

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



ORIGINAL

In the Matter of)
)
1-800 CONTACTS, INC.,)
a corporation,)
)
Respondent)
_____)

DOCKET NO. 9372

**NON-PARTY LUXOTTICA RETAIL NORTH AMERICA INC.'S
MOTION FOR *IN CAMERA* TREATMENT**

Pursuant to Rule 3.45 of the Federal Trade Commission's Rules of Practice, 16 C.F.R § 3.45(b), non-party Luxottica Retail North America Inc. ("Luxottica") respectfully moves the Commission for *in camera* treatment of a competitively-sensitive, confidential business document (the "Confidential Document"). Luxottica produced the Confidential Document, along with other documents, in response to a third-party subpoena issued by the Federal Trade Commission ("FTC") in the above-captioned matter. The FTC has now notified Luxottica that it intends to introduce four of these documents into evidence at the administrative trial in this matter, including the Confidential Document. See Letter from the FTC dated March 3, 2017 (attached as Exhibit A).

The document for which Luxottica is seeking *in camera* treatment is a confidential business document, such that if it were to become part of the public record, Luxottica would be significantly harmed in its ability to compete in the contact lens industry. For the reasons discussed in this motion, Luxottica requests that the Commission afford the Confidential Document *in camera* treatment indefinitely or, in the alternative, for a period of no less than five years. In support of this motion, Luxottica relies on the Affidavit of Mitch Wessels, Senior Director – Contact Lenses

("Wessels Declaration"), attached as Exhibit B, which provides additional details regarding the Confidential Document.

I. The Document for Which Protection is Sought

Luxottica seeks *in camera* treatment for the following Confidential Document, a copy of which is attached as Exhibit C.

Exhibit No.	Document Title/Description	Date	Beginning Bates No.	Ending Bates No.
CX1817	Luxottica US Contact Lens Sales		LUX00005533	LUX00005533

II. The Document at Issue is Highly Confidential and Material to Luxottica’s Business

In camera treatment of a document is appropriate when its "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 documents are secret and that they are material to the business. *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Dura Lube Corp.*, 1999 F.T.C. LEXIS 255, *5 (1999). In this context, the Commission generally attempts "to protect confidential business information from unnecessary airing." *HP. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

In considering both secrecy and materiality, the Commission analyzes the following factors:

(1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 456-457 (1977). As discussed in the Wessels Declaration, the Confidential Document contains a detailed monthly breakdown of Luxottica’s contact lens sales in the United

States from 2007-2016. Wessels Declaration at ¶4. Such data is both secret and material to Luxottica's business and, as set forth below, satisfies the standard for *in camera* treatment.

The sales data contained in the Confidential Document is not shared with anyone outside of the Company, aside from its contact lens fulfillment provider, 1-800 Contacts, Inc. ("1-800"). Wessels Declaration at ¶4. All of Luxottica's contact lens orders are transmitted to 1-800 for fulfillment, which necessarily includes accompanying sales information. *Id.* at ¶4. However, even then, Luxottica's contractual agreement with 1-800 contains a confidentiality provision that restricts disclosure of Luxottica's sales data. *Id.* at ¶4. This same level of confidentiality also applies internally at Luxottica, where only a limited number of employees have access to the sales data and the rest are only provided access, if at all, on a "need to know" basis. *Id.* at ¶4. For example, only members of the Contact Lens, Product Planning, Product Buying, IT and Accounting teams have access to the sales data, all of which need to have access to this data in the ordinary course of their respective duties. *Id.* at ¶4. Otherwise, the sales data is not divulged outside of this core group and is the standard practice of Luxottica to maintain the sales data in strict confidentiality. *Id.* at ¶4.

Furthermore, as discussed below in Section III, the sales data represents propriety information that, if it were disclosed publicly, would create a significant competitive advantage to Luxottica's competitors and suppliers who would not otherwise have access to this data. For instance, the sales data could be used by competitors to diminish Luxottica's market share and by suppliers to increase leverage in contract negotiations – both of which amount to a competitive disadvantage to Luxottica. *Id.* at ¶5. Luxottica spends a significant amount of time and internal resources on compiling and tracking the sales data, such that it would be highly prejudicial to allow third parties to gain from these efforts and essentially use the data to Luxottica's detriment. *Id.* at ¶7.

Finally, the Commission has explicitly recognized that sales figures like the ones at issue here are highly confidential and appropriate for *in camera* treatment. The Commission in *The Matter of Champion Spark Plug Company*, 1982 LEXIS 85 (April 5, 1982) held the following:

With respect to Group A exhibits, sales volumes for specific product lines never are publicly disclosed by Tenneco or its competitors. Publication of such data will give competitors a definite picture of Tenneco's relative size in a particular product line market which competitors could employ to their advantage. **There is ample support for granting *in camera* treatment for sales data of a type not normally disclosed.** *Id.* at *2 (emphasis added).

See also In The Matter of Kaiser Aluminum & Chemical Corporation, 103 F.T.C. 500, 500 (May 25, 1984), where the Commission extended *in camera* treatment to sales data of a third party, noting that they were "documents detailing sales of specific lines of refractories and related products, data regarded as extremely sensitive by both firms."

III. Public Disclosure of the Confidential Document Would Result in Serious Competitive Injury to Luxottica.

The sales data, in its present form, could be extrapolated by competitors and manufacturers to achieve a competitive advantage over Luxottica. Wessels Declaration ¶5. Specifically, competitors could use this sales data to determine Luxottica's share of the contact lens market in the United States and, therefore, would be in a significantly stronger position to compete with Luxottica for advantageous manufacturing and provider agreements. *Id.* at ¶5. Additionally, because the monthly sales data is further broken down by Luxottica's retail brands, competitors can determine what periods of time Luxottica has historically promoted products and when they may run such promotions in the future. *Id.* at ¶5. Thus, competitors could develop competing promotions or marketing plans that take market shares and sales away from Luxottica's retail brands. *Id.* at ¶5.

Manufacturers would also stand to benefit if Luxottica’s sales data was publicly disclosed, albeit in a different, but equally damaging way. Luxottica has contractual agreements with various contact lens manufacturers amongst its several retail brands, all of which contain confidentiality provisions. *Id.* at ¶6. However, the manufacturers know which of their competitors’ products are sold at a given Luxottica retail location, or could easily ascertain this information by simply visiting one of these locations, such as Target Optical, Sears Optical, LensCrafters, or Pearle Vision. *Id.* at ¶6. Therefore, if the manufacturers know the total sales of a particular Luxottica retail brand and also know their own sales to that brand, they can potentially determine the differing market shares of their competitors at a given Luxottica retail brand. *Id.* at ¶6. As such, this could potentially put the manufacturers in a stronger bargaining position when it would come time to renew or restructure their existing contracts with Luxottica. *Id.* at ¶6. For example, if Manufacturer A knows that its brand accounts for 75% of contact lens sales at a given Luxottica retail brand, this could be used as leverage to negotiate more favorable contract and pricing terms based on the perceived dependency of Luxottica on Manufacturer A’s products at the specific retail brand.

Finally, Luxottica’s status as a third party is relevant to the treatment of its Confidential Document. The FTC has held that “[t]here can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible.” *H.P. Hood & Sons*, 58 F.T.C. at 1186. This is especially so in the case of a third-party, which deserves “special solicitude” in its request for *in camera* treatment for its confidential business information. *See 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.”). As such, Luxottica’s third-party status weighs in favor of granting *in camera* treatment of the Confidential Document.

IV. *In Camera* Treatment of the Confidential Document Will Not Impede Public Understanding of the Commission’s Decision in This Matter

Luxottica recognizes that a “full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission.” *In re Bristol-Myers Co.*, 90 F.T.C. 455, 458 (1977). However, the sales figures contained within the Confidential Document are in no way central to the FTC’s claims against 1-800 Contacts. Indeed, according to the Case Summary for this matter on the FTC’s website, the FTC alleges that 1-800 Contacts “unlawfully orchestrated a web of anticompetitive agreements with rival online contact sellers that suppress competition in certain online search advertising auctions and that restrict truthful and non-misleading internet advertising to consumers.” Adjudication of these claims will not hinge upon Luxottica’s contact lens sales from 2007-2016 or otherwise be vital to either the FTC’s case-in-chief or 1-800 Contacts’ defense. Therefore, *in camera* treatment of the Confidential Document will not harm the public interest or detract from the public understanding of the Commission’s decision in this matter. In other words, as the Commission aptly stated in *Kaiser Aluminum & Chemical Corporation*, “[a] public understanding of this proceeding does not depend on access to these data submitted by these third party firms.” 103 F.T.C. at 500.

V. The Confidential Document Will Remain Sensitive Over Time and, Therefore, Permanent *In Camera* Treatment is Justified.

Given the highly sensitive nature of the information contained in the Confidential Document, Luxottica respectfully requests that it be given *in camera* treatment indefinitely. The information contained in the Confidential Document "is likely to remain sensitive or become more sensitive with the passage of time" such that the need for confidentiality is not likely to decrease over time. *In re Dura Lube Corp.*, 1999 FTC LEXIS at *7-8. Indeed, regardless of how old the sales data is, if it were publicly disclosed then competitors and manufacturers would

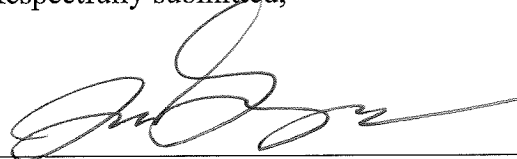
be able to estimate industry-average cost/price increases for each year to arrive at fairly accurate and current sales data. Wessels Declaration at ¶7. Therefore, the competitive advantage for competitors and manufacturers is not likely to decrease over time and permanent *in camera* treatment is appropriate. In the alternative, if the Commission finds that permanent *in camera* treatment is not proper here, then Luxottica requests that *in camera* treatment be afforded to the Confidential Document for at least five years.

VI. Conclusion

For the reasons set forth above and in the accompanying Wessels Declaration, Luxottica respectfully requests that the Commission grant *in camera* treatment for the Confidential Document indefinitely or, in the alternative, for a period of not less than five years.

Dated: March 27, 2017

Respectfully submitted,



Jason D. Groppe, Assistant General Counsel
Luxottica Retail North America Inc.
4000 Luxottica Place
Mason, Ohio 45040
Phone: 513-765-4319
Email: jgroppe@luxotticaretail.com

Counsel for Luxottica Retail North America Inc.

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

In the Matter of)
)
1-800 CONTACTS, INC.,)
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)
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_____)

[PROPOSED] ORDER

Upon consideration of Luxottica Retail North America Inc.'s ("Luxottica") Motion for *in camera* Treatment, it is HEREBY ORDERED that the following document is provided permanent *in camera* treatment from the date of this Order.

Exhibit No.	Document Title/Description	Date	Beginning Bates No.	Ending Bates No.
CX1817	Luxottica US Contact Lens Sales		LUX00005533	LUX00005533

ORDERED:

The Honorable D. Michael Chappell
Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2017, I filed the foregoing documents electronically 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

Dated: March 27, 2017

By:



Jason D. Groppe, Esq.

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

Luxottica, Inc.
c/o Michael Sibarium, Esq.

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

Dear Mr. Sibarium:

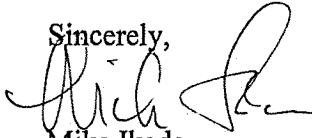
By this letter we are providing formal notice, pursuant to Rule 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.45(b), that Complaint Counsel intend to offer the documents and testimony referenced in the enclosed Attachment A into evidence in the administrative trial in the above-captioned 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) 326-2160.

Sincerely,


Mika Ikeda
Counsel Supporting the Complaint

EXHIBIT A

Exhibit No.	Description	Date	BegBates	EndBates
CX0442	Email from SMACK@luxotticaRetail.com to Karen Kreider Gaunt re: 1-800 Contacts Update	5/11/2005	LUX00000377	LUX00000379
CX0444	Email from Greg Matthews to Mitch Wessels re: EyeMed/Contacts Direct	11/20/2014	LUX00000542	LUX00000551
CX0445	Email from Mitch Wessels to Thomas Hersch re: wording for sec 3.01	11/8/2013	LUX00000809	LUX00000812
CX1817	Luxottica US Contact Lens Sales	00/00/0000	LUX00005533	LUX00005533

EXHIBIT B

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

**DECLARATION OF MITCH WESSELS IN SUPPORT OF NON-PARTY LUXOTTICA
RETAIL NORTH AMERICA INC.'S MOTION FOR *IN CAMERA* TREATMENT**

I, Mitch Wessels, hereby declare as follows:

1. I am Senior Director of Contact Lenses for Luxottica Retail North America Inc. ("Luxottica"). I make this declaration in support of Non-Party Luxottica's Motion for *In Camera* Treatment (the "Motion"). I have personal knowledge of the matters stated herein and, if called upon to do so, could competently testify about them.
2. The Federal Trade Commission ("FTC") has informed Luxottica that it intends to offer four documents that Luxottica produced in response to a subpoena into evidence at the administrative trial in the above-captioned matter. Out of these four documents, Luxottica is seeking *in camera* protection for only one of them; namely CX1817/LUX00005533 ("Confidential Document"), which contains particularly sensitive and highly confidential business information.
3. I have reviewed and am familiar with the Confidential Document that Luxottica produced. Given my position at Luxottica, I am familiar with the type of information contained in the document at issue and its competitive significance to Luxottica. Based on my review of the Confidential Document, my knowledge of Luxottica's business and familiarity with the confidentiality protection afforded this type of information by Luxottica; I submit that public disclosure of the Confidential Document would cause serious competitive injury to Luxottica.
4. The Confidential Document consists of a detailed monthly breakdown of Luxottica's contact lens sales from 2007-2016, separated by individual retail brands. This sales data is not publicly reported and Luxottica keeps this information in strict confidence. Within Luxottica,

contact lens sales data is only accessible by a limited number of employees who need access to this data in the ordinary course of their duties. These employees work on the Contact Lens, Product Planning, Product Buying, Accounting, and IT teams. All other employees at Luxottica are not privy to this data and are strictly on a “need to know” basis. Outside of Luxottica, the sales data is only shared with its contact lens fulfillment provider, 1-800 Contacts, Inc. (“1-800”). All of Luxottica’s contact lens orders are transmitted to 1-800 for fulfillment, which necessarily includes accompanying sales information. However, even then, Luxottica’s contract with 1-800 contains a confidentiality provision that restricts disclosure of Luxottica’s sales data. Other than what is referenced herein, the sales data is not disclosed outside of this core group and it is the standard practice of Luxottica to maintain sales data in strict confidentiality.

5. The sales data is significantly valuable not only to Luxottica, but also to its competitors and contact lens manufacturers. The data in its present form can be extrapolated into market share data, which could be very damaging to Luxottica’s contact lens business. For instance, competitors could use the monthly and yearly breakdown of Luxottica’s sales to determine Luxottica’s share of the contact lens market in the United States. This would allow competitors to better compete with Luxottica for advantageous manufacturing and provider agreements. Moreover, because the sales data also shows the monthly sales of specific Luxottica retail brands, retail competitors could ascertain what periods of time Luxottica retail brands have historically promoted products and are likely to promote them in the future. Knowing this information would allow competitors to develop competing promotions or marketing plans to take market share and sales away from Luxottica.

6. Likewise, contact lens manufacturers could also benefit from Luxottica’s contact lens sales data being made public. Luxottica has agreements with various contact lens manufactures amongst its several retail brands, all of which are confidential. However, manufacturers are aware of which

competitors' products are sold by a given Luxottica retail brand, or could easily ascertain this information through store visits. By now learning the total sales of that location and knowing their own sales in that location, they can extrapolate this data into share data for their competing contact lens suppliers and that would put them in a stronger bargaining position when it would come time to renew or restructure their contracts with Luxottica.

7. Luxottica spends a significant amount of time and resources on compiling and tracking the sales data contained in the Confidential Document and would be highly prejudiced if it were to be disclosed publicly. Both competitors and manufacturers would gain an unnecessary and damaging competitive advantage over Luxottica. This competitive advantage is not likely to decrease over time because competitors and manufacturers can estimate industry-average, yearly cost/price increases to arrive at fairly accurate present day sales data. Most importantly, public disclosure of the sales data provides them a baseline to do so. Thus, regardless of whether the data is from 2007 or 2016, if competitors and manufacturers have this information they will be able to use informed approximations to better compete against and/or negotiate with Luxottica.

8. Based on the foregoing, the confidential nature of the sales data at issue and risk of serious competitive injury to Luxottica by its public disclosure are unlikely to decrease over time. Therefore, indefinite *in camera* protection of the Confidential Document is appropriate.

I declare under penalty of perjury that the foregoing is true and correct. Executed March 23,
2017 in Mason, Ohio.

A handwritten signature in black ink, appearing to read "Mitch Wessels", written over a horizontal line.

Mitch Wessels
Sr. Director, Contact Lenses

EXHIBIT C

Confidential Document – Redacted in Entirety
Hearing Exhibit No. CX1817

Notice of Electronic Service

I hereby certify that on March 27, 2017, I filed an electronic copy of the foregoing Luxottica Retail North America Inc.'s Motion for In Camera Treatment, Exhibit A - FTC Letter, Exhibit B - Wessels Declaration, Exhibit C - Confidential Document - Redacted, 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 March 27, 2017, I served via E-Service an electronic copy of the foregoing Luxottica Retail North America Inc.'s Motion for In Camera Treatment, Exhibit A - FTC Letter, Exhibit B - Wessels Declaration, Exhibit C - Confidential Document - Redacted, upon:

Thomas H. Brock
Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Barbara Blank
Attorney
Federal Trade Commission
bblank@ftc.gov
Complaint

Gustav Chiarello
Attorney
Federal Trade Commission
gchiarello@ftc.gov
Complaint

Kathleen Clair
Attorney
Federal Trade Commission
kclair@ftc.gov
Complaint

Joshua B. Gray
Attorney
Federal Trade Commission
jbgray@ftc.gov
Complaint

Geoffrey Green
Attorney
Federal Trade Commission
ggreen@ftc.gov
Complaint

Nathaniel Hopkin
Attorney

Federal Trade Commission
nhopkin@ftc.gov
Complaint

Charles A. Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Daniel Matheson
Attorney
Federal Trade Commission
dmatheson@ftc.gov
Complaint

Charlotte Slaiman
Attorney
Federal Trade Commission
cslaiman@ftc.gov
Complaint

Mark Taylor
Attorney
Federal Trade Commission
mtaylor@ftc.gov
Complaint

Gregory P. Stone
Attorney
Munger, Tolles & Olson LLP
gregory.stone@mto.com
Respondent

Steven M. Perry
Attorney
Munger, Tolles & Olson LLP
steven.perry@mto.com
Respondent

Garth T. Vincent
Munger, Tolles & Olson LLP
garth.vincent@mto.com
Respondent

Stuart N. Senator
Munger, Tolles & Olson LLP
stuart.senator@mto.com
Respondent

Gregory M. Sergi
Munger, Tolles & Olson LLP
gregory.sergi@mto.com
Respondent

Justin P. Raphael
Munger, Tolles & Olson LLP
Justin.Raphael@mto.com
Respondent

Sean Gates
Charis Lex P.C.
sgates@charislex.com
Respondent

Mika Ikeda
Attorney
Federal Trade Commission
mikeda@ftc.gov
Complaint

Zachary Briers
Munger, Tolles & Olson LLP
zachary.briers@mto.com
Respondent

Chad Golder
Munger, Tolles, and Olson
chad.golder@mto.com
Respondent

Julian Beach
Munger, Tolles & Olson LLP
julian.beach@mto.com
Respondent

Aaron Ross
Attorney
Federal Trade Commission
aross@ftc.gov
Complaint

Thomas Dillickrath
Attorney
Federal Trade Commission
tdillickrath@ftc.gov
Complaint

Jessica S. Drake
Attorney
Federal Trade Commission
jdrake@ftc.gov
Complaint

W. Stuart Hirschfeld
Attorney
Federal Trade Commission
shirschfeld@ftc.gov
Complaint

David E. Owyang
Attorney
Federal Trade Commission
dowyang@ftc.gov
Complaint

Henry Su
Attorney

Federal Trade Commission
hsu@ftc.gov
Complaint

Jason Groppe
Attorney