

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of

1-800 CONTACTS, INC.,
a corporation,

Respondent.

DOCKET ORIGINAL

NON-PARTY LENS DISCOUNTERS.COM'S
MOTION FOR IN CAMERA TREATMENT

Under Rule 3.45 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.45(b), non-party LensDiscounters.com ("LD Vision") respectfully moves this Court for *in camera* treatment of competitively-sensitive, confidential business documents, as well as a declaration made by Mr. Shaneef Mitha on January 10, 2017 (the "Confidential Materials"). LD Vision produced these documents and declaration either in response to a *subpoena duces tecum*, upon the demands of the named parties, and/or in support of the FTC's investigation into the matters at issue in the above-referenced case. The FTC has now notified LD Vision that it intends to introduce a number of LD Vision's documents and Mr. Mitha's declaration, comprising the Confidential Materials, into evidence at the administrative trial in this matter. See March 3, 2017 letter from FTC, attached as Exhibit A.

The Confidential Documents warrant protection from public disclosure given the sensitive business information and trade secrets they contain. LD

Vision therefore submits this motion requesting permanent *in camera* treatment of the Confidential Materials in their entirety.

All materials for which LD Vision seeks *in camera* treatment are confidential business documents, such that if they were to become part of the public record, LD Vision would be significantly harmed in its ability to compete in the online retail contact lens market. For the reasons discussed in this motion, LD Vision requests that this Court afford its confidential business documents and Mr. Mitha's declaration *in camera* treatment indefinitely. In support of this motion, LD Vision relies on the Declaration of Shaneef Mitha ("Mitha Decl."), attached as Exhibit B, which provides additional details on the documents for which LD Vision is seeking *in camera* treatment.

I. LD Vision seeks protection for its Confidential Materials.

LD Vision seeks *in camera* treatment for the following Confidential Materials, copies of which are attached as Exhibit C:

Ex. No.	Description	Date	Beg. Bates	End Bates
CX1479	Spreadsheet: 2011–2016 Sales/Revenue/Profit/Costs	00/00/0000	LDV_0000481	LDV_0000481
CX1812	LensDiscounters.com data files—NKW Report Sheet	00/00/0000	LDV_0000190	LDV_0000190
CX1813	LensDiscounters.com data files—Sales Sheet	00/00/0000	LDV_0000062	LDV_0000062
CX8003	Declaration of Shaneef Mitha	01/10/2017	CX8003-001	CX8003–057

II. LD Vision's Confidential Materials are secret and material, such that disclosure would result in serious injury to it.

In camera treatment of material 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, at *5 (Dec. 23, 1999). In this context, courts generally attempt “to protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

In considering both secrecy and materiality, the Court may consider: (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, 456–57 (1977).

The Confidential Materials are both secret and material to LD Vision’s business as discussed in detail within the Mitha Declaration. In sum, the materials at issue contain information of competitive significance to LD Vision, such as sensitive financial and other information revealing pricing strategies, marketing and advertising strategies, proprietary processes, techniques, systems and data; which are essential to the competitive advantage of LD Vision in the online retail contact lens market. Mitha Decl., ¶¶ 3–7. As an online contact lens

retailer, LD Vision depends on its ability to evaluate its confidential and proprietary data for the purpose of assessing market advantages and risks. *Id.* Thus, its development of internal processes to collect, evaluate, and formulate strategies and practices to enhance competitive advantages while assuaging risk, is central and essential to the competitive success of LD Vision in the online contact lens retail market. *Id.* Indeed, when LD Vision produced the Confidential Materials, it took steps to maintain confidentiality by designating the documents “Confidential” pursuant to the Protective Order in this case. Because of the highly confidential and proprietary nature of the information and its materiality to LD Vision’s business, *in camera* treatment is appropriate.

Further, disclosure of the Confidential Materials will result in the loss of a business advantage to LD Vision. *See Dura Lube*, 1999 FTC LEXIS 255, at *7 (“The likely loss of business advantages is a good example of ‘clearly defined, serious injury.’”). The Confidential Materials are material to LD Vision’s online retail contact lens business. Mitha Decl., ¶¶ 3–7. Making such documents public would result in a loss of business advantage that LD Vision has built as the result of its own substantial investments in the development of its proprietary systems, strategies, and technical processes.

Finally, LD Vision’s status as a third party is relevant to the treatment of its confidential documents and information. 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 *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 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.”). LD Vision’s third-party status therefore weighs in favor of granting *in camera* status to the Confidential Materials.

III. The Confidential Materials contain trade secrets, which will remain sensitive over time and thus, permanent *in camera* treatment is justified.

Given the highly sensitive nature of the information contained in the Confidential Materials, LD Vision requests that they be given *in camera* treatment indefinitely. The trade secret information contained in the Confidential Materials “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. *Dura Lube*, 1999 FTC LEXIS 255, at **7–8. “Trade secrets”—such as secret formulas and secret technical information—are granted more protection than ordinary business documents. *Id.* at *5. Here, as described in the Mitha Declaration, the Confidential Materials contain confidential business information and trade secrets in the form of financial documents and other written statements, which either discuss or apply secret formulas and technical processes in connection with LD Vision’s online retail contact lens business. Mitha Decl., ¶¶ 3–7. The competitive significance of the technical

processes, LD Vision's formulas and criteria to collect evaluate and formulate strategies and practices, is unlikely to decrease or change significantly over time and thus, indefinite protection from public disclosure is appropriate. *Id.*

IV. Conclusion

For the reasons set forth above and in the accompanying Mitha Declaration, LD Vision respectfully requests that this Court grant permanent *in camera* treatment for the Confidential Materials in their entirety.

Respectfully submitted,

DATED: March 27, 2017

Bona Law PC

s/Jarod Bona

JAROD BONA

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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

LD Vision Group Inc. d/b/a LensDiscounters.com
c/o Matthew R. Riley, Esq.
Bona Law PC
4275 Executive Square, #200
La Jolla, CA 92037

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

Dear Mr. Riley:

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.

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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) 326-2435

Sincerely,

A handwritten signature in black ink, appearing to read 'N Hopkin', with a long horizontal flourish extending to the right.

Nathaniel Hopkin
Counsel Supporting the Complaint

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EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

<p>In the Matter of</p> <p>1-800 CONTACTS, INC., a corporation,</p> <p style="text-align: center;">Respondent</p>))))))))	<p style="text-align: center;">DOCKET NO. 9372</p>
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DECLARATION

I, Shaneef Mitha, pursuant to 28 U.S.C. §1746, make the following statements:

1. I am an employee of LD Vision Group, Inc., I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently under oath to such facts.

2. I have reviewed the documents referenced in Table A of this Declaration. The FTC has identified these documents as those it would use as trial exhibits in the above-captioned matter.

TABLE A

Exhibit No.	Description	Date	Beg. Bates	End Bates
CX1479	Spreadsheet: 2011-2016 Sales/Revenue/Profit/Costs	00/00/0000	LDV_0000481	LDV_0000481
CX1812	LensDiscounters.com data files – NKW Report Sheet	00/00/0000	LDV_0000190	LDV_0000190
CX1813	LensDiscounters.com data files – Sales Sheet	00/00/0000	LDV_0000062	LDV_0000062
CX8003	Declaration of Shaneef Mitha	1/10/2017	CX8003-001	CX8003-057

3. I certify that each of the documents in Table A contain information that is both secret and material to LD Vision Group’s online retail contact lens business. The documents include information related to LD Vision’s financial

condition, pricing strategies, investment strategies, and techniques for marketing and advertising its products. Information revealing such strategies and techniques is central and absolutely essential to the competitive success of LD Vision Group in the online retail contact lens market. LD Vision depends on its ability to evaluate its confidential and proprietary data for the purpose of assessing market advantages and risks. The trade secrets contained in the documents referenced in Table A reveal LD Vision Group's internal processes to collect, evaluate, and formulate strategies and practices to enhance competitive advantages while assuaging risk to its business. LD Vision's trade secrets will continue to be utilized in the future and will be necessary for its long-term success and prosperity in a competitive marketplace.

4. Exhibit CX1479 is a spreadsheet containing financial data of LD Vision's operations from January 2011 to September 2016. This document was produced with the designation "Confidential" pursuant to the Protective Order in this matter. LD Vision has taken steps to ensure only a select few employees who contributed to its preparation know the information contained in the document. Disclosure of this document to LD Vision's competitors or to other third parties is likely to result in serious harm to LD Vision's business interests. Outside parties, knowing LD Vision's financial condition and practices, such as its financial investments in advertising and its profit margins, could exploit the information to their advantage when negotiating terms of agreements with LD Vision, or otherwise make use of the information to LD Vision's detriment.

5. Exhibit CX1812 is a spreadsheet containing negative keywords implemented in relation to 1-800 Contacts. This document was produced with the designation "Confidential" pursuant to the Protective Order in this matter. LD Vision has taken steps to ensure only a select few employees who contributed to its preparation know the information contained in the document. Disclosure of this document to LD Vision's competitors or to other third parties is likely to result in serious harm to LD Vision's business interests. The strategic use of implementing keywords and negative keywords in online advertising campaigns is central to the success of LD Vision's online business. This document reveals how LD Vision's marketing strategies utilize and formulate keywords and negative keywords, individually and in combination, to achieve beneficial and competitive results in its advertising campaigns. Disclosure of this document to LD Vision's competitors or to other third parties is likely to result in serious harm to LD Vision's business interests. Outside parties, knowing how LD Vision implements keywords and negative keywords in various combinations will diminish the competitive advantages LD Vision enjoys, and undermines the resources LD Vision has used to test and develop its keyword strategies. The revelation of LD Vision's trade secrets, the strategies it employs when formulating keyword and negative keyword campaigns, would be detrimental to LD Vision's short and long-term success in the online retail contact lens market.

6. Exhibit CX1813 is a spreadsheet containing financial data of LD Vision's operations for August 2016 and September 2016. This document was

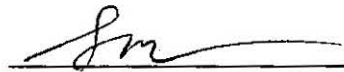
produced with the designation "Confidential" pursuant to the Protective Order in this matter. LD Vision has taken steps to ensure only a select few employees who contributed to its preparation know the information contained in the document. Disclosure of this document to LD Vision's competitors or to other third parties is likely to result in serious harm to LD Vision's business interests. Outside parties, knowing LD Vision's financial condition, could exploit the information contained in this document for their advantage when negotiating terms of agreements with LD Vision, or otherwise make use of the information to LD Vision's detriment.

7. Exhibit CX8003 is the Declaration of Shaneef Mitha, executed on January 10, 2017, which contains sensitive trade secrets concerning LD Vision's marketing and advertising strategies. The declaration was produced with the designation "Confidential" pursuant to the Protective Order in this matter. Only a few select employees have knowledge of the trade secrets and confidential business information disclosed in the declaration. Disclosure of the declaration to LD Vision's competitors or to other third parties is likely to result in serious harm to LD Vision's business interests. Outside parties, knowing LD Vision's marketing and advertising strategies can duplicate or work to diminish the effectiveness of such strategies. LD Vision depends upon and has invested substantial time, money, and other resources to test and develop its business strategies in order to maintain a competitive advantage in the online contact

lens retail market. The revelation of LD Vision's trade secrets and the strategies it employs, would be detrimental to its short and long-term success of LD Vision.

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

Executed on: March 17, 2017


Name: Shanceef Mitha
Title COO

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

<p>In the Matter of</p> <p>1-800 CONTACTS, INC., a corporation,</p> <p style="text-align: center;">Respondent.</p>

DOCUMENT NO. **ORIGINAL**

[PROPOSED] ORDER

Upon consideration of non-party LensDiscounters.com's Motion for *In Camera* Treatment, it is ORDERED that the following documents are provided permanent *in camera* treatment from the date of this Order:

Ex. No.	Description	Date	Beg. Bates	End Bates
CX1479	Spreadsheet: 2011–2016 Sales/Revenue/Profit/Costs	00/00/0000	LDV_0000481	LDV_0000481
CX1812	LensDiscounters.com data files—NKW Report Sheet	00/00/0000	LDV_0000190	LDV_0000190
CX1813	LensDiscounters.com data files—Sales Sheet	00/00/0000	LDV_0000062	LDV_0000062
CX8003	Declaration of Shaneef Mitha	01/10/2017	CX8003-001	CX8003–057

ORDERED:

The Honorable D. Michael Chappell
Administrative Law Judge

Date: _____

Notice of Electronic Service

I hereby certify that on March 27, 2017, I filed an electronic copy of the foregoing Non-Party LensDiscounters.com's Motion for In Camera Treatment, Exhibit A, Exhibit B, [Proposed] Order, 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 Non-Party LensDiscounters.com's Motion for In Camera Treatment, Exhibit A, Exhibit B, [Proposed] Order, upon:

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