

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

In the Matter of)	
)	
1-800 Contacts, Inc.,)	
a corporation,)	DOCKET NO. 9372
)	
Respondent.)	

SECOND ORDER ON NON-PARTIES'
MOTIONS FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Rules of Practice of the Federal Trade Commission (“FTC”) and the April 4, 2017 Order on Non-Parties’ Motions for *In Camera* Treatment (April 4 Order), several non-parties filed renewed motions for *in camera* treatment for materials that FTC Complaint Counsel and/or Respondent 1-800 Contacts (“Respondent” or “1-800 Contacts”) have listed on their exhibit lists as materials that might be introduced into evidence at the trial in this matter.

The specific motions of each of the non-parties are analyzed using the legal standards set forth in the April 4 Order and are addressed below in alphabetical order.

II.

AEA Investors LP (“AEA”)

The April 4 Order granted *in camera* treatment, for a period of five years, for RX1228, CX0439, and CX1343, which are three different versions of a presentation that AEA created in relation to a proposed acquisition. AEA renews its request and asks that these exhibits be granted indefinite *in camera* treatment. In support of its motion, AEA provides a declaration from its General Counsel and Chief Compliance Officer.

The declaration explains why certain portions of these documents are highly sensitive, that the documents reveal strategic planning that extends beyond five years, how the disclosure of these portions would cause material harm to AEA if publicly disclosed, and why the need to protect these materials will not diminish in the next five

years. Specifically, the declaration explicitly states that the materials will remain highly sensitive until AEA no longer holds an ownership interest in 1-800 Contacts. Thus, the declaration explains why the need to protect these materials will not diminish over time.

Accordingly, AEA has met its burden of demonstrating that the documents meet the Commission's standards for indefinite *in camera* treatment. Indefinite *in camera* treatment is GRANTED for: RX1228, CX0439, and CX1343.

Memorial Eye, PA (“Memorial Eye”)

The April 4 Order denied without prejudice Memorial Eye's original motion for *in camera* treatment. Memorial Eye has filed a renewed motion, seeking *in camera* treatment for documents and portions of deposition testimony that Complaint Counsel and Respondent intend to introduce into evidence.

Memorial Eye supports its motion with a declaration from its General Manager. The motion and the declaration explain that, in a lawsuit that was ultimately settled between 1-800 Contacts and Memorial Eye, the United States District Court of Utah entered two orders covering certain categories of Memorial Eye documents for which Memorial Eye seeks *in camera* treatment and that the protective order entered in that case does not have an expiration date. The declaration further explains the competitively sensitive nature of other materials for which Memorial Eye seeks *in camera* treatment. Memorial Eye has met its burden of demonstrating that the materials for which it seeks *in camera* treatment should be given such protection, except as set forth below.

With respect to the settlement agreement entered into in *1-800 Contacts, Inc. v. Memorial Eye, PA, et al.* No. 208-cv-00983-TS, Memorial Eye asserts only that it has a contractual obligation not to disclose the settlement or its terms. During trial proceedings in this matter on April 11, 2017, Counsel for Respondent 1-800 Contacts affirmed on the record that 1-800 Contacts was releasing Memorial Eye of this obligation. The settlement agreement does not otherwise meet the Commission's standards for *in camera* treatment. Therefore, Memorial Eye's motion is DENIED as to: CX0326, CX1316, RX0409, RX1795, RX1797, and as to the following portions of the deposition of Eric Holbrook concerning the settlement agreement: CX9024 (61:18-71:17, 76:2-15, 78:13-21, 84:5-85:5, 166:9-177:23, 188:15-201:13 and corrections to those passages in the attached errata sheet). However, the record does not show that 1-800 Contacts has released Memorial Eye of its obligation with respect to the deposition transcripts in that action. Therefore, indefinite *in camera* is GRANTED for the documents identified as: RX0676 and RX0677/CX1300.

With respect to internal Memorial Eye documents, financial statements, internal communications, business analyses, data on customer orders and search terms, and other communications, Memorial Eye has demonstrated that the documents contain information, which if publicly disclosed, would cause Memorial Eye competitive harm. Accordingly, *in camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as: RX0855, RX0856, RX0857, RX0858,

RX0860, RX1774, RX1775, RX1776, RX1777, RX1789, CX1309, CX1310, CX1311, CX1324, RX0849, RX0850, RX0851, RX0852, RX0853, RX0854, RX0859, RX1769, RX1770, RX1771, RX1772, RX1773, RX1785, RX1801, CX1301, RX1768, RX 1781, RX 1782, RX1783, RX1784, RX1788, RX1790, RX1800, CX1624, CX1625, CX1626, CX1627, CX1628, CX1629, CX1630, CX1631, CX1632, CX1633, CX1634, CX1635, CX1636, CX1637, CX1638, and portions of CX9024 (33:5-35:1-19, 54:24-57:1, 80:18-82:19, 99:3-121:19, 149:2-16, 211:24-217:1-22, 229:1-17, 232:10-234:25, 241:24-244:2 and corrections to those passages in the attached errata sheet).

In addition, Memorial Eye has demonstrated that the following documents, which contain personal email addresses, account numbers, and/or medical history, contain “sensitive personal information,” as that term is defined under Rule 3.45(b) and the April 4 Order, and thus are entitled to indefinite *in camera* treatment: RX1786, RX1802, RX1803, RX1804, and portions of CX9024 (93:14, 99:22, 101:3, 108:18-23, 110:3, 113:22, 114:4-9, 115:2, 116:12-24, 120:1).

Microsoft Corporation (“Microsoft”)

The April 4 Order granted *in camera* treatment, for a period of five years, for three sets of data. In its renewed motion, Microsoft reasserts its request that these data sets be accorded indefinite *in camera* treatment. Microsoft supports its motion with a declaration from its Assistant General Counsel. The declaration avers that the data sets contain highly confidential data on customer bids, ad campaigns, user clicks, ad impressions, and page views. The renewed motion and declaration further explain that the data provides unencrypted personal information and that revealing the data will expose Microsoft’s proprietary algorithms.

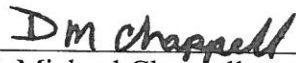
Microsoft has now demonstrated that the three data sets are likely to remain sensitive and that the need for confidentiality is not likely to decrease over time. Accordingly, Microsoft’s motion is GRANTED. Indefinite *in camera* treatment is GRANTED for the three data sets identified as: MSFT-FTC0001-3057, FTC-MSOFT-00001-000006, and MS00000002-MS00017106. If a party seeks to introduce these data sets as exhibits, counsel shall prepare a proposed order indicating that each data set has been granted indefinite *in camera* treatment by this Order and identifying it by its CX or RX number.

III.

Each non-party whose documents or information has been granted *in camera* treatment by this Order shall inform its testifying current or former employees that *in camera* treatment has been provided for the material described in this Order. At the time that any documents that have been granted *in camera* treatment are offered into evidence, or before any of the information contained therein is referred to in court, the parties shall identify such documents and the subject matter therein as *in camera*, inform the court

reporter of the trial exhibit number(s) of such documents, and request that the hearing go into an *in camera* session. Any testimony regarding documents that have been granted *in camera* treatment may be provided in an *in camera* session.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: April 12, 2017