

CV 07 4896

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
LONG ISLAND COURTHOUSE

FILED  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.

★ NOV 27 2007 ★

LONG ISLAND OFFICE

WEXLER, J.  
BOYLE, M.

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: right;">Plaintiff</p> <p style="text-align: center;">v.</p> <p>BEWILD, INC.; and BRIAN COHEN, individually and in his capacity as President of BeWild, Inc.,</p> <p style="text-align: right;">Defendants.</p>
---

(NSF)

CIV. NO.

**COMPLAINT FOR CIVIL PENALTIES, PERMANENT  
INJUNCTION AND OTHER RELIEF**

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission ("FTC" or "Commission"), for its Complaint alleges that:

1. Plaintiff brings this action under Sections 9(a) and 9(b) of the Fairness to Contact Lens Consumers Act ("FCLCA"), 15 U.S.C. §§ 7608(a) and (b), and Sections 5(a)(1), 5(m)(1)(A), 13(b), 16(a), and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b), 56(a), and 57b, to obtain monetary civil penalties, a permanent injunction, and other equitable relief for defendants' violations of the Contact Lens Rule ("Rule"), 16 C.F.R. Part 315.

**JURISDICTION AND VENUE**

2. This Court has jurisdiction over this matter under 28 U.S.C. §§ 1331, 1337(a),

1345, and 1355, and under 15 U.S.C. §§ 45(m)(1)(A), 53(b), and 56(a). This action arises under 15 U.S.C. §§ 45(a)(1) and 7608(a).

3. Venue in this District is proper under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b) - (c) and 1395(a).

### DEFINITIONS

4. For purposes of this Complaint, the terms "contact lens," "contact lens prescription," "direct communication," and "prescriber" are defined as those terms are defined in Section 315.2 of the Rule, 16 C.F.R. § 315.2.

### THE CONTACT LENS RULE

5. Congress enacted the FCLCA, 15 U.S.C. §§ 7601-7610, in 2003. The Act directed the FTC to promulgate a trade regulation rule implementing the FCLCA. The Commission promulgated the Rule, 16 C.F.R. Part 315, on July 2, 2004 pursuant to Section 8 of the FCLCA, 15 U.S.C. § 7607, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553. The Rule went into effect on August 2, 2004.

6. On November 9, 2005, Congress amended the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 - 399 to state that all contact lenses, including non-corrective, decorative, ("plano") contact lenses are restricted medical devices. 21 U.S.C. § 360j(n). Consequently, the Rule applies to both corrective and plano contact lenses.

7. Under the Rule, contact lens sellers may sell contact lenses only in accordance with a contact lens prescription for the patient that is either presented to the seller or verified by direct communication with the prescriber. 16 C.F.R. § 315.5(a). Both contact lenses that correct users' vision and plano contact lenses require a valid contact lens prescription. 21 U.S.C.

§ 360j(n).

8. The Rule further requires contact lens sellers to maintain records of the contact lens prescriptions presented to the seller, the seller's verification requests, and direct communications from prescribers. 16 C.F.R. § 315.5(f).

9. The Rule also prohibits any person involved in "the manufacture, processing, assembly, sale, offering for sale, or distribution of contact lenses" from representing that contact lenses may be obtained without a prescription. 16 C.F.R. § 315.7.

10. Pursuant to Section 9(a) of the FCLCA, 15 U.S.C. § 7608(a) and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the Rule constitutes an unfair or deceptive act or practice, in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1).

#### DEFENDANTS

11. BeWild, Inc. ("BeWild"), is a New York corporation with its principal place of business at 2200 Wantagh Avenue, Wantagh, NY 11793. Defendant BeWild has advertised and sold decorative, non-corrective ("plano") contact lenses to consumers, including via the telephone and through the [www.bewild.com](http://www.bewild.com) website. BeWild transacts, or has transacted, business in this District.

12. Defendant Brian Cohen is the president of BeWild. In connection with the matters alleged herein, Cohen resides and transacts business in this District.

13. Individually, or in concert with others, Cohen has formulated, directed, and controlled the acts and practices of BeWild, including the various acts and practices set forth herein.

14. The acts and practices of defendants BeWild and Cohen alleged in this Complaint

have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

### **DEFENDANTS' COURSE OF CONDUCT**

15. Since at least June 21, 2006, defendants have advertised and sold plano contact lenses to consumers on their website, [www.bewild.com](http://www.bewild.com).

16. Defendants have sold plano contact lenses to consumers without obtaining the consumers' contact lens prescription or verifying the prescription by direct communication with the prescriber.

17. Defendants have failed to maintain records of the consumers' contact lens prescriptions, defendants' verification requests, or defendants' direct communications from the contact lens prescribers.

18. Defendants have represented that their contact lenses can be obtained without a valid contact lens prescription.

### **DEFENDANTS' VIOLATIONS OF THE CONTACT LENS RULE**

19. In numerous instances, in connection with the advertising and sale of plano contact lenses, defendants have sold plano contact lenses to consumers without obtaining the consumers' contact lens prescription or verifying the prescription by direct communication with the prescriber. Therefore, defendants have violated Section 315.5(a) of the Contact Lens Rule, 16 C.F.R. § 315.5(a).

20. In numerous instances, in connection with the advertising and sale of plano contact lenses, defendants have failed to maintain records of the consumers' contact lens prescriptions, defendants' verification requests, or defendants' direct communications from the

contact lens prescribers. Therefore, defendants have violated Section 315.5(f) of the Contact Lens Rule, 16 C.F.R. § 315.5(f).

21. In numerous instances, in connection with the advertising and sale of plano contact lenses, defendants have represented that their contact lenses can be obtained without a valid contact lens prescription. Therefore, defendants have violated Section 315.7 of the Contact Lens Rule, 16 C.F.R. § 315.7.

#### **DEFENDANTS' VIOLATIONS OF THE FTC ACT**

22. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts or practices in or affecting commerce."

23. Pursuant to Section 9(a) of the FCLCA, 15 U.S.C. § 7608(a), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the Rule constitutes an unfair or deceptive act or practice, in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1).

24. By and through the acts and practices described in Paragraphs 19 - 21 above, defendants have violated Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1).

#### **THE COURT'S POWER TO GRANT RELIEF**

25. Defendants have violated the Rule as described above with the knowledge required by Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

26. Each sale of plano contact lenses that was completed from November 9, 2005 through the filing of this Complaint, each failure to maintain records for such sales, and each dissemination of the representation described in Paragraph 21, which violates the Rule in one or more of the ways described above, constitutes a separate violation for which the plaintiff seeks monetary civil penalties.

27. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, and Section 1.98(d) of the FTC's Rules of Practice, 16 C.F.R. § 1.98(d), authorize this Court to award monetary civil penalties of not more than \$11,000 for each such violation of the Rule.

28. Under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), this Court is authorized to issue a permanent injunction against defendants' violations of the FTC Act, as well as such ancillary relief as may be just and proper.

**PRAYER FOR RELIEF**

WHEREFORE, plaintiff Federal Trade Commission, pursuant to Sections 5(a)(1), 5(m)(1)(A), 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b), and 57b, and the Court's own equitable powers, requests that the Court:

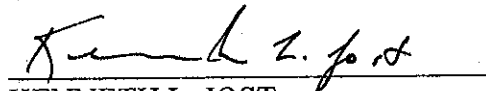
- (1) Enter a permanent injunction to prevent future violations of the FTC Act and the Contact Lens Rule by the defendants;
- (2) Award the plaintiff monetary civil penalties from defendants for each violation of the Rule alleged in this complaint; and
- (3) Award plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

DATED: \_\_\_\_\_

FOR THE UNITED STATES OF  
AMERICA:

PETER D. KEISLER  
Assistant Attorney General  
Civil Division  
United States Department of Justice

EUGENE M. THIROLF  
Director



KENNETH L. JOST  
Deputy Director  
Office of Consumer Litigation  
Civil Division  
U.S. Department of Justice  
Washington, D.C. 20530  
(202) 616-0219 (Phone)  
(202) 514-8742 (Facsimile)

BENTON J. CAMPBELL  
United States Attorney  
Eastern District of New York



THOMAS A. MCFARLAND  
Assistant United States Attorney  
610 Federal Plaza  
Central Islip, NY 11722-4454  
(631) 715-7900 (telephone)  
(631) 715-7922 (facsimile)

FOR THE FEDERAL TRADE  
COMMISSION:

KAREN JAGIELSKI  
Attorney  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room NJ-3212  
Washington, D.C. 20580