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

ORDER DENYING MOTION OF NON-PARTY WEBEYECARE TO QUASH OR LIMIT SUBPOENA ISSUED BY RESPONDENT

I.

On October 14, 2016, non-party WebEyeCare ("WEC") filed a Motion to Quash or Limit a subpoena served on it by Respondent 1-800 Contacts, Inc. on October 3, 2016, or in the alternative, to order Respondent to pay the costs of production ("Motion"). On October 24, 2016, Respondent filed an opposition to WEC's Motion to Quash ("Opposition"). Also on October 24, 2016, WEC moved to withdraw its objections to document requests 1-4 and 36 of Respondent's subpoena, together with an affidavit in support ("Motion to Withdraw"). The Motion to Withdraw is GRANTED, and those objections are hereby deemed WITHDRAWN.

The subpoena at issue in the Motion contains 39 requests for documents ("Document Requests"). Based on the granting herein of the Motion to Withdraw, there are no pending objections to Document Requests 1-4 and 36. In addition, the Motion recites that Document Requests 5 and 33 are "neither objected to nor . . . required to be quashed" provided that WEC is allowed "sufficient time" to respond. Motion at 7, 27-28. Furthermore, WEC states that it has no documents that are responsive to Document Requests 24-26, 35, and 37-38 and that it "reasonably believe[s]" that it does not possess documents responsive to Document Requests 15 and 17. Motion at 17-19, 22, 28-29 (stating also with respect to Document Requests 15 and 17 that, even if WEC does have responsive documents, "the time and expense to locate such documents far outweigh the benefits such documents may have in this matter). Accordingly, the Document Requests that remain at issue are 6-14, 16, 18-23, 27-32, and 34.

As further explained below, WEC's Motion is DENIED.

II.

The Commission's Complaint alleges that certain "Bidding Agreements" that Respondent made with various competing online contact lens sellers constitute a restraint of trade and an unfair method of competition in the alleged markets for the auctioning of keyword search online advertising and the retail sale of contact lenses, in violation of Section 5 of the FTC Act. Complaint ¶¶ 28-29, 31. According to the Complaint, search engine companies sell advertising space that appears on a search results page by means of auctions. Complaint ¶ 10. An advertiser may bid on particular keywords that might be contained in a search query. Complaint ¶ 10(b). When a consumer enters a search query, an algorithm reviews the relevant bids and the winner of the auction will have its advertisements displayed to the user on the search result page. If the user clicks through to the advertiser's website, the advertiser pays a fee to the search engine company. Complaint ¶ 10(c). The Complaint avers that in response to a query containing a trademark name, such as "1-800 Contacts," the user might be presented with advertisements for multiple companies in addition to the owner of the trademark. Complaint ¶ 12. A bidding advertiser may also specify negative keywords, which will prevent its advertisement from appearing in response to queries with such terms. Complaint ¶ 13.

The Complaint also alleges that in or around 2004, Respondent sent cease and desist letters asserting trademark violation to competitors whose advertisements appeared in response to user search queries containing the term "1-800 Contacts" or its variations. Complaint ¶ 17. Thereafter, according to the Complaint, fourteen competitors entered into agreements restricting bidding in search advertising auctions. Complaint ¶ 20. Pursuant to these Bidding Agreements, the Complaint alleges, the competitors agreed not to bid in any online search advertising auction for the use of the search term "1-800-Contacts" or variations thereof, and to employ negative keywords in paid search advertising to prevent competitors' advertising from appearing in response to a query for "1-800-Contacts." Complaint ¶¶ 22, 24. Respondent agreed reciprocally with respect to the competitors' trademarks. Complaint ¶ 23. According to the Complaint, the Bidding Agreements are not justified by trademark protection. Complaint ¶ 21.

Respondent's Answer asserts, among other things, that the alleged Bidding Agreements were settlement agreements to resolve *bona fide* litigation over competitors' use of its trademark, and denies that such agreements are anticompetitive or unlawful. Answer ¶¶ 20-24, 31, 33-34. Respondent's Answer further avers that the Complaint fails to allege facts that would establish a relevant product market. Answer, Ninth Defense.

III.

Under Federal Trade Commission Rule 3.31(c), "[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. . . . Information may not be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 16 C.F.R. § 3.31(c)(1). However, even if requested discovery is deemed relevant under Rule 3.31(c)(1), discovery can be limited if, among other reasons, "[t]he burden and expense of the proposed discovery on a party or third party outweigh its likely benefit." 16 C.F.R. § 3.31(c)(2)(iii).

Moreover, "[i]n order to protect the parties and third parties against improper use and disclosure of confidential information," the Rules require the issuance of a standard protective order ("Protective Order") protecting confidential materials produced in discovery from improper exposure and use. 16 C.F.R. §§ 3.31(d); 3.31A. The Protective Order was entered in this case on August 8, 2016. The burden of showing that a subpoena should be quashed is on the subpoenaed party. *See In re Lab. Corp. of America*, 2011 FTC LEXIS 31, at *7 (Feb. 28, 2011); *In re Intel Corp.*, 2010 FTC LEXIS 48, at *5 (May 28, 2010).

IV.

In summary, the Document Requests set forth in Respondent's subpoena seek information about WEC's product sales and revenue, and WEC's marketing and advertising practices. Respondent states that the Document Requests 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 alleged Bidding Agreements over a period of years. Opposition at 3. WEC contends that the subpoena should be quashed or limited because the Document Requests seek confidential information that is not relevant and that complying with the Document Requests would be unduly burdensome for WEC.

a. Relevance

WEC argues that WEC's product sales and revenue, and marketing and advertising practices are not relevant, or calculated to lead to the discovery of admissible evidence. However, WEC, which has the burden of proof on its Motion, fails to explain or support this assertion. Moreover, WEC states that it is willing to produce such documents "on a confidential basis," to the extent that they relate to "the approximately two-week period of time in 2010 in which WEC used 1-800 Contacts search terms (the 'Restricted Period')." *See, e.g.,* Response to Request 6. WEC's Motion fails to explain why information beyond its chosen limitation is not relevant.

Information from competitors is frequently used and often crucial in proceedings under the antitrust laws. *See Lab. Corp.*, 2011 FTC LEXIS 31, at *7 (citing *Service Liquor Distributors, Inc. v. Calvert Distillers Corp.*, 16 F.R.D. 507, 509 (S.D.N.Y. 1954)). In addition, Respondent notes that both Complaint Counsel and Respondent have issued subpoenas to multiple market participants, including, but not limited to, companies that Respondent asserted violated its trademark in keyword search advertising. Furthermore, according to Respondent, Complaint Counsel has identified on its preliminary witness list, WEC's owner and president, Peter Batushansky, to testify regarding, among other things, competition among contact lens retailers. *See Lab. Corp.*, 2011 FTC LEXIS 31, at *7-8 (denying motion to quash and holding that information from a company whose founder is listed as expected to testify at trial was relevant). In this regard, Respondent points to Investigational Hearing testimony from Mr. Batushansky that addressed: WEC's pricing strategy in relation to certain competitors; seasonal fluctuations in the sale of contact lenses; and the impact of online advertisements on sales, among other topics. Opposition at 3-5.

Conclusory assertions that discovery is not relevant do not adequately support a motion to quash, especially where, as here, the non-party is a potential trial witness. *See Intel*, 2010 FTC LEXIS 48, at *3-4 (denying non-parties' motion to quash deposition subpoenas). For all the foregoing reasons, WEC has failed to demonstrate that Respondent's requested discovery is not relevant.

b. Confidentiality

WEC's argument that the subpoena should be quashed or limited because the Document Requests require production of confidential or proprietary information is without merit. "The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery." *In re N. Texas Specialty Physicians*, 2004 FTC LEXIS 14, at *5 (Jan. 30, 2004) (quoting *LeBaron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9th Cir. 1971)). *See also Federal Trade Commission v. Rockefeller, et al.*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), *aff'd* 591 F.2d 182 (2d Cir. 1979) (stating that an objection to a subpoena on grounds that it seeks confidential information "poses no obstacle to enforcement."). This is particularly the case here, where there is a Protective Order in place.

WEC asserts the Protective Order is insufficient because it fails to prevent Respondent's employees from gaining access to WEC's confidential material. The Protective Order is clear in this regard, however, providing that:

> 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.

Protective Order, August 8, 2016 ¶ 7. Based on the foregoing provisions, the Protective Order is sufficient to protect WEC's information from being shared with employees of Respondent. Accordingly, WEC's argument that the subpoena should be quashed or limited in order to protect WEC's confidential business information is without merit and is rejected. *See In re Phoebe Putney Health Sys.*, 2013 FTC LEXIS 84, at *9-10 (May 28, 2013) (denying non-party motion to quash subpoena and holding that the Protective Order adequately protected the confidential materials that the non-party sought to withhold).

c. Undue Burden

WEC argues that the subpoena should be quashed as unduly burdensome. According to WEC, the subpoena "calls for the production of probably tens of thousands of pages of

documents" and "would require significant resources from WEC, which is a small business without employees in place to be able to produce the requested documents." Motion at 3. WEC asserts that complying with the Document 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." Motion at 3-4. *See also* Motion at 31-32 (stating that "the cost of production will be substantial").

WEC did not submit with the Motion any affidavit or other evidence supporting its assertions as to undue burden or cost. WEC did, however, with its Motion to Withdraw, file a Declaration of Peter Batushansky, as WEC's president and co-owner, which contains assertions that are relevant to WEC's contention of undue burden.

Mr. Batushansky asserts that WEC does not have any employees who are authorized and have the requisite knowledge to collect the data requested, and that he himself would have to expend significant time to either learn how to generate the requested data, or research and find outside consultants to evaluate WEC's systems and pull the data requested. Specifically, Mr. Batushansky attests that: WEC is a very small, family owned, online retailer of contact lenses that was started in late 2009; WEC has not had any type of "outside/venture capital investment" and has been "boot-strapped/internally funded over the years"; WEC currently has less than 15 full time employees, all of whom are customer service and order processing related employees; other than a general manager, whose primary function is to oversee the customer service team, WEC does not have any other managerial level employees, marketing and IT related employees, or any business or web analytics employees; Mr. Batushansky does not work for WEC fulltime; and he does know how to obtain many of the documents requested. Motion to Withdraw, Exhibit A.

Commission Rule 3.31(c)(3) provides that a non-party "need not provide discovery of electronically stored information from sources that the [non-party] identifies as not reasonably accessible because of undue burden or cost." 16 C.F.R. § 3.31(c)(3). However, it is well established that "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *In re N. Texas Specialty Physicians*, 2004 FTC LEXIS 14, at *8 (quoting *Federal Trade Commission v. Dresser Indus., Inc.*, 1977 U.S. Dist. LEXIS 16178, *13 (D.D.C. 1977)). "Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding." *In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009). A subpoenaed party is expected to absorb the reasonable expenses of compliance as a cost of doing business, with reimbursement by the proponent of the subpoena being appropriate only where the costs are shown by the subpoenaed party to be unreasonable. *Intel*, 2010 FTC LEXIS 48, at *8-9 (denying request for cost reimbursement). Whether expenses are unreasonable must be determined "in relation to the size and resources of the subpoenaed party." *Id.* at *9.

The Batushansky Declaration, summarized above, contains insufficient information to support the conclusion that complying with the subpoena would be unduly burdensome, including by failing to provide necessary information as to the alleged cost of complying with

the subpoena or the available resources of WEC to pay such costs.[1] Accordingly, the subpoena will not be quashed or limited as unduly burdensome, and WEC's request for cost reimbursement for complying with the subpoena is rejected. *See In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009) (holding that a movant's general allegation that a subpoena is unduly burdensome is insufficient to carry its burden of showing that the requested discovery should be denied); *In re Lab. Corp.*, 2011 FTC LEXIS 31, at *8 (denying non-party motion to quash where there was a failure to support claims of undue burden or expense).

V.

As set forth above, WEC has failed to demonstrate that Respondent's subpoena should be quashed or limited as requested, or that WEC is entitled to costs for complying with the subpoena. Accordingly, WEC's Motion is DENIED. Absent an order extending its deadline for good cause, WEC shall complete its production to Respondent pursuant to the subpoena within 30 days of the date of this Order.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: November 4, 2016

[1] WEC also objects to the instruction in the subpoena that directs WEC to produce documents dating from "2002 to the present," arguing that WEC was not even in existence until 2009. *See* Subpoena Instruction 1. Notwithstanding the instruction, many of the Document Requests are expressly limited to documents from the preceding five years. *See, e.g.*, Document Requests 7, 8, 10-16, 19, 28, 30-32. Obviously, WEC cannot be required to produce documents that it does not possess or control, including because WEC did not exist, and the subpoena need not be quashed or limited on this ground.

Notice of Electronic Service

I hereby certify that on November 04, 2016, I filed an electronic copy of the foregoing Order Denying Motion of Non-Party WebEyeCare to Quash or Limit Subpoena, with:

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I hereby certify that on November 04, 2016, I served via E-Service an electronic copy of the foregoing Order Denying Motion of Non-Party WebEyeCare to Quash or Limit Subpoena, upon:

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