handled exceptions (“uncategorized documents”); and if the company’s documents include foreign language documents, whether reviewed manually or by some technology-assisted method; and
    - ii. provide all statistical analyses utilized or generated by the company or its agents related to the precision, recall, accuracy,



validation, or quality of its document production in response to this subpoena; and identify the person(s) able to testify on behalf of the company about information known or reasonably available to the organization, relating to its response to this specification.

- c. if the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media in response to this subpoena, or if the Company's computer systems contain or utilize such software, the Company must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this subpoena

12. Any questions you have relating to the scope or meaning of anything in subpoena or suggestions for possible modifications thereto should be directed to Gus Chiarello at (202) 326-2633, [gchiarello@ftc.gov](mailto:gchiarello@ftc.gov). The response to the request shall be addressed to the attention of Nathaniel Hopkin, Federal Trade Commission, 400 7th Street SW, Washington, D.C. 20024, and delivered between 8:30 a.m. and 5:00 p.m. on any business day.

**CERTIFICATION**

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Subpoena *Duces Tecum* is complete and correct to the best of my knowledge and belief.

\_\_\_\_\_  
(Signature of Official)

\_\_\_\_\_  
(Title/Company)

\_\_\_\_\_  
(Typed Name of Above Official)

\_\_\_\_\_  
(Office Telephone)

**CERTIFICATE OF SERVICE**

I hereby certify that I delivered via electronic mail a copy of the foregoing document to:

Gregory P. Stone  
Steven M. Perry  
Garth T. Vincent  
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*Counsel for Respondent 1-800 Contacts, Inc.*

October 4, 2016

By: /s/ Daniel Matheson  
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Telephone: (202) 326-2075

*Counsel Supporting the  
Complaint*

Notice of Electronic Service

**I hereby certify that on October 14, 2016, I filed an electronic copy of the foregoing Non-Party Motion to Quash and/or Limit Subpoena Duces Tecum, 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 October 14, 2016, I served via E-Service an electronic copy of the foregoing Non-Party Motion to Quash and/or Limit Subpoena Duces Tecum, upon:**

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## Complaint

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