

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 WITHDRAW CERTAIN OBJECTIONS TO PREVIOUS
MOTION TO QUASH AND/OR LIMIT SUBPOENAS DUCES TECUM

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**NON-PARTY MOTION TO WITHDRAW CERTAIN OBJECTIONS TO PREVIOUS
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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 Withdraw Certain Objections raised in WEC's previously filed motions to quash and/or limit subpoenas issued by the Federal Trade Commission and 1-800 Contacts, Inc. In support thereof, WEC states as follows:

1. On October 3, 2016, WEC was served with a Subpoena Duces Tecum issued on September 27, 2016 at the behest of Respondent 1-800 Contacts Inc. ("1-800 Contacts"). On October 13, 2016, in accordance with 16 C.F.R. § 3.34 and Rule 3.34(c), WEC filed a Motion to Quash and/or Limit Subpoena against 1-800 Contacts (the "1-800 Contacts Motion to Quash").

2. On October 4, 2016, WEC was served with a similar Subpoena Duces Tecum issued on October 4, 2016 at the behest of Complainant Federal Trade Commission ("FTC" or "Complainant"). On October 14, 2016, in accordance with 16 C.F.R. § 3.34 and Rule 3.34(c), WEC filed a similar Motion to Quash and/or Limit Subpoena against the FTC (the "FTC Motion to Quash").

3. The respective Subpoenas Duces Tecum issued by 1-800 Contacts and FTC contained certain requests for documents and information that mirrored each other.

4. On October 18, October 19, and October 20, 2016, Chad Nold and Daliah Saper, counsel for WEC, and Gus Chiarello, counsel for the FTC, conferred via telephone specifically regarding the FTC Motion to Quash. After extensive discussion regarding the FTC requests and WEC's concerns – as set forth in detail in the FTC Motion to Quash – the respective parties reached agreement with respect to certain requests set forth in the FTC subpoena.

5. Specifically, WEC has agreed to produce, to the extent possible, documents in response to Specifications 1-5 of the FTC Subpoena.

6. Also on October 20, 2016, Chad Nold conferred with Steven Perry, counsel for 1-800 Contacts, regarding WEC's agreement to produce certain documents in response to the FTC Subpoena. Upon conferring, the parties confirmed that Specifications 1-5 in the FTC Subpoena matched Specifications 1-4, and Specification 36, of the 1-800 Contacts Subpoena. As such, WEC also has agreed to produce, to the extent possible, documents in response to Specifications 1-4, and 36 of the 1-800 Contacts Subpoena.

7. Therefore, WEC files this motion to withdraw the specific objections WEC raised in the FTC Motion to Quash solely with respect to Specifications 1-5 of the FTC Subpoena *Duces Tecum*.

8. WEC further moves to withdraw the specific objections WEC raised in the 1-800 Contacts Motion to Quash solely with respect to Specifications 1-4, and 36, of the 1-800 Contacts Subpoena *Duces Tecum*.

9. Notwithstanding the foregoing, WEC reiterates all other objections and arguments raised in its FTC Motion to Quash, including but not limited to its general objections to the scope of the FTC subpoena, its specific objections to Specifications 6-10, its objections to the time periods covered by the FTC Subpoena, its concerns with the existing protective order, and its

request for all or part of its fees and expenses incurred in responding to the FTC Subpoena to be borne by the FTC. In further support to the FTC and 1-800 Motions to Quash, WEC submits the attached Affidavit from one of WEC's co-owners, Mr. Peter Batushansky.

10. Similarly, WEC reiterates all other objections and arguments raised in its 1-800 Motion to Quash, including but not limited to its general objections to the scope of the 1-800 Contacts Subpoena, its specific objections to Specifications 5-35, and 37-39, its objections to the time periods covered by the 1-800 Contacts Subpoena, its concerns with the existing protective order, and its request for all or part of its fees and expenses incurred in responding to the 1-800 Contacts Subpoena to be borne by 1-800 Contacts. In support thereof, see the attached Affidavit.

WHEREFORE, WEC respectfully requests that WEC's specific objections raised in the FTC Motion to Quash solely with respect to Specifications 1-5 of the FTC Subpoena Duces Tecum be withdrawn, that WEC's specific objections raised in the 1-800 Contacts Motion to Quash solely with respect to Specifications 1-4, and 36 of the 1-800 Contacts Subpoena Duces Tecum be withdrawn, and for such other further relief previously requested in WEC's prior FTC and 1-800 Contacts Motions to Quash.

Dated: October 24, 2016

Respectfully Submitted,

SAPER LAW OFFICES, LLC

/s/Daliah Saper

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

CERTIFICATE OF SERVICE

I certify that on October 24, 2016, I electronically filed a document entitled "Motion to Withdraw Certain Objections to Previous Motion to Quash and/or Limit Subpoenas 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 24, 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 24, 2016

By: /s/ Daliah Saper
Daliah Saper

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AFFIDAVIT IN SUPPORT OF MOTION TO WITHDRAW

I, Peter Batushansky, under the penalty of perjury, hereby declare and state as follows:

1. I am of legal age, under no legal disability, and if called to testify, I could competently testify to the following.
2. I have personal knowledge of the matters stated herein.
3. I am the President and Co-Owner of WebEyeCare, Inc. ("WEC").
4. WEC is a very small, family owned, online retailer of contact lenses that was started in late 2009.
5. I joined WEC in early 2010.
6. WEC has not had any type of outside/venture capital investment and has all been boot-strapped/internally funded over the years.
7. Based on my knowledge of the U.S. contact lens market and WEC's sales and market penetration, WEC currently represents less than 0.5% of the U.S. contact lens market and less than 2% of the U.S. online contact lens market.
8. WEC currently has less than 15 full time employees, all of whom are customer service and order processing related employees.
9. Other than a general manager, whose primary function is to oversee our customer service team, WEC does not have any other managerial level employees. WEC does not have

any marketing and IT related employees. WEC does not have any business or web analytics employees.

10. In addition, even though I am President of WebEyeCare, this is not my full time job as I am involved in various other business ventures that require my time.

11. In short, WEC does not have any employees who are authorized and have the requisite knowledge to extract the data requested.

12. I do not currently have nor know how to generate many of the items requested.

13. Therefore, I would have to expend significant time to either learn how to generate the requested data, or research and find outside consultants to evaluate my systems and pull the data requested.

14. WEC's 1-800 Contacts related search term activity, which is the reason for WEC's involvement in this investigation, was run by WEC for a total of 17 days in the summer of 2010. The level of activity that resulted from these terms is so small that it is virtually irrelevant to the broader case against 1-800 Contacts and its potential defenses.¹

15. Most of the data that is being sought from WEC focuses more on WEC's general business rather than on activity that is specifically related to the 1-800 Contacts search terms.

16. Further, as such a small business, even if WEC is able to generate the various data requested, because our business represents such a small sample size of the broader market, it is unlikely that our data would be useful in extrapolating the broader impacts on the consumer.

17. Ultimately, aside from information related to the 17 days that WEC ran advertisements for 1-800 Contacts related keywords, WEC's involvement in this matter and the other data that is being requested will be extremely burdensome on our business both in time and money to compile and is not likely to add value to the overall case.

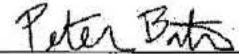
¹ Upon request, specific data can be provided for *in camera* inspection.

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18. Affiant further sayeth not.

Under the penalties as provided by Pennsylvania and federal law, I declare under the penalty of perjury that the foregoing statements are true and correct.

Executed this 23rd day of October, 2016, in Bristol, Pennsylvania, Arizona.



Peter Batushansky
10 Canal Street Suite 302
Bristol, PA 19007

Notice of Electronic Service

I hereby certify that on October 24, 2016, I filed an electronic copy of the foregoing Non-Party Motion to Withdraw Certain Objections to Previous Motions to Quash and/or Limit Subpoenas, 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 Non-Party Motion to Withdraw Certain Objections to Previous Motions to Quash and/or Limit Subpoenas, upon:

Thomas H. Brock
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