

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



ORIGINAL

DOCKET NO. 9372

_____)
In the Matter of)
)
1-800-Contacts, Inc.,)
a corporation,)
)
Respondent.)
_____)

NON-PARTY WEBEYECARE, INC.’S MOTION FOR *IN CAMERA* TREATMENT

Pursuant to Rule 3.45(b) of the Federal Trade Commission’s (“FTC”) Rules of Practice, non-party WebEyeCare, Inc. (“WEC”) respectfully moves this Court for *in camera* treatment of three documents (“Confidential Documents”), as well as select portions of an Investigative Hearing transcript and a deposition transcript (“Confidential Testimony”), as each of these materials contains competitively-sensitive, confidential business information (collectively, “Confidential Materials”). WEC produced the Confidential Documents in response to third-party subpoenas and civil investigative demands in this matter. The Confidential Testimony of Peter Batushansky was obtained by the FTC through an Investigative Hearing and a deposition in this matter. Both the FTC and 1-800-Contacts, Inc. have notified WEC that they intend to introduce the Confidential Materials into evidence at the administrative trial in this matter. *See* Letters from the Federal Trade Commission and 1-800-Contacts, Inc., dated March 3, 2017 and March 15, 2017, respectively (attached as Exhibits A-B). WEC is not seeking *in camera* treatment of its Settlement Agreement with 1-800-Contacts, which the FTC also seeks to introduce in this action.

The entirety of the three Confidential Documents and the Confidential Testimony for

which WEC is seeking *in camera* treatment contain confidential business information, such that if they were to become part of the public record, WEC would be significantly harmed in its ability to compete in the online contact lens sales industry. For the reasons discussed in this motion, WEC requests that this Court afford its Confidential Materials *in camera* treatment indefinitely. In support of this Motion, WEC relies on the declaration of Peter Batushansky (“Batushansky Decl.”), attached as Exhibit C, which provides additional details on the materials for which WEC is seeking *in camera* treatment.

I. THE DOCUMENTS FOR WHICH PROTECTION IS SOUGHT

WEC seeks *in camera* treatment for the following Confidential Materials, copies of which are attached as Exhibits D-H. With respect to the Confidential Testimony, WEC seeks *in camera* treatment only of the portions of testimony highlighted in Exhibits G and H.

Exhibit No.	Description	Date	BegBates	EndBates
CX1467	WebEyeCare Spreadsheet: Sales by Product	00/00/0000	FTC-WEC-0000029	FTC-WEC-0000029
CX1819	WebEyeCare Spreadsheet: Keywords report by month	00/00/0000	FTC-WEC-0000031	FTC-WEC-0000031
CX1820/ RX1849	WebEyeCare Spreadsheet: Financials	00/00/0000	FTC-WEC-0000030; WEBEYECARE000 00078	FTC-WEC-0000030 WEBEYECARE00 000078
CX9000	IH Transcript of Peter Batushansky	7/8/2015	CX9000-001	CX9000-054
CX9014	Deposition Transcript of Peter Batushansky	11/16/2016	CX9014-001	CX9014-081

II. THE CONFIDENTIAL MATERIALS ARE SECRET AND MATERIAL SUCH THAT DISCLOSURE WOULD RESULT IN SERIOUS INJURY TO WEBEYECARE

In camera treatment of material is appropriate when “public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting” such treatment. 16 C.F.R. § 3.45(b). The proponent demonstrates serious competitive injury by

“showing that the information concerned is sufficiently secret and sufficiently material to [its] business that disclosure would result in serious competitive injury.” *In re Jerk, LLC*, No. 9361, 2015 WL 926508, at *1 (F.T.C. Feb. 23, 2015) (internal quotations and citation omitted). In considering both secrecy and materiality, the Court may consider the (1) extent to which the information is known outside of the business; (2) extent to which it is known by employees and others involved in the business; (3) extent of measures taken to guard the secrecy of the information; (4) value of the information to the business and its competitors; (5) amount of effort or money expended in developing the information; and (6) ease or difficulty with which the information could be acquired or duplicated by others. *In re BristolMyers Co.*, 90 F.T.C. 455, 456-57 (1977).

In light of the Commission’s recognition that “[t]he likely loss of business advantages is a good example of a clearly defined, serious injury,” courts generally attempt “to protect confidential business information from unnecessary airing.” See *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 138, at *6 (Sept. 19, 2000) (internal quotations and citation omitted); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186-88 (1961). Indeed, the Commission found *in camera* treatment of business records to be appropriate on a number of occasions. See *Jerk*, 2015 WL 926508, at *2 (collecting sources).

As discussed in detail in the Batushansky Declaration, the Confidential Materials are both secret and material to WEC’s business. They contain information of competitive significance to WEC, such as information about WEC’s product sales and revenue, as well as its marketing and advertising practices, including statistics pertaining to its online search advertising efforts (and the relative success of different strategies). Batushansky Decl. ¶¶ 5, 7-12. As an online retailer of contact lenses, WEC has collected this information since its inception in 2009

and relies on it in order to decide how to grow its business. *Id.* ¶ 7. For example, WEC tracks the number of units of each product sold, the price at which it was sold, and the revenue earned from those sales. *Id.* ¶ 8. These data reveal, *inter alia*, how well each product sells and the profitability of selling certain products over others. *Id.* WEC relies on such information to determine how to most efficiently stock its inventory and price its products. *Id.* Similarly, WEC's records on its marketing and advertising practices, including keywords it uses for different campaigns, provides WEC with crucial information about the most effective strategies. *Id.* ¶ 8-9. Especially when coupled with its product sales information, WEC's advertising and marketing data show how its advertising and marketing choices affected its product sales and customer acquisition. *Id.* Hence, WEC depends on this information to decide how to best invest its resources to expand its business. *Id.*

With respect to the Confidential Testimony, Mr. Batushansky discusses at length private WEC data and metrics, including some of the same data reflected in the Confidential Documents, as well as what certain data means when viewed in context. *Id.* ¶ 7, 11-12. In addition, Mr. Batushansky also provided significant insight into WEC's marketing practices, strategies and investments, customer acquisition methods, and tools used to implement such strategies. *Id.* Similar, Mr. Batushansky discussed WEC's internal pricing methodologies, business practices, sales strategies, and more highly sensitive business information. *Id.* Further, Mr. Batushansky discussed WEC's business structure, and its internal views on the online contact lens industry. *Id.* In sum, Mr. Batushansky's Confidential Testimony provides an extensive look at WEC's internal know-how, business practices, strategy, procedures, data gathering methods and data in general, all of which WEC has spent a great deal of time and resources developing and protecting since its inception. *Id.*

Public disclosure of this information would cause WEC serious competitive injury. *Id.* ¶¶ 5, 7-12. WEC spent a significant amount of time, money, and effort since 2009 testing new keyword and advertising strategies, and compiling and analyzing its sales and marketing records. *Id.* ¶¶ 5, 7. In turn, the records reflect the extent to which implementing new business strategies was successful. The resulting sales and advertising data help WEC develop and refine its business strategies, making it more competitive in the online market for contact lenses. *Id.* ¶ 9. Since discovering the best strategies requires trial and error, the development of these records is costly.

Consequently, *in camera* treatment is necessary because allowing WEC's competitors free access to the information would give them an unfair competitive advantage. For instance, instead of using a trial-and-error method or hiring consultants to figure out optimal inventory amounts, product pricing, or advertising strategies, competitors would simply be able to model their strategies based on the choices that worked for WEC, while avoiding those that did not. WEC, a small, family owned, online retailer, is particularly susceptible to such competition. *Id.* ¶ 5. Disclosure of the Confidential Materials would put WEC at an unfair disadvantage by allowing competitors to skip over the barriers to entry that WEC had to face. Unlike sales and marketing information of a large business with long-standing established infrastructure that only a limited number of similarly-situated competitors could use, making available WEC's information since 2009 would essentially provide a roadmap for anyone trying to enter the market or force WEC out of the market entirely. *See Gen. Foods*, 95 F.T.C. at 353.

It is precisely because of the value of the information and the unfair disadvantage that public disclosure would inflict on WEC that WEC has gone to many lengths to keep this information secret. WEC has not previously made this information in the Confidential Materials

publicly available, nor is WEC aware of any way it would be accessible to its competitors or the public. *See* Batushansky Decl. ¶¶ 5, 7-12; *cf. Gen. Foods*, 95 F.T.C. at 352-54. In addition, when WEC produced the Confidential Materials, it took steps to maintain their confidentiality by designating them as “Confidential” and produced them pursuant to the Protective Order in this case. Batushansky Decl. ¶ 6.

With respect to any information in the Confidential Materials that dates back to 2009, it still remains “competitively sensitive” and is thus entitled to *in camera* treatment.” *See Jerk*, 2015 WL 926508, at *2 (to receive *in camera* treatment, information older than three years requires declaration demonstrating that it “remains competitively sensitive”). Indeed, the fact that the information dates back more than three years makes it more competitively sensitive than information from the last three years, alone. Rather than simply providing random snapshots of information that is no longer relevant today, WEC’s sales and marketing records date back to the website’s launch. As a result, the Confidential Materials essentially provide a playbook of successful and unsuccessful business strategies that a young, growing enterprise could utilize to fast-track its development, bypassing the business mistakes that slowed WEC’s growth and consumed its resources.

Moreover, unlike cases where the respondent’s request for *in camera* treatment covers massive amounts of large documents, without discriminating between the confidential and non-confidential information contained therein, *see, e.g., In re Basic Research*, No. 9318, 2006 WL 271520, at *2 (F.T.C. Jan. 25, 2006), the documents for which WEC seeks *in camera* treatment consist solely of confidential information that, if disclosed, would cause WEC to suffer a serious competitive injury. The Confidential Documents contain only information that meets this *in camera* treatment standard, and nothing more. In a similar vein, WEC seeks *in camera* treatment

only for specifically tailored portions of Batushansky's hearing and deposition testimony pertaining to confidential business information. *See In re Union Oil Co. of Calif.*, 2005 FTC LEXIS 9, at *1 (Jan. 19, 2005).

Finally, WEC's third-party status entitles it to "special solicitude" in its request for *in camera* treatment for its confidential business information. *See in re Kaiser Aluminum & Chem. Corp.*, 103 FTC 500, 500 (1984). "As a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests." *Ibid.*

Therefore, because the Confidential Materials are and continue to be sufficiently secret and sufficiently material such that their disclosure would result in serious competitive injury to WEC, they must be entitled to *in camera* treatment.

III. THE CONFIDENTIAL MATERIALS WILL REMAIN SENSITIVE OVER TIME AND THUS, PERMANENT *IN CAMERA* TREATMENT IS JUSTIFIED

Given the highly sensitive and competitive harm that could result from the disclosure of the information contained in the Confidential Materials, WEC requests that they be given *in camera* treatment indefinitely. The key consideration in determining the duration of the treatment is the balancing of two interests: the public interest in disclosure and the private interest in avoiding injury resulting from disclosure. *See Union Oil*, 2005 FTC LEXIS 9, at *1. Where the injury from the disclosure of information is likely to wane over time such that it ceases to be "serious," *see* 16 C.F.R. § 3.45(b), the public interest in disclosure will eventually outweigh the private interest, thus justifying disclosure at some future point. But if the "competitive sensitivity or the proprietary value of the information" is not likely to decrease with the passage of time, then neither is the seriousness of the injury and thus the private interest outweighs the public interest in disclosure; hence, indefinite *in camera* treatment is necessary in

such circumstances. *See* 16 C.F.R. § 3.45(b)(3); *Jerk*, 2015 WL 926508, at *2 (quoting *In re Coca-Cola Co.*, 1990 FTC LEXIS 364, at *7 (Oct. 17, 1990)); *In re Dura Lube Corp.*, 1999 F.T.C. LEXIS 255, *7-8 (1999).¹

Here, the information contained in the Confidential Materials will retain its competitive sensitivity for an indeterminable amount of time. *See* Batushansky Decl. ¶¶ 5, 7-12. It will continue to inform competitors—particularly ones that are relatively new to the online contact lens retail market (i.e. WEC’s main competitors)—about which business practices to pursue with respect to keyword and advertising strategies as well as product sales and pricing. Unless the online market for contact lenses experiences significant changes, the utility of the information, and therefore its need for secrecy, as discussed above, will continue.

Furthermore, it is unclear if any public interest in disclosing the Confidential Materials is of the kind that is relevant to the determination of how long *in camera* treatment should last. The relevant public interest “weighing in favor of disclosure [is] the importance of the information in explaining the rationale of our decisions.” *Gen. Foods*, 95 F.T.C. at 353-54. But where the public’s understanding of the main proceeding before the Commission does not depend on access to confidential data submitted by third parties pursuant to a subpoena, the public interest in disclosure fails to outweigh the harm caused. *Kaiser*, 103 F.T.C. 500. Here, the FTC initiated the action against 1-800-Contacts based on 1-800-Contacts’ alleged orchestration of a web of anticompetitive agreements to eliminate competition in auctions to place advertisements on the search results page generated by online search engines. *See* Compl. The specific information

¹ As the revelation of most business records “may in many instances produce no more than embarrassment,” *H.P. Hood*, 58 F.T.C. at 1187, the Commission has noted that *in camera* treatment for “ordinary business records” is “typically provided for two to five years,” *see Jerk*, 2015 WL 926508, at *2. However, the Confidential Materials contain strategic financial and marketing information from the entirety of WEC’s existence; their disclosure would not just cause “embarrassment,” but gravely injure its ability to compete.

contained in the Confidential Materials, such as particular sales figures or even the keywords used by WEC are not necessary pieces of information for the public to understand the proceeding.

Because the Confidential Materials will remain sensitive or become more sensitive with the passage of time, and considering the degree of injury that would result from their disclosure, indefinite protection from public disclosure is appropriate.²

IV. CONCLUSION

For the reasons set forth above and in the accompanying Batushansky Declaration, WEC respectfully requests that this Court grant permanent *in camera* treatment for the Confidential Materials as specified herein.

Dated: March 27, 2017

Respectfully Submitted,

SAPER LAW OFFICES, LLC

/s/Daliah Saper

Daliah Saper

Chad Nold

505 N LaSalle St, Ste 350

Chicago, IL 60654

312-527-4100

ds@saperlaw.com

chad@saperlaw.com

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

² In the event such permanent treatment is not given, WEC requests that the period of *in camera* treatment of the Confidential Materials be no less than the five years customarily afforded to business records. *Jerk*, 2015 WL 926508, at *2.

CERTIFICATE OF SERVICE

I certify that on March 27, 2017, I electronically filed a document entitled “Motion for *In Camera* Treatment” 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: March 27, 2017

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: March 27, 2017

By: /s/ Daliah Saper
Daliah Saper

EXHIBIT A



Bureau of Competition
Anticompetitive Practices Division

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

March 3, 2017

Via E-Mail

Web Eye Care, Inc.
c/o Daliah Saper, Esq.
Saper Law Offices
505 N Lasalle Suite 350
Chicago IL 60654

RE: *In the Matter of 1-800 Contacts, Inc.*, Federal Trade Commission Dkt. No. 9372

Dear Ms. Saper:

By this letter we are providing formal notice, pursuant to Rule 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.45(b), that Complaint Counsel intend to offer the documents and testimony referenced in the enclosed Attachment A into evidence in the administrative trial in the above-captioned matter. The administrative trial is scheduled to begin on April 11, 2017. All exhibits admitted into evidence become part of the public record unless *in camera* status is granted by Administrative Law Judge D. Michael Chappell.

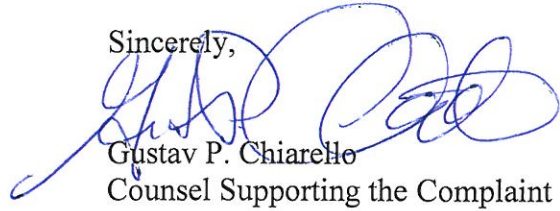
For documents or testimony which include sensitive or confidential information that you do not want on the public record, you must file a motion seeking *in camera* status or other confidentiality protections pursuant to 16 C.F.R §§ 3.45, 4.10(g). Judge Chappell may order that materials, whether admitted or rejected as evidence, be placed *in camera* only after finding that their public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment.

Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Jerk*, 2015 FTC LEXIS (Feb. 23, 2015); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); and *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). You must also provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

Please be aware that under the current Scheduling Order dated September 7, 2016, the deadline for filing motions seeking *in camera* status is March 27, 2017.

If you have any questions, please feel free to contact me at (202) 326-2633.

Sincerely,



Gustav P. Chiarello
Counsel Supporting the Complaint

EXHIBIT B

MUNGER, TOLLES & OLSON LLP

350 SOUTH GRAND AVENUE
FIFTIETH FLOOR
LOS ANGELES, CALIFORNIA 90071-3426
TELEPHONE (213) 683-9100
FACSIMILE (213) 687-3702

560 MISSION STREET
SAN FRANCISCO, CALIFORNIA 94105-3089
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

1155 F STREET N.W.
SEVENTH FLOOR
WASHINGTON, D.C. 20004-1361
TELEPHONE (202) 220-1100
FACSIMILE (202) 220-2300

March 15, 2017

RONALD L. OLSON*
ROBERT E. DENHAM
JEFFREY I. WEINBERGER
CARY B. LERMAN
GREGORY P. STONE
BRAD D. BRIAN
BRADLEY S. PHILLIPS
GEORGE M. GARVEY
WILLIAM D. TEHKO
STEPHEN M. KRISTOVICH
JOHN W. SPIEGEL
DONALD B. VERRILLI, JR.*
TERRY E. SANCHEZ
STEVEN M. PERRY
MARK B. HELM
JOSEPH D. LEE
MICHAEL R. DOYEN
MICHAEL E. SOLOFF
GREGORY D. PHILLIPS
KATHLEEN H. HODOWELL
GLENN D. POMERANTZ
THOMAS B. WALPER
O'MALLEY M. MILLER
SANDRA A. SEVILLE-JONES
HENRY WEISSMAN
KEVIN S. ALLRED
JEFFREY A. HEINTZ
JUDITH T. KITANO
MARC T.G. DWORSKY
JEROME C. ROTH
STEPHEN D. ROSE
GARTH T. VINCENT
TED DANE
STUART N. SENATOR
MARTIN D. BERN
DANIEL P. COLLINS
ROBERT L. DELL ANGELO
BRUCE A. ABBOTT
JONATHAN E. ALTMAN
MARY ANN TODD
MICHAEL J. O'SULLIVAN
KELLY M. KLAUS
DAVID B. GOLDMAN
KEVIN S. MASUDA
DAVID H. FRY
LISA J. DEMSKY
MALCOLM A. HEINICKE
GREGORY J. WEINGART
TAMERLIN J. GODLEY

JAMES C. RUTTEN
RICHARD ST. JOHN
ROHIT K. SINGLA
LUIS LI
MICHAEL B. DESANTCIS*
CAROLYN HOECKER LUEDTKE
C. DAVID LEE
FRED A. ROWLEY, JR.
KATHERINE M. FORSTER
BLANCA FROMM YOUNG
RANDALL G. SOMMER
ROSEMARIE T. RING
TODD J. ROSEN
MELINDA EADES LEMOINE
SETH GOLDMAN
GRANT A. DAVIS-DENNY
JONATHAN H. BLAVIN
DANIEL B. LEVIN
MIRIAM KIM
MISTY M. SANFORD
HAILYN J. CHEN
BETHANY W. KRISTOVICH
JACOB S. KREILKAMP
JEFFREY Y. WU
LAURA D. SINGWINE
ANJAN CHOUDHURY
KYLE W. MACH
HEATHER E. TAKAHASHI
ERIN J. COX
BENJAMIN J. HORWICH
E. MARTIN ESTRADA
MATTHEW A. MACDONALD
BRYAN H. HECKENLIVELY
SAMUEL T. GREENBERG
KIMBERLY A. CHI
ADAM P. LAWTON
MARGARET G. MARASCHINO
JESLYN A. EVERITT
MARK R. SAYSON
JEREMY A. LAWRENCE
CHRISTOPHER M. LYNCH
ADAM I. KAPLAN
AMELIA LB. SARGENT
JASMINE M. ROBERTS
LAURA K. LIN
GREGORY M. SERGI
ROBERT J. PADRKE
MARI OVERBECK
JOHN M. GILDERSLEEVE

ERIC K. CHIU
SARAH L. GRAHAM
ZACHARY M. BRIERS
JENNIFER H. BRODER
EMILY B. VIGLIETTA
KEVIN L. BRADY
ELLEN MEDLIN RICHMOND
JORDAN D. SEGALL
WESLEY T.L. BURRELL
CHRISTA L. CULVER
KAREN A. LORANG
KURUVILLA J. OLASA
JUSTIN P. RAPHAEL
CRAIG A. LAVOIE
THOMAS P. CLANCY
JOSHUA PATASHNIK
JOSHUA S. MELTZER
ADAM B. WEISS
ROSE LEDA EHLE
AMY L. GREYHITT
NASSIM NAZEMI
CATHLEEN H. HARTGE
JOON S. HUR
MARIA JHAI
ADAM P. BARRY
JENNIFER L. BRYANT
JUSTIN T. HELLMAN
ANDREW CATH. RUBENSTEIN
JEFFREY A. PAYNE
HANNAH L. DUBINA
ADAM GOTTESFELD
NICHOLAS D. FRAM
JOHN F. MULLER
JOHN L. SCHWAB
SARA N. TAYLOR
ALEXANDER D. TEREPAK
MAXIMILIAN L. FELDMAN
SAMUEL T. BOYD
PETER E. BOOS
SETH J. FORTIN
ANKUR MANDHANIA
J'AME K. FORREST
ASHLEY D. KAPLAN
JESSICA REICH BARIL
JEREMY K. BEECHER
MATTHEW K. DONOHUE
ALLYSON R. BENNETT
ELIZABETH A. LAUGHTON
EMILY CURRAN-HUBERTY

TIMOTHY J. MOON
JORDAN X. NAVARETTE
JOHN B. MAJOR
BRYAN A. WILLIAMS
DAVID J. FEDER
LAUREN C. BARNETT
NICHOLAS R. SIDNEY
C. HUNTER HAYES
KIMBERLY D. OHMENS
USHA C. VANCE
AARON D. PENNEKAMP
TREVOR N. TEMPLETON
STEPHEN T. MAYER
SKYLAR D. BROOKS
ELIZABETH R. AYRAL
SARAH S. LEE
JULIAN BEACH
ELIZABETH A. KIM
SUSAN S. HAR
THOMAS RUBINSKY
NICHOLAS DUFAU
LAURA M. LOPEZ
MICHAEL C. BAKER
SARAH G. BOYCE**
MOLLY K. PRIEDEMAN
BENJAMIN WOODSIDE SCHRIER
OF COUNSEL
ROBERT K. JOHNSON
ALAN V. FRIEDMAN
PATRICK J. CAFFERTY, JR.
PETER A. DETRE
MARK H. KIM
ALLISON B. STEIN
BRAD SCHNEIDER
ERIC P. TUTTLE
PETER E. GRATZINGER
MARK R. YOHALEM
CHAD GOLDER*
E. LEROY TOLLES
(1922-2008)

*A PROFESSIONAL CORPORATION

*ADMITTED IN DC AND NY ONLY
**ADMITTED IN DC AND MD ONLY

Writer's Direct Contact
(213) 683-9133
steven.perry@mto.com

VIA E-MAIL AND U.S. MAIL

Daliah Saper, Esq.
Saper Law Offices
505 N. LaSalle Street, Suite 350
Chicago, IL 60654

Re: In the Matter of 1-800 Contacts, Inc., FTC Docket No. 9372

Dear Ms. Saper:

This letter will constitute notice to WebEyeCare, Inc., pursuant to 16 C.F.R. § 3.45 and paragraph 7 of the Scheduling Order in this matter, that 1-800 Contacts, Inc. intends to use a document produced by WebEyeCare as evidence at the upcoming trial in this matter. The document in question is an Excel spreadsheet that was designated as WEBEYECARE00000078. The trial exhibit number for this document is RX 1849.

Any motion seeking in camera treatment for this exhibit must be filed on or before March 27, 2017. See Scheduling Order, p. 3. For your convenience, I have enclosed a copy of the Scheduling Order.

The Scheduling Order requires that we inform you of the "strict standards for motions for in camera treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45, explained in In re Jerk, LLC, 2015 FTC LEXIS (Feb. 23, 105); In re Basic Research, Inc., 2006 FTC LEXIS 14 (Jan. 25, 2006); In re Hoechst Marion Roussel, Inc., 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); and

MUNGER, TOLLES & OLSON LLP

Daliah Saper, Esq.
March 15, 2017
Page 2

In re Dura Lube Corp., 1999 FTC LEXIS 255 (Dec. 23, 1999). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004).” Scheduling Order, paragraph 7.

Please contact me if you have any questions regarding the foregoing.

Sincerely,

A handwritten signature in blue ink, appearing to read 'SMP', with a long horizontal flourish extending to the right.

Steven M. Perry

SMP:ei

Enclosures

EXHIBIT C

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

In the Matter of

1-800 Contacts, Inc.

Docket No. D09372

**DECLARATION OF PETER BATUSHANSKY IN SUPPORT OF NON-PARTY
WEBEYECARE, INC.'S MOTION FOR *IN CAMERA* TREATMENT**

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 a Co-Owner of WebEyeCare, Inc. (“WEC”). I make this declaration in support of Non-Party WebEyeCare, Inc.’s Motion for *In Camera* Treatment (the “Motion”).
4. I have reviewed and am familiar with the documents WEC produced in the above-captioned matter in response to subpoenas from the Federal Trade Commission and 1-800 Contacts, Inc. I provided a certification of authenticity as to the produced documents, including the documents that are the subject of the Motion. Given my position at WEC, I am familiar with the type of information contained in the documents at issue and its competitive significance to WEC. Based on my review of the documents, my knowledge of WEC’s business, and my familiarity with the confidentiality protection afforded this type of information by WEC, I submit that the disclosure of these documents to the public and to competitors of WEC would cause serious competitive injury to WEC.

5. WEC is a very small, family owned, online retailer of contact lenses that started in late 2009. Since 2009, WEC has collected various sales and pricing information, including products sold, quantities sold, average sale price, and more. In addition, WEC tracks the successes (and failures) of its marketing, advertising, and customer acquisition strategies, which include running different keyword campaigns and search terms. All of this online marketing and advertising information, statistics, and data is generated through WEC's Google Analytics account. The information collected and stored in Google Analytics is treated confidentially as it is critical that competitors or potential competitors do not have access to WEC's business development and competitive strategies.

6. The FTC and 1-800 Contacts, Inc. have informed WEC that they intend to use, between them, three of the documents that WEC produced—on a confidential basis pursuant to the Protective Order in this case—in response to subpoenas at the administrative hearing in this matter. The FTC has also informed WEC that it intends to use transcripts from an investigative hearing and deposition in this matter. As described in the Motion, WEC seeks permanent *in camera* protection of the following documents and testimonial materials:

Exhibit No.	Description	Date	BegBates	EndBates
CX1467	WebEyeCare Spreadsheet: Sales by Product	00/00/0000	FTC-WEC-0000029	FTC-WEC-0000029
CX1819	WebEyeCare Spreadsheet: Keywords report by month	00/00/0000	FTC-WEC-0000031	FTC-WEC-0000031
CX1820/ RX1849	WebEyeCare Spreadsheet: Financials	00/00/0000	FTC-WEC-0000030; WEBEYECARE000 00078	FTC-WEC-0000030 WEBEYECARE00 000078
CX9000	IH Transcript of Peter Batushansky	7/8/2015	CX9000-001	CX9000-054
CX9014	Deposition Transcript of Peter Batushansky	11/16/2016	CX9014-001	CX9014-081

7. The documents contain information about WEC's product sales and revenue, as well as its marketing and advertising practices, including statistics pertaining to its online search

advertising efforts through keywords and search terms (and the relative success of different strategies). In addition, the testimonial materials contain information related to not only WEC's marketing and advertising practices, customer acquisition methods and strategies, as well as the tools used to implement and monitor the foregoing, but also WEC's internal views, thoughts, and analysis that drives the actions WEC takes (and doesn't take) to grow its business. The testimonial materials therefore go beyond raw numbers to WEC's know-how, strategy, and procedures. Moreover, the information contained in these confidential materials reflects information that WEC has collected since its inception in 2009 and information WEC relies on in order to decide how to grow its business.

8. Specifically, CX1467 shows WEC's sales reports by product since 2009. It includes the number of units sold for each product, the revenue from each product, and the average unit sale price per product. WEC keeps the information contained in CX1467 in strict confidence because it shows exactly what products WEC's sells, how many and for how much each product is sold, and the total revenue applicable to each product, thus giving WEC insight into the profitability of selling certain products over others. WEC relies on such information to determine how to most efficiently stock its inventory and price its products. Not only that, because CX1467 includes sales information going all the way back to 2009, the available data can be used to establish different sales trends over the past seven years, showing which products have grown increasingly more important to consumers and which products WEC should consider allocating the most resources towards. Such information is highly valuable to WEC and would undermine its competitive position in the marketplace if competitors had access to WEC's specific sales information and the corresponding trends specifically because a competitor would know which products are most popular to online contact lens consumers. WEC does not make

these sales reports available to its competitors, nor does WEC share this information with non-WEC personnel in the ordinary course of business.

9. CX1819 is equally, if not more, valuable to WEC. CX1819 contains detailed reports generated from its Google Analytics account that shows information on WEC's keyword and search term advertising practices dating all the way back to 2009, a period of time in which WEC has devoted substantial time and resources learning best advertising practices and honing its strategies to maximize effectiveness. It includes a detailed summary of every keyword WEC has used in every advertising campaign WEC has conducted, broken down on a monthly basis, from May 2009 to November 2016. The document further includes detailed analytics and data regarding each keyword and campaign, including impressions, clicks, click through rate, average cost per thousand impressions, and more advertising cost-benefit variables. WEC collects this information through Google Analytics, and relies heavily on it – and search term and keyword marketing practices – to attract customers and grow its business with the most effective strategies. Especially when coupled with its product sales information, WEC's advertising and marketing data show how its advertising and marketing choices affected its product sales and customer acquisition. For these reasons, WEC keeps its keyword data in strict confidence as it provides a detailed overview of every advertising campaign, the search terms, and the relative success rate of each. In the hands of a competitor, this information could be used to skip the time and expense of hiring an independent consultant, or conducting its own trial-and-error approach, to effectively model its own advertising and sales strategies based on the choices that worked for WEC, while avoiding those that did not. Therefore, public disclosure would harm WEC because it would make public WEC's most valuable advertising data and strategies that it spent years accruing, giving competitors and potential market entrants a significant head start on

competing in the online contact lens retail industry. Furthermore, WEC does not make these advertising reports available to its competitors, nor does WEC share this information with non-WEC personnel in the ordinary course of business.

10. In addition, CX1820/RX1849 provides a snapshot of WEC's financials between 2011-2015. It shows WEC's year over year growth, annual revenue, cost of goods sold, contribution margins, and additional administrative expenses. As a very small, non-public, closely held business, we hold these financials in strict confidence as we try to expand and grow in a competitive marketplace. Indeed, in addition to me, the only other individuals who are familiar with this data are the other co-owners of WEC, and WEC's accountants and attorneys. Further, if disclosed, this information, when combined with the other information included in the remaining confidential materials the FTC and 1-800 Contacts plan to introduce, would serve as a significant blow to WEC's business prospects. { }
{ }
.....
.....
.....
.....
.....
..... }

Therefore, public disclosure of WEC's financials contained in CX1820/RX1849 would cause WEC significant harm in the online contact lens retail industry both from competitors and prospective partners and future business opportunities.

11. CX9000 and CX9014, the testimonial materials, both contain largely the same sort of confidential business information. I discussed at length with both the FTC and 1-800 Contacts WEC's private business structure, practices, strategies, and methodologies. Much of

this discussion focused on much of the data and analytics included in the above documents. However, unlike the documents which feature quantitative data that can be used to evaluate the success and failure of different strategies as well as predict trends as to what will and won't work, these transcripts provide actual insight into how WEC viewed the data and analytics it gathered on sales methods, pricing strategies, and advertising strategies. The information is therefore highly confidential and sensitive to WEC as it reflects WEC's know-how and strategy that was implemented to grow WEC and keep it competitive in the online contact lens retail industry. If the contents of my testimony were made public, WEC would suffer serious competitive injury, as WEC's current and possible future competitors would know what products to sell, what advertising channels and customer acquisition strategies are most effective, and what aspects of WEC's business is most vulnerable to outside forces. More problematic, competitors would have all of this information free of charge, and would not have to invest years of time, money, and intellectual capital in honing and implementing the most effective business strategies that are particular to online contact lens retailers. In short, WEC would suffer significant and irreversible competitive harm if the information in my testimony (that I've specifically redacted) was made publicly available.

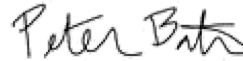
12. Each of the five documents and/or testimonial materials contain highly sensitive business information, including WEC's Google Analytics data and the corresponding advertising campaigns, strategies, and practices, WEC's internal strategies, views of the industry, and know-how that drives decision making, and important financial information related to the growth of the company and product sales and pricing information. All such information is hidden – and heavily protected – from the public. WEC uses this information to inform marketing and advertising strategies, product decisions (including which products to feature and establishing

product pricing), and decide on customer acquisition strategies, all in an effort to grow its business in the highly competitive contact lens marketplace. Given the complete picture the information discussed herein provides of WEC's entire business history (including its successes and failures), the competitive significance of the marketing and advertising data, product sales information, and business know-how developed over several years is unlikely to decrease over time. Thus, indefinite protection from public disclosure is appropriate.

13. Affiant further sayeth not.

Pursuant to 28 U.S.C. § 1746, I declare, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on: 3/24/17



Name: Peter Batushansky
Title: Owner

EXHIBITS

D-H

**MARKED CONFIDENTIAL
REDACTION IN THEIR ENTIRETY
REQUESTED**