

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



In the Matter of

Docket No. 9372

1-800 Contacts, Inc.
a corporation

**1-800 CONTACTS' MEMORANDUM IN OPPOSITION TO NON-PARTY
WEBEYECARE, INC.'S MOTION TO QUASH AND/OR LIMIT THE
SUBPOENA DUCES TECUM SERVED BY 1-800 CONTACTS**

I. INTRODUCTION

Respondent 1-800 Contacts, Inc. ("1-800 Contacts") served WebEyeCare, Inc. ("WEC"), an online retailer of contact lens, with a Subpoena Ducas Tecum in this matter on October 3, 2016. WEC has filed a motion to quash or limit that subpoena on four principal grounds, none of which has merit, as summarized below:

(1) WEC contends that the *only* documents that are relevant to the allegations in the Complaint or to Respondent's defenses are documents relating to WEC's admitted use of 1-800 Contacts' trademarks as keywords in connection with paid search advertising for a short period in 2010, and it contends in particular that documents relating to its own advertising and marketing strategies are irrelevant, Motion at 7-30, despite the fact that WEC's CEO has been listed by Complaint Counsel as a trial witness to address WEC's own marketing and search advertising activities and strategies;¹

¹ See Declaration of Steven M. Perry ("Perry Decl."), ex. 1 at 6 (Complaint Counsel's Preliminary Witness List).

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(2) WEC contends that compliance with the subpoena would require “an unreasonable and monumental undertaking,” *id.* at 4, although it did not timely submit any declaration in support of that argument;

(3) WEC contends that the Protective Order entered in this matter “does not adequately protect WEC” and should be replaced by “a more stringent protective order,” *id.* at 31, even though the only specific language WEC proposes to add is already in the existing Order; and

(4) WEC contends that the “cost of production will be substantial” and asks that 1-800 Contacts be required to bear some of its expenses, again without support from any declaration. *Id.* at 31-32.

None of these arguments has any merit, and WEC’s motion to quash should be denied. WEC’s motion should also be denied because it substantially exceeds the word limit in Rule 3.22(c), which provides that memoranda in support of a non-dispositive motion “shall not exceed 2500 words.” WEC’s 33-page brief contains in excess of 8400 words (not including the attachments), more than 3X over the limit.²

II. NONE OF WEC’S ARGUMENTS HAS MERIT

A. The Requested Data And Documents Are Relevant To The Claims, Defenses And Issues In This Case.

WEC makes two arguments in challenging the relevance of the documents and data that 1-800 Contacts seeks. First, WEC contends repeatedly that the *only* documents that could be relevant are documents that relate to WEC’s purchase of 1-800 Contacts’ trademarks for two

² Counsel for 1-800 Contacts obtained a word count via the process of turning a pdf of the brief into a Word document and then using Word tools to obtain an approximate count. Perry Decl., ¶ 2.

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weeks in 2010. Motion at 4, 6, 10-18, 24. Such a limitation is unwarranted. Both Complaint Counsel and 1-800 Contacts have served subpoenas on multiple market participants, including but not limited to the companies who were involved in trademark disputes with 1-800 Contacts. *See Perry Decl.*, ¶ 4. Through those subpoenas, the parties are seeking evidence regarding the nature and extent of competition in the markets addressed in the complaint and answer, in addition to evidence regarding the alleged impact, if any, on competition from the settlement agreements at issue, over a period of years. *Id.* Efforts to obtain market-related information from third-party participants in those markets are not just commonplace in antitrust cases; they can be essential. *See In re Laboratory Corporation of America*, 2011 WL 822920, at *3 (Feb. 28, 2011) (denying a third party's motion to quash a subpoena and explaining that "[i]nformation from competitors is frequently crucial in proceedings such as this one"); *In re North Texas Specialty Physicians*, 2004 WL 527340, at *2 (Jan. 30, 2004) (same). This is particularly true in this case, where Complaint Counsel has included on its Preliminary Witness List an officer or employee of *nine* different current or past retailers of contact lens. *Perry Decl.*, ex. 1, pp. 5-7.

WEC's second principal argument about relevance, which it makes repeatedly, is that its own marketing and business strategies and search advertising practices are not relevant to any issue in this matter. *See Motion* at 7-30 (addressing request nos. 6-39). These arguments are entirely refuted by the fact that Complaint Counsel has identified WEC's owner and CEO, Peter Batushansky, as a trial witness. Complaint Counsel's Preliminary Witness List provides this description of Batushansky's anticipated testimony at trial:

"Mr. Peter Batushansky or another current or former employee of Web Eye Care, Inc. Complaint Counsel anticipates that Mr. Batushansky will testify regarding competition among contact lens retailers, the history of Web Eye Care, Inc. ('Web') and Web's marketing and search advertising activities and strategies. In addition, Mr. Batushansky will testify regarding the Bidding Agreement between Web and 1-800 Contacts, including the negotiation of the Bidding

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Agreement, litigation between Web and 1-800 Contacts, the reasons Web entered into the Bidding Agreement, and the impact of the Bidding Agreements on Web.”

See Perry Decl., ex. 1 at 6.

[REDACTED]

3

[REDACTED] and in light of Mr. Batushansky's likely role as a trial witness for Complaint Counsel, it is clear that WEC documents related to WEC's "marketing and search advertising activities and strategies," *id.*, which include at least requests 2, 6-33 and 35-39, are quite relevant here. *See In re Laboratory Corporation of America*, 2011 WL 822920, at *3 (Feb. 28, 2011) (denying a third party's motion to quash in part on the ground that "[i]nformation from a company whose founder is listed as expected to testify at trial on its ability to enter and expand into a relevant market is relevant to" the Complaint and to Respondents' defenses.).

Moreover, documents regarding WEC's advertising and marketing strategies would be relevant *even if* its CEO were not a trial witness, because they go directly to the question of whether the challenged settlement agreements have had or could have any anticompetitive impact. For example, evidence that companies such as WEC that settled trademark litigation with 1-800 Contacts by agreeing not to purchase 1-800 Contacts' trademarks as search terms have not, in practice, purchased the trademarks of *other* online competitors, would tend to prove

³ [REDACTED] Perry Decl., ¶ 6.

that the settlement agreements have not had any anticompetitive impact, as would evidence that a third party had tested such purchases and had abandoned its efforts as uneconomical.⁴

B. WEC's Arguments That Compliance With The Subpoena Would Be Unduly Burdensome Are Unsupported And Insufficient.

WEC also contends that compliance with the subpoena "would require significant resources" and would create a heavy burden on the owners of WEC. . . ." *Id.* at 3-4. These arguments fail because, among other reasons, they are not supported by any declaration from any WEC officer or employee.⁵ The law applicable to this proceeding makes it "clear that a recipient of a subpoena *duces tecum* issued in an FTC adjudicative proceeding who resists compliance therewith bears a heavy burden," and a "general allegation that [a subpoena] is unduly burdensome is insufficient to carry its burden. . . ." *In re Intel Corporation*, 2010 WL 2143904, at * 3 (May 19, 2010). *Accord, In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009). In particular, where a third party "has provided no specific information regarding the burden or expense involved in producing the requested documents other than its unsupported statement that the requests would take months and tens or even hundreds of thousands of dollars

⁴ Because of the low conversion rates associated with the purchase of competitors' trademarks as search terms, and because Google, Bing and other search engines charge *per-click*, not *per-sale*, the evidence will show that generally it is not economically rational to purchase competitor trademarks as search terms. Evidence of WEC's click rates and conversion rates when purchasing its competitors' trademarks is therefore relevant. And, of course, if WEC has *not* been purchasing competitors' search terms, [REDACTED] it will not have much difficulty complying with the requests that address those issues.

⁵ On October 24, 2016, eleven days after filing its motion to quash, WEC submitted an affidavit by Mr. Batushansky that purports to address burden. The affidavit was attached to WEC's "Motion to Withdraw Certain Objections to Previous Motion to Quash," although the affidavit does not mention or relate to that motion. 1-800 Contacts objects to this late and highly inappropriate filing (which arrived the same day that this opposition was due). Rule 3.34(c) clearly states that motions to quash must include "all . . . affidavits and other supporting documentation" with the initial filing.

to comply with,” its motion to quash should be denied. *In re Laboratory Corporation of America*, 2011 WL 822920, at *3 (Feb. 28, 2011).

WEC also contends that the time period covered by the subpoena is unreasonably long. Motion at 1, 23, 30-31. The time periods in question are reasonable because they reflect the time periods described in the complaint and are in many instances the same time periods used by Complaint Counsel for requests contained in subpoenas they have served. Perry Decl., ¶ 3. *See In re North Texas Specialty Physicians*, 2004 WL 527340, at *2 (Jan. 30, 2004) (denying third party motion to quash and holding that “[a] request for documents relating to the time period which was investigated by Complaint Counsel is not unreasonable.”). Moreover, WEC asserts that it has only been in business for the past seven years, so it would not be impacted by any longer periods of time set out in some of the requests.

C. The Protective Order In This Case Satisfies WEC’s Concerns Regarding Confidentiality.

WEC also contends that the Protective Order entered in this case should be replaced by a “more stringent protective order” that makes it “abundantly clear” that confidential information is “Attorneys Eyes Only.” Motion at 31. The existing Protective Order addresses that very issue (at ¶ 7), and WEC does not contend otherwise. As a result, as in past cases, “[t]he Protective Order entered in this case pursuant to Commission Rule 3.31(d) adequately protects the information that [the third party] seeks to protect.” *In re ECM BioFilms, Inc.*, 2014 WL 1396502, at *3 (March 27, 2014).

D. WEC Has Not Met Its Burden In Connection With Its Request To Shift The Costs Of Production To 1-800 Contacts.

WEC also asks the Court to order that 1-800 Contacts be required “to bear some of the expense of production,” relying on Rule 45 of the Federal Rules of Civil Procedure. Motion at

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32. Rule 45 does not govern this issue, and the law applicable here provides that reimbursement of costs is only proper if the cost of compliance is “unreasonable.” *In re Polypore Int’l*, 2009 WL 569708, at *1 (Feb. 3, 2009). WEC provides no estimate of its costs, and its arguments that the documents sought are irrelevant are simply wrong, as discussed above. WEC’s broad and unsupported assertions of burden and expense are an insufficient basis for an order shifting costs. *In re Rambus Incorporated*, 2002 WL 31868184, at *5-6 (Nov.18, 2002).

For these and the other reasons set out in this opposition brief (including WEC’s decision to file a substantially overlong brief without seeking permission to do so), WEC’s motion to quash should be denied.

DATED: October 24, 2016

Respectfully submitted,

/s/ Steven M. Perry

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Counsel for 1-800 Contacts, Inc.

EXHIBIT A

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

In the Matter of

1-800 Contacts, Inc.
a corporation

Docket No. 9372

**DECLARATION OF STEVEN M. PERRY IN SUPPORT OF MEMORANDUM
IN OPPOSITION TO NON-PARTY WEBEYECARE, INC.'S MOTION TO QUASH
AND/OR LIMIT THE SUBPOENA DUCES TECUM SERVED BY 1-800 CONTACTS**

I, Steven M. Perry, declare as follows:

1. I am an attorney at the law firm of Munger, Tolles & Olson LLP, counsel for Respondent 1-800 Contacts, Inc. in this matter. I am duly licensed to practice law before the courts of the State of California and have entered an appearance in this action pursuant to Rule 4.1 of the Commission's Rules of Practice. I make this declaration in support of Respondent 1-800 Contacts' Opposition to the Motion to Quash and/or Limit Subpoena Duces Tecum filed in this matter by non-party WebEyeCare, Inc. ("WEC").

2. After I received a PDF of WEC's 33-page motion to quash, I asked my firm's word processing center to obtain a word count by creating a Microsoft Word version of WEC's motion. I am informed and believe that WEC's motion contains more than 8,400 words (not including the cover and counsel's "Certificate of Conference").

3. I am familiar with the subpoenas *duces tecum* served in this matter by Respondents and by Complaint Counsel. Both parties have served subpoenas on numerous current and former online retailers of contact lenses. In very general terms, the subpoenas seek evidence regarding the nature and extent of competition in the markets addressed in the

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complaint and answer, as well as evidence regarding the impact, if any, on competition from the settlement agreements described in the complaint. Many of the requests that were included by both Complaint Counsel and Respondent have the same relevant time periods.

4. I have attached, as Exhibit 1, a true copy of Complaint Counsel's Preliminary Witness List in this matter. Complaint Counsel described the anticipated testimony of WEC's owner and CEO, Mr. Peter Batushansky, on page 6 of the witness list.

5. I have reviewed [REDACTED]

6. [REDACTED] 1-800 Contacts will comply with the Protective Order and the FTC Rules of Practice in connection with this filing. I have attached, as Exhibit 2, a copy of the Protective Order in this matter, which addresses the procedures applicable to this situation.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on October 24, 2016 at Los Angeles, California.

/s/ Steven M. Perry
Steven M. Perry

EXHIBIT 1

**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 PRELIMINARY WITNESS LIST

Pursuant to the Scheduling Order, Complaint Counsel provides our preliminary witness list, not including expert witnesses, including a brief summary of the proposed testimony from each witness. Complaint Counsel reserves the following rights:

1. Pursuant to Paragraph 15 of the Additional Provisions of the Scheduling Order, to include on Complaint Counsel's final witness list any person deposed after the date on which Complaint Counsel provides this Preliminary Witness List;
2. To present testimony, by deposition or by live witness, from any other person who is identified by Respondent as a potential witness in this matter after the date on which Complaint Counsel provides this Preliminary Witness List;
3. To call the custodian of records of any party or non-party from which documents or records have been obtained to the extent necessary to demonstrate the authenticity or admissibility of documents, in the event Complaint Counsel is unable to establish the authenticity or admissibility of such documents or records through another means, such as a Request for Admission, a stipulation, an affidavit pursuant to F.R.E. 902(11), or a deposition;

4. To question the persons listed about any topics that are the subjects of testimony by witnesses called by Respondent;
5. Not to call at the hearing any of the persons listed, as circumstances may warrant;
6. To question the persons listed about any other topics about which the person testified during an Investigational Hearing, or about which the person testifies at a deposition conducted after the date on which Complaint Counsel provides this Preliminary Witness List, or about any matter that is discussed in documents to which the person had access and which have not yet been produced as of the date on which Complaint Counsel provides this Preliminary Witness List; and
7. To call any unnamed individual who is a current or former employee of Respondent or of a third party identified below to the extent the named witness(es) cannot give complete testimony on the topics we have described;
8. To call any of these individuals or any other person for rebuttal testimony.

Subject to these reservations of rights, Complaint Counsel's provides the following preliminary list:

RESPONDENT'S CURRENT AND FORMER EMPLOYEES

1. **Mr. Brian Bethers.** Complaint Counsel anticipates that Mr. Bethers will testify regarding Respondent's history, operations, corporate organization, and corporate strategies, including but not limited to strategies for marketing, pricing, and search advertising. In addition, Mr. Bethers will testify regarding: competitive conditions in the contact lens industry; Respondent's litigation against Lens.com and other parties, including but not limited to 1-800 Contacts' goals and beliefs regarding the litigation; Respondent's reasons for entering the Bidding Agreements; Respondent's predictions regarding the impact of the Bidding Agreements; the negotiation of the Bidding Agreements; and any written or unwritten agreements with third parties with the same purpose as the Bidding Agreements; and any other topics relevant to the allegations of the complaint, the proposed relief, to Respondent's defenses.
2. **Ms. Joan Blackwood.** Complaint Counsel anticipates that Ms. Blackwood will testify regarding Respondent's activities and strategies regarding marketing and pricing,

including but not limited to Respondent's search advertising activities, strategies, policies, and goals. In addition, Complaint Counsel anticipates that Ms. Blackwood will testify regarding Respondent's efforts to monitor and respond to competitors' advertisements, actions taken to enforce Bidding Agreements, and Respondent's goals and predictions regarding the impact of the Bidding Agreements; and any other topics relevant to the allegations of the complaint, the proposed relief, to Respondent's defenses.

3. **Mr. Jonathan Coon.** Complaint Counsel anticipates that Mr. Coon will testify regarding Respondent's history, operations, and corporate strategies, including but not limited to marketing, pricing, and search advertising strategies. In addition, Mr. Coon will testify regarding Respondent's litigation against Lens.com and other parties, including but not limited to Respondent's goals and beliefs regarding the litigation. Also, Mr. Coon will testify regarding Respondent's motivations and reasons for entering the Bidding Agreements, Respondent's goals and predictions regarding the impact of the Bidding Agreements, and any agreements with third parties with the same purpose as the Bidding Agreements; and any other topics relevant to the allegations of the complaint, the proposed relief, to Respondent's defenses.
4. **Mr. Bryce Craven.** Complaint Counsel anticipates that Mr. Craven will testify regarding search advertising, including but not limited to Respondent's search advertising activities, strategies, policies, and goals. In addition, Mr. Craven will testify regarding: Respondent's activities and strategies regarding marketing and pricing; Respondent's efforts to monitor and respond to competitors' advertisements; communications with competitors regarding advertisements and Bidding Agreements; actions taken to enforce Bidding Agreements; and Respondent's goals and predictions regarding the impact of the Bidding Agreements; and any other topics relevant to the allegations of the complaint, the proposed relief, to Respondent's defenses.
5. **Ms. Amy Larson.** Complaint Counsel anticipates that Ms. Larson will testify regarding Respondent's activities and strategies relating to marketing and pricing, including but not limited to Respondent's search advertising activities, strategies, policies, and goals. In addition, Complaint Counsel anticipates that Ms. Larson will testify regarding Respondent's efforts to monitor and respond to competitors' advertisements, Respondent's efforts to enforce Bidding Agreements, and Respondent's goals and predictions regarding the impact of the Bidding Agreements; and any other topics relevant to the allegations of the complaint, the proposed relief, to Respondent's defenses.
6. **Mr. Brady Roundy.** Complaint Counsel anticipates that Mr. Roundy will testify regarding search advertising, including but not limited to Respondent's search advertising activities, strategies, policies, and goals. In addition, Mr. Roundy will testify regarding Respondent's activities and strategies regarding marketing and pricing, Respondent's efforts to monitor and respond to competitors' advertisements, actions taken to enforce Bidding Agreements, and Respondent's goals and predictions regarding the impact of the Bidding Agreements; and any other topics relevant to the allegations of the complaint, the

proposed relief, to Respondent's defenses.

7. **Mr. Tim Roush.** Complaint Counsel anticipates that Mr. Roush will testify regarding Respondent's activities and strategies relating to marketing and pricing, including but not limited to Respondent's search advertising activities, strategies, policies, and goals. In addition, Complaint Counsel anticipates that Mr. Roush will testify regarding Respondent's efforts to monitor and respond to competitors' advertisements, actions taken to enforce Bidding Agreements, and Respondent's goals and predictions regarding the impact of the Bidding Agreements; and any other topics relevant to the allegations of the complaint, the proposed relief, to Respondent's defenses.
8. **Ms. Laura Schmidt.** Complaint Counsel anticipates that Ms. Schmidt will testify regarding Respondent's activities and strategies regarding marketing and pricing, including but not limited to Respondent's search advertising activities, strategies, policies, and goals. In addition, Complaint Counsel anticipates that Ms. Schmidt will testify regarding Respondent's efforts to monitor and respond to competitors' advertisements, actions taken to enforce Bidding Agreements, and 1-800 Contacts' goals and predictions regarding the impact of the Bidding Agreements; and any other topics relevant to the allegations of the complaint, the proposed relief, to Respondent's defenses.
9. **Mr. David Zeidner.** Complaint Counsel anticipates that Mr. David Zeidner will testify regarding Respondent's reasons for entering the Bidding Agreements, communications between Respondent and third parties regarding the Bidding Agreements, the process of negotiating the Bidding Agreements, the actions taken to enforce Bidding Agreements, Respondent's goals and predictions regarding the impact of the Bidding Agreements, and any written or unwritten agreements with third parties with the same purpose as the Bidding Agreements. In addition, Mr. David Zeidner will testify regarding Respondent's litigation against Lens.com and other parties, including but not limited to 1-800 Contacts' goals and beliefs regarding the litigation; and any other topics relevant to the allegations of the complaint, the proposed relief, to Respondent's defenses.
10. **Mr. Joseph Zeidner.** Complaint Counsel anticipates that Mr. David Zeidner will testify regarding Respondent's reasons for entering the Bidding Agreements, communications between Respondent and third parties regarding the Bidding Agreements, the process of negotiating the Bidding Agreements, the actions taken to enforce Bidding Agreements, Respondent's goals and predictions regarding the impact of the Bidding Agreements, and any written or unwritten agreements with third parties with the same purpose as the Bidding Agreements. In addition, Mr. David Zeidner will testify regarding Respondent's litigation against Lens.com and other parties, including but not limited to 1-800 Contacts' goals and beliefs regarding the litigation; and any other topics relevant to the allegations of the complaint, the proposed relief, to Respondent's defenses.

THIRD PARTY WITNESSES

1. **Mr. Stephen Fedele, or another current or former employee of Walgreen Co.** Complaint Counsel anticipates that Mr. Fedele, or another witness employed by Walgreen Co. (“Walgreens”) will testify regarding competition among contact lens retailers, the history of Walgreens efforts to sell contact lenses, the marketing and search advertising activities and strategies of Walgreens, and the importance of search advertising to contact lens retailers including Walgreens. In addition, Mr. Fedele will testify regarding the Bidding Agreement between Walgreens and 1-800 Contacts, including the negotiation of the Bidding Agreement, the reasons Walgreens entered into the Bidding Agreement, and the impact of the Bidding Agreement on Walgreens.
2. **Mr. Glen Hamilton, or another current or former employee of Vision Direct.** Complaint Counsel anticipates that Mr. Hamilton, or another witness employed by Vision Direct will testify regarding competition among contact lens retailers, the history of Vision Direct, the marketing and search advertising activities and strategies of Vision Direct, and the importance of search advertising to contact lens retailers including Vision Direct. In addition, Mr. Hamilton will testify regarding the Bidding Agreement between Vision Direct and 1-800 Contacts, including the negotiation of the Bidding Agreement, the reasons Walgreens entered into the Bidding Agreement, and the impact of the Bidding Agreement on Vision Direct.
3. **Ms. Sandhya Mohan, or another current or former employee of Walmart, Inc.** Complaint Counsel anticipates that Ms. Mohan, or another witness employed by Walmart, Inc. (“Walmart”) will testify regarding competition among contact lens retailers, the history of Walmart’s efforts to sell contact lenses, the marketing and search advertising activities and strategies of Walmart, and the importance of search advertising to contact lens retailers including Walmart.
4. **Mr. Adam Juda, or another current or former employee of Google, Inc.** Complaint Counsel anticipates that Mr. Juda, or another witness employed by Google, Inc. (“Google”) will testify regarding: the characteristics, history, and importance of search advertising; search advertising auctions; Google’s search advertising policies and technologies; and the operation and details of the search advertising products Google makes available to advertisers and end users. In addition, Mr. Juda or another witness employed by Google will testify regarding: Google’s business strategies related to search advertising; Google’s understanding of end users’ expectations and understanding of search advertising; and the effect and likely future effect of the Bidding Agreements on Google and on end users.
5. **Ms. Rukmini Iyer, or another current or former employee of Microsoft Corporation.** Complaint Counsel anticipates that Ms. Iyer, or another witness employed by Microsoft Corporation (“Bing”) will testify regarding: the characteristics, history, and importance of search advertising; search advertising auctions; Bing’s search advertising policies and technologies; and the operation and details of the search advertising products Bing makes available to advertisers and end users. In addition, Ms. Iyer or another

witness employed by Bing will testify regarding: Bing's business strategies related to search advertising; Bing's understanding of end users' expectations and understanding of search advertising; and the effect and likely future effect of the Bidding Agreements on Bing and on end users.

6. **Ryan Alvois, or another current or former employee of LensDirect.com.** Complaint Counsel anticipates that Mr. Alvois, or another witness employed by LenDirect.com ("LensDirect") will testify regarding competition among contact lens retailers, the history of LensDirect's efforts to sell contact lenses, the marketing and search advertising activities and strategies of LensDirect, and the importance of search advertising to contact lens retailers including LensDirect.
7. **Mr. Peter Batushansky or another current or former employee of Web Eye Care, Inc.** Complaint Counsel anticipates that Mr. Batushansky will testify regarding competition among contact lens retailers, the history of Web Eye Care, Inc. ("Web"), and Web's marketing and search advertising activities and strategies. In addition, Mr. Batushansky will testify regarding the Bidding Agreement between Web and 1-800 Contacts, including the negotiation of the Bidding Agreement, litigation between Web and 1-800 Contacts, the reasons Web entered into the Bidding Agreement, and the impact of the Bidding Agreements on Web.
8. **Mr. Peter Clarkson, or another current or former employee of Arlington Contact Lens Service, Inc.** Complaint Counsel anticipates that Mr. Clarkson will testify regarding competition among contact lens retailers, the history of Arlington Contact Lens Service, Inc. ("AC Lens"), the marketing and search advertising activities and strategies of AC Lens, and the importance of search advertising to contact lens retailers including AC Lens. In addition, Mr. Clarkson will testify regarding the Bidding Agreement between AC Lens and 1-800 Contacts, including the negotiation of the Bidding Agreement, the reasons AC Lens entered into the Bidding Agreement, and the impact of the Bidding Agreement on AC Lens.
9. **Mr. Jared Duley, or another current or former employee of Visionworks of American, Inc. and its subsidiary Empire Vision Centers, Inc. (together, "Visionworks").** Complaint Counsel anticipates that Mr. Duley will testify regarding competition among contact lens retailers, the history of Visionworks, and Visionworks' marketing and search advertising activities and strategies. In addition, Mr. Duley will testify regarding the Bidding Agreement between Visionworks and 1-800 Contacts, including the negotiation of the Bidding Agreement, litigation between Visionworks and 1-800 Contacts, the reasons Visionworks entered into the Bidding Agreement, and the impact of the Bidding Agreements on Visionworks.
10. **Mr. Eric Holbrook, or another current or former employee of Memorial Eye, P.A.** Complaint Counsel anticipates that Mr. Holbrook will testify regarding competition among contact lens retailers, the history of Memorial Eye P.A. ("Memorial"), and Memorial's marketing and search advertising activities and strategies. In addition, Mr. Holbrook will testify regarding the Bidding Agreement between Memorial and 1-800

Contacts, including the negotiation of the Bidding Agreement, litigation between Memorial and 1-800 Contacts, the reasons Memorial entered into the Bidding Agreement, and the impact of the Bidding Agreements on Memorial.

11. **Mr. Craig Lennox, or another current or former employee of Coastal Contacts, Inc.** Complaint Counsel anticipates that Mr. Lennox will testify regarding competition among contact lens retailers, the history of Coastal Contacts, Inc. ("Coastal"), Coastal's marketing and search advertising activities and strategies, and the importance of search advertising to contact lens retailers including Coastal. In addition, Mr. Lennox will testify regarding the Bidding Agreement between Coastal and 1-800 Contacts, including the negotiation of the Bidding Agreement, the reasons Coastal entered into the Bidding Agreement, and the impact of the Bidding Agreement on Coastal.

OTHER WITNESSES

In addition to the individuals named above, Complaint Counsel may call the following witnesses who need not or cannot be identified at this time:

1. Complaint Counsel's expert witness or witnesses, who will be identified on January 13, 2017, pursuant to the Scheduling Order.
2. Complaint Counsel's rebuttal expert witnesses, who will be identified on March 8, 2017, pursuant to the Scheduling Order.
3. Witnesses not yet identified to provide necessary testimony regarding the authenticity, admissibility or probative value of any exhibits introduced by either Complaint Counsel or Respondent.
4. Witnesses not yet identified to provide necessary testimony regarding any official record or document that was recorded or filed in a public office, pursuant to Fed. R. Evid. 1005.
5. Witnesses not yet identified to provide necessary testimony regarding any summary, chart, or calculation introduced by Complaint Counsel to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in Court, pursuant to Fed. R. Evid. 1106.

Dated: October 10, 2016

Respectfully submitted,

s/ Dan Matheson

Daniel Matheson

Kathleen Clair

Barbara Blank

Charlotte Slaiman

Gustav P. Chiarello

Nathaniel Hopkin

Joshua Gray

Thomas H. Brock

Charles Loughlin

Geoffrey Green

Counsel Supporting the Complaint

Bureau of Competition

Federal Trade Commission

Washington, DC 20580

Telephone: (202) 326-2075

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Electronic Mail: dmatheson@ftc.gov

CERTIFICATE OF SERVICE

I hereby certify that on OCTOBER 10, 2016, I served COMPLAINT COUNSEL'S PRELIMINARY WITNESS LIST via electronic mail on the following counsel for Respondents:

Steven Perry, Steven.Perry@mto.com
Justin Raphael, Justin.Raphael@mto.com
Stuart Senator, Stuart.Senator@mto.com
Gregory Stone, Gregory.Stone@mto.com
Gregory Sergi, Gregory.Sergi@mto.com
Garth Vincent, Garth.Vincent@mto.com

October 10, 2016

By: s/ Daniel Matheson
Attorney

EXHIBIT 2

PUBLIC

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

In the Matter of)
)

1-800 Contacts, Inc.,)
a corporation,)

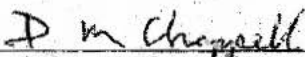
Respondent.)
)

DOCKET NO. 9372

PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL

Commission Rule 3.31(d) states: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." 16 C.F.R. § 3.31(d). Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: August 8, 2016

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. "Sensitive personal information" shall refer to, but shall not be limited to, an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL – FTC Docket No. 9372" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL – FTC Docket No. 9372" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, 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:

Daliah Saper, *ds@saperlaw.com*
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DATED: October 24, 2016

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: October 24, 2016

By: /s/ Steven M. Perry
Attorney

Notice of Electronic Service

I hereby certify that on October 24, 2016, I filed an electronic copy of the foregoing Redacted Opposition to WEC Motion to Quash or Limit Subpoena DT, 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 24, 2016, I served via E-Service an electronic copy of the foregoing Redacted Opposition to WEC Motion to Quash or Limit Subpoena DT, upon:

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