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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

STEPHEN MANGUM, on behalf of himself
and all others similarly situated,

Plaintiffs,

v.

COOPERVISION, INC.; ALCON
LABORATORIES, INC.; BAUSCH + LOMB;
JOHNSON & JOHNSON VISION CARE,
INC.; and ABB/CON-CISE OPTICAL GROUP
LLC,

Defendants.

Case No. _____

**COMPLAINT FOR VIOLATIONS OF
THE SHERMAN ACT; CALIFORNIA
CARTWRIGHT ACT AND CALIFORNIA
UNFAIR COMPETITION LAW**

CLASS ACTION

JURY TRIAL DEMANDED

1 Plaintiff Stephen Mangum, individually and on behalf of all others similarly situated, and
2 demanding trial by jury, upon information and belief complains and alleges as follows:

3 **NATURE OF THE ACTION**

4 1. This is an antitrust class action brought to recover for the injuries sustained by
5 Plaintiffs and the members of the Plaintiff Class to their business or property as a result of
6 Defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, and seeks treble damages,
7 injunctive relief, costs of suit, and reasonable attorneys' fees pursuant to Sections 4 and 16 of the
8 Clayton Act, 15 U.S.C. §§15 and 26 and Rule 23 of the Federal Rules of Civil Procedure, Plaintiff
9 also alleges violations of California's Cartwright Act (Cal. Bus. & Prof. Code section 16700, *et*
10 *seq.*) and Unfair Competition Law (Cal. Bus. & Prof. Code section 17200, *et seq.*) and seeks treble
11 damages, injunctive relief, costs of suit, and reasonable attorneys' fees and to obtain restitution, and
12 other available remedies from defendants, respectively, pursuant to those statutes. The Plaintiff
13 Class is defined more fully in Paragraph 24, below, and consists of all persons who purchased
14 disposable contact lenses manufactured by Defendants CooperVision, Inc. ("CV"), Alcon
15 Laboratories, Inc. ("Alcon"), Johnson & Johnson Vision Care, Inc. ("J&J") and Bausch + Lomb
16 ("B&L") (collectively, the "Manufacturer Defendants") between June 1, 2013 and the present (the
17 "Class Period").

18 2. Plaintiffs allege that Defendants engaged in an unlawful horizontal conspiracy to set
19 minimum resale prices for their disposable contact lenses. Beginning on June 1, 2013, the
20 Manufacturer Defendants implemented a series of "Unilateral Pricing Policies" ("UPP") that set
21 minimum prices by which their disposable contact lenses could be sold. Manufacturers conspired
22 with each other, wholesaler Defendant ABB/Con-Cise Optical Group LLC, also known as ABB
23 Optical Group, (collectively "ABB"), independent eye care professionals ("ECPs") represented by
24 ABB (*e.g.*, optometrists and ophthalmologists who sell contact lenses to consumers), and others to
25 impose minimum resale prices on certain contact lens lines by requiring retailers to adhere to UPPs.
26 In effect, the UPPs eliminated price competition from large retailers such as Wal-Mart Stores, Inc.
27 ("Wal-Mart"), Meijer, Inc. ("Meijer"), and Costco Wholesale Corporation ("Costco"), and internet-
28 based retailers such as 1-800 Contacts and LensDiscounters.com.

1 3. Prior to June 2013, the Manufacturer Defendants permitted their distributors and
2 retailers to determine the prices at which they would sell contact lenses and did not preclude the
3 practice of discounting prices. On June 1, 2013, Defendant Alcon adopted a UPP that required
4 retailers and wholesalers to sell contact lenses at a minimum resale price. Over the next 15 months,
5 each Manufacturer Defendant implemented a substantially similar minimum resale price
6 maintenance (“MRPM”) strategy duplicitously dubbed as “UPP”. Contact lenses are the only
7 prescription medical device sold in the United States subject to a UPP.

8 4. ECPs play a unique role in the market for contact lenses in the United States. ECPs
9 both prescribe and sell contact lenses. When an ECP writes a prescription for a patient, that ECP
10 prescribes not only the type and power of the lenses, but also the particular brand. Unless the
11 patient comes back for another eye exam, or switches ECPs, they are locked into buying the brand
12 of lenses prescribed by the ECP for the length of the prescription. Generic equivalents are
13 generally not available.

14 5. The power to prescribe makes ECPs the gatekeepers of the disposable contact lens
15 market. ECPs have the power and the economic incentive to prescribe the lenses that provide them
16 the largest profit margins. Contact lens manufacturers understand these incentives all too well.
17 ECPs will refuse to prescribe a manufacturer’s lenses if their profit margins are undercut by more
18 efficient retailers such as mail order and Internet companies, or big box stores. As a result, contact
19 lens manufacturers have tried to insulate ECPs from price competition. Likewise, the economic
20 purpose of the UPPs is to insulate ECPs from price competition from more efficient distributors.

21 6. Defendant ABB is the nation’s largest distributor of soft contact lenses, supplying
22 more than two-thirds of ECPs with brand name contact lenses and high grade ophthalmic and fully
23 customizable Gas Permeable Lenses. ABB sells primarily to independent ECPs as opposed to ECPs
24 employed by chain optical stores. Independent ECPs charge the highest average prices for contact
25 lenses compared to other channels of distribution. According to Angel Alvarez, its CEO, ABB’s
26 goal is to help ECPs grow their practices and “make more money.” ABB regularly surveys its ECP
27 customers to find out how much they are charging their patients for each different type and brand
28 of contact lenses. ABB then publishes the results of the surveys in its periodic *Retail Price Matrix*

1 publication so that ECPs can make sure their prices are as high as their fellow practitioners. In its
2 *Profit Advisor* newsletter, ABB also advises its ECP customers to charge as much as possible for
3 contact lenses, beyond the UPP floor set by the Manufacturer Defendants. As the biggest customer
4 of the manufacturer defendants, ABB acts as an agent for its 19,000 Independent ECP customers.
5 UPPs benefit ABB by forcing more consumers to purchase replacement contact lenses from the
6 Independent ECPs who are ABB's customers. As part of this conspiracy, ABB worked with the
7 Manufacturer Defendants to develop UPPs for several of the most advanced and most popular lines
8 of contact lenses sold by the Manufacturer Defendants.

9 7. MRPM policies in the form of UPPs have been implemented across the contact lens
10 industry. In testimony given at a hearing held on July 30, 2014 before the Subcommittee on
11 Antitrust, Competition Policy and Consumer Rights of the United States Senate's Judiciary
12 Committee investigating the practices at issue here ("Senate Hearing"), it was estimated that the
13 MRPM agreements implemented by Alcon, J&J and B&L encompassed 40% of the domestic
14 contact lens market and that the Manufacturer Defendants would extend their UPPs to cover 80%
15 of the market by the end of 2015. Thus, if Defendants are allowed to continue this unlawful
16 MRPM practice, millions of Americans will be subjected to higher contact lens prices by the end of
17 the year.

18 8. Despite the name given to the MRPM agreements by the Manufacturer Defendants,
19 and contrary to statements by the Manufacturer Defendants' executives, those agreements are not
20 "unilateral" pricing policies. Manufacturer Defendants agreed to limit retail price competition only
21 after extensive consultation with ECPs including by and through their agent, the ABB. Following
22 implementation, Manufacturer Defendants have enforced the MRPM agreements through actual
23 retaliation, as well as threats, warnings and other communications that ensure compliance with the
24 agreements.

25 9. The MRPM agreements were intended to eliminate discounting by big box, internet
26 and warehouse club store retailers of contact lenses, thereby decreasing their ability to compete
27 with ECPs who also sell contact lenses. The MRPM agreements have had the desired effect, as
28 reflected in statements by ECPs, ABB, and big box, warehouse club and internet retailers. For

example, Jim Murphy, Vice President of Alcon, described Alcon's UPP in a public podcast as, *inter alia*, a "win" for manufacturers and doctors. ABB CEO Angel Alvarez called the UPPs one of the best developments of the last 20 years because of their impact on profit margins.

10. Defendants have a history of antitrust violations. Starting in 1996, 32 state attorneys general ("AGs") and consumers brought antitrust lawsuits against Defendants J&J, B&L, CIBA Vision (Alcon's predecessor) and the trade association American Optometric Association ("AOA"), alleging a conspiracy with ECPs to restrict the supply of contact lenses to alternative sources of distribution, such as mail-order houses. Various foreign governments have also recently imposed penalties on the Manufacturer Defendants for fixing minimum resale prices of contact lenses and restricting internet and wholesale prices of its contact lenses.

11. Defendants' conspiracy has injured Plaintiff and class members in their business or property by causing them to pay millions of dollars more for disposable contact lenses than they otherwise would have paid.

JURISDICTION AND VENUE

12. This action is instituted under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, to recover treble damages and the costs of this suit, including reasonable attorneys' fees, against Defendants for the injuries sustained by Plaintiff and the members of the Plaintiff Class by virtue of Defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. §1, and to enjoin further violations. This action is also instituted under California's antitrust and unfair competition laws; respectively Cal. Bus. & Prof. Code section 16700, *et seq.*, and section 17200, *et seq.*

13. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1337, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15(a) and 26.

14. Venue is appropriate in this District under Sections 4, 12, and 16 of the Clayton Act, 15 U.S.C. §§15, 22 and 26 and 28 U.S.C. §1391(b), (c) and (d), because during the Class Period the Defendants resided or transacted business in this District, and because a substantial portion of the affected interstate commerce described herein was carried out in this District.

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15. The activities of the Defendants and their co-conspirators, as described herein, were within the flow of, were intended to, and did have direct, substantial and reasonably foreseeable effects on the foreign and interstate commerce of the United States.

INTRADISTRICT ASSIGNMENT

16. Intradistrict assignment to the San Francisco Division is appropriate. The practices at issue affect adversely contact lens consumers who reside in that division. On March 2, 2015, Costco filed a related case against J&J concerning its use of MRPM agreements with respect to contact lenses. *Costco Wholesale Corp. v. Johnson & Johnson Vision Care, Inc.*, No. 3:15-cv-00941 (N.D. Cal.) (“Costco Action”) and on March 3 and 4, 2015, the following related class actions were filed: *John Machikawa et al. v. Cooper Vision Inc. et al.*, No. 3:15-cv-01001 (N.D. Cal.); *Rachel Miller, et al. v Alcon Laboratories, Inc. et al.*, No. 3:15-cv-01028. (N.D. Cal.).

PARTIES

17. Plaintiff Stephen Mangum is a resident of the State of California who, during the Class Period, purchased disposable contact lenses manufactured by one or more of the Defendants and thereby suffered injury.

18. Defendant CV is a United States company headquartered in Pleasanton, California. During the Class Period, CV and/or its predecessors, wholly-owned or controlled subsidiaries or affiliates manufactured and sold disposable contact lenses in interstate commerce in the United States.

19. Defendant Alcon is a United States company headquartered in Fort Worth, Texas and is a division of Novartis International AG (“Novartis”). During the Class Period, Alcon and/or its predecessors, wholly-owned or controlled subsidiaries or affiliates manufactured and sold disposable contact lenses in interstate commerce in the United States.

20. Defendant J&J is a United States company headquartered in Jacksonville, Florida, and operates in the United States under the “Vistakon” trade name. During the Class Period, J&J and/or its predecessors, wholly-owned or controlled subsidiaries or affiliates manufactured and sold disposable contact lenses in interstate commerce in the United States.

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1 21. Defendant B&L is a United States company founded in Rochester, New York and
2 now headquartered in Bridgewater, New Jersey and is now owned by Valeant Pharmaceuticals, Inc.
3 (“Valeant”). During the Class Period, B&L and/or its predecessors, wholly-owned or controlled
4 subsidiaries or affiliates manufactured and sold disposable contact lenses in interstate commerce in
5 the United States.

6 22. Defendant ABB is a United States company headquartered in Coral Springs, Florida
7 that has its contact lens manufacturing operation and one of its distribution centers in Alameda,
8 California. During the Class Period, ABB and/or its predecessors, wholly-owned or controlled
9 subsidiaries or affiliates sold disposable contact lenses in interstate commerce in the United States
10 as a wholesale of contact lenses sold by Manufacturer Defendants and it serves 16,000 ECPs
11 nationwide.

12 23. “Defendant” or “Defendants” as used herein, includes, in addition to those named
13 specifically above, all of the named Defendants’ predecessors, including contact lens manufacturers
14 or, in the case of ABB wholesalers merged with or acquired by the named Defendants and each
15 named Defendants’ wholly-owned or controlled subsidiaries or affiliates that sold disposable
16 contact lenses in interstate commerce in the United States during the Class Period.

17 24. To the extent that subsidiaries and divisions within Defendants’ corporate families
18 sold or distributed disposable contact lenses in the United States, these subsidiaries played a
19 material role in the conspiracy alleged in this complaint because Defendants wished to ensure that
20 the prices paid for such disposable would not undercut the artificially raised and inflated pricing
21 that was the aim and intended result of Defendants’ coordinated and collusive behavior as alleged
22 herein. Further each of the corporate parent took profits from their wholly-owned or controlled
23 subsidiaries or affiliates that sold disposable contact lenses, including profits from the conduct
24 herein alleged and generally shared facilities, management and personnel. Thus, all such entities
25 within the corporate family were active, knowing participants in the conspiracy alleged herein, and
26 their conduct in selling, pricing, distributing and directly or indirectly collecting monies from
27 Plaintiffs and the members of the Plaintiff Class for disposable contact lenses was known to and
28 approved by their respective corporate parent named as a Defendant in this complaint.

CO-CONSPIRATORS, CORPORATE LIABILITY AND AGENCY

25. Various other persons, firms and corporations, not named as Defendants, have participated as co-conspirators with Defendants and have performed acts and made statements in furtherance of the conspiracy. The Defendants are jointly and severally liable for the acts of their co-conspirators, whether named or not named, as Defendants in this Complaint, and Plaintiff reserves the right to name some or all of these persons as Defendants at a later date.

26. Whenever reference is made to any act of any corporation, the allegation means that the corporation engaged in the act by or through its officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of the corporation's business or affairs.

27. Each of the Defendants named herein acted as the agent or joint-venturer of or for the other Defendants with respect to the acts, violations and common course of conduct alleged herein.

CLASS ACTION ALLEGATIONS

28. Plaintiff brings this action on behalf of himself and as a class action under the provisions of Federal Rules of Civil Procedure Rule 23(a), (b)(2) and (b)(3) on behalf of the members of the following Class:

All persons who purchased disposable contact lenses manufactured by Defendants from June 1, 2013, to the present for their own use and not for resale. Excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any co-conspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this litigation.

29. Class Identity: The Class is readily identifiable and is one for which records should exist.

30. Numerosity: Due to the nature of the trade and commerce involved, Plaintiff believes that there are most likely hundreds of thousands of Class members as above described, the number and their identities being known to Defendants and their Co-conspirators.

31. Typicality: Plaintiff's claims are typical of the claims of the members of the Class because Plaintiff purchased contact lenses subject to a Manufacturer Defendants' MRPM

1 agreement and covered by a UPP, and therefore Plaintiff's claims arise from the same common
 2 course of conduct giving rise to the claims of the members of the Class and the relief sought is
 3 common to the Class.

4 32. Common Questions Predominate: There are questions of law and fact common to
 5 the Class, including:

6 a. Whether the Manufacturer Defendants engaged in an agreement,
 7 combination and/or conspiracy among themselves and with ABB and ECPs to fix, raise, elevate
 8 maintain or stabilize prices of disposable contact lenses sold in interstate commerce in the United
 9 States;

10 b. The duration of the conspiracy alleged herein and the acts performed by
 11 Defendants and their co-conspirators in furtherance of the conspiracy;

12 c. Whether the alleged conspiracy violated Section 1 of the Sherman Act, 15
 13 U.S.C. §1; the Cartwright Act, Cal. Bus. & Prof Code §16700, *et seq.* or the Unfair Competition
 14 Law, Cal. Bus. & Prof Code §17200, *et seq.*;

15 d. Whether the conduct of Defendants and their co-conspirators, as alleged in
 16 this Complaint, caused injury to the business or property of the Plaintiff and the other members of
 17 the Plaintiff Class;

18 e. The effect of Defendants' alleged conspiracy on the prices of disposable
 19 contact lenses sold in the United States during the Class Period;

20 f. The appropriate class-wide measure of damages;

21 g. The appropriate amount of class-wide restitution; and

22 h. The nature of class-wide equitable or injunctive relief.

23 33. These and other questions of law or fact which are common to the members of the
 24 Class predominate over any questions affecting only individual members of the Plaintiff Class.

25 34. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class in
 26 that Plaintiff's interests are aligned with, and not antagonistic to, those of the other members of the
 27 Class and Plaintiff has retained counsel competent and experienced in the prosecution of class
 28 actions and antitrust litigation to represent himself and the Plaintiff Class.

35. Superiority: A class action is superior to other available methods for the fair and efficient adjudication of this controversy since individual joinder of all Class members is impractical. Prosecution as a class action will eliminate the possibility of repetitious litigation. The damages suffered by individual Class members are relatively small, given the expense and burden of individual prosecution of the claims asserted in this litigation. Absent a class action, it would not be feasible for Class members to redress the violations of law herein alleged. Further, individual litigation presents the potential for inconsistent or contradictory judgments and would greatly magnify the delay and expense to all parties and to the court system. Management of this action as a class action poses no material difficulty; indeed, prior class action litigation involving similar conduct with respect to a similar consumer class and the same products was successfully managed in *In re Disposable Contact Lens Antitrust Litig.* MDL No. 1030 (M.D. Fla.) (“*Disposable Contact Lens*”). Therefore, a class action presents far fewer case management difficulties and will provide the benefits of unitary adjudication, economy of scale and comprehensive supervision by a single court.

36. Defendants have acted on grounds generally applicable to the Class, thereby making final injunctive relief appropriate with respect to the Class as a whole.

TRADE AND INTERSTATE COMMERCE

37. Testimony in the aforementioned July 2014 Senate Hearing confirms that nearly 40 million Americans wear contact lenses and spend nearly \$4.2 billion annually on these products.

38. During the time period covered by this Complaint, Defendants manufactured or sold contact lenses in the United States. The activities of Defendants and their co-conspirators as described herein were within the flow of and substantially affected interstate commerce, including in this judicial district.

39. During the Class Period, Manufacturer Defendants collectively controlled the majority of the United States contact lens market.

40. Defendant ABB is the largest distributor of contact lenses in the United States.

41. The business activities of Defendants substantially affected interstate trade and commerce in the United States and caused antitrust injury in the United States.

FACTS**Disposable Contact Lens Industry**

42. During the relevant period, Defendants and their co-conspirators manufactured, or sold disposable contact lenses in a continuous and uninterrupted flow of interstate commerce.

43. According to testimony at the Senate Hearing, nearly 40 million Americans currently wear contact lenses and spend approximately \$4.2 billion on these products annually.

44. By law, in the United States contact lenses are sold only by prescription. ECPs perform eye exams, provide contact lens prescriptions and fittings, and receive payment for those services.

45. Based on examination, ECPs prescribe a specific brand of contact lens for the patient. The law does not allow consumers to substitute one brand for another. Consumers generally cannot obtain a generic equivalent for a branded contact. ECPs have an economic incentive to prescribe contact lens brands that they sell and to sell those that have higher margins, over lower-priced alternatives.

46. However, consumers are not required to purchase contact lenses from their ECP. Under the Fairness to Contact Lens Consumers Act, 15 U.S.C. §102, *et seq.* ("FCLCA"), ECPs are required to give patients a copy of their prescription. Patients may then have the prescription filled by the contact lens retailer of their choice. This de-bundling of professional services from goods has led to wide intrabrand price competition. Big box stores, optical chain retailers, buying clubs and online retailers dispense contact lenses in competition with each other and with ECPs and, prior to June 2013, were able to do so at a significantly lower cost to consumers. The FTC issued a report in 2005, wherein it presented data from both Ocular Sciences, Inc. ("OSI") and 1-800 Contacts on the share of contact lens prescriptions filled and sold through various retail channels. The OSI figures were as follows:

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Retailer Type	Share of Patient Visits	Estimated Share of Filled Prescriptions
Independent MD	14.1%	12.3%
Independent OD	52.6%	45.8%
Independent Stores and OD Groups	12.2%	10.6%
Chain Retailers and Optical Stores	21.0%	18.4%
Mail Order/Internet	n/a	13.0%

47. 1-800 Contacts presented the following data:

Channel	Estimated Share of Filled Prescriptions
Independent MD	4.3%
Independent OD	64.3%
Mass Merchandisers	13.0%
Chain Retailers	9.5%
Mail Order/Internet	8.0%

48. Studies conducted prior to Defendants' implementation of UPPs found that contact lenses were less expensive when purchased online or from big-box stores instead of ECP's. According to a study by 1-800 Contacts included in a 2004 FTC Report:

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Retailer	Contact Lens		
	Focus Toric (CIBA)	FreshLook Colorblends (CIBA)	Acuvue 2 (J&J)
<u>ECPs</u>			
Optical Chains	\$66.69	\$42.09	\$22.85
Independent Optometrists	\$70.91	\$46.67	\$24.39
Ophthalmologists	\$73.18	\$46.54	\$25.74
ECP Average	\$70.26	\$45.10	\$24.33
<u>Non-ECPs</u>			
Mass Merchandisers	\$53.21	\$35.40	\$18.05
1-800-Contacts	\$59.00	\$34.95	\$19.95
Non-ECP Average	\$56.11	\$35.18	\$19.00
Price Difference	\$14.16	\$9.93	\$5.33
% Difference	+25.2%	+28.2%	+28.0%

49. Intrabrand retail price competition results in lower margins and lower sales volume. As a July 2014 *Reuters* article explained, “the online channel is beginning to garner considerable attention from [ECPs]. Many are seeing this channel as a threat to traditional stores.” ECPs, unhappy with price competition on lenses from other retailers, have asked manufacturers to agree to restrain this competition. Since manufacturers distribute their largest share of contact lenses through ECPs, they are incentivized to listen to the ECPs and comply with their request.

Structure of the Disposable Contact Lens Industry

50. The disposable contact lens industry has characteristics that make it highly susceptible to collusive behavior and anticompetitive conduct.

51. Relatively Few Firms: The market for the disposable contact lenses is highly concentrated. Consolidation in recent years has attributed to the industry’s high concentration. For example, Novartis acquired Alcon in 2011, Valent acquired B&L in 2013 and, in August 2014, CV

acquired Sauflon Pharmaceuticals Limited. As a result, Manufacturer Defendants are the four major contact lens manufacturers in the United States and collectively account for over 97% of sales by revenue. According to testimony at the Senate Hearing from R. Joe Zeidner, former General Counsel of 1-800 Contacts, J&J controls approximately 35.5% of the market, Alcon controls 30.6% of the market, CV controls 23.9% of the market, and B&L controls 7.2% of the market. All four firms have implemented MRPM agreements in the form of UPPs.

52. Barriers to Entry: The contact lens market has high barriers to entry. Manufacturing contact lenses requires complex technology, know-how and skilled labor, which takes years to develop. Manufacturers bear substantial upfront research and development costs and maintain high facility and infrastructure costs. New entrants are also deterred by patents and regulatory approval by the FDA.

53. No Close Substitutes: Disposable contact lenses have no close substitutes. Although there are alternative corrective vision devices to disposable contact lenses, such as traditional glasses, consumers generally do not switch between products or services.

54. Inelastic Demand and Market Power: Demand for disposable contact lenses is relatively inelastic; concerted price increases are likely to be profitable and sustainable since purchasers will continue to buy nearly the same quantity of disposable contact lenses despite price increases. As such, a small non-transitory increase in prices ("SNIP") for contact lenses would not cause consumers to switch to another eye vision corrective product or service in sufficient numbers to defeat the price increase. Nor would a SNIP cause retailers to change their activities sufficiently to make such a price increase unprofitable to a manufacturer with market power. Consumers are therefore unable to constrain Defendants' market power by switching products.

VIOLATIONS ALLEGED

History of Anticompetitive Conduct

55. Defendants have, for years, been subject to antitrust scrutiny arising from their efforts to collectively maintain prices and thwart off discount retailers. In 1996, consumers and state AGs filed antitrust lawsuits against J&J, B&L, CIBA Vision (predecessor to Alcon), and the AOA. *See In re Disposable Contact Lens Antitrust Litig.* 170 F.R.D. 524 (M.D. Fla. 1996). These

lawsuits alleged that the contact lens manufacturers and AOA “conspired among themselves ... to restrict the supply of replacement contact lenses to alternative channels of distribution.” The plaintiffs alleged that manufacturers and the AOA restricted wholesale sales to alternative suppliers such as mail order houses and pharmacies and, but for the conspiracy, the plaintiffs would have paid lower prices for contact lenses. *See In re Disposable Contact Lens Antitrust Litig.*, MDL No. 1030, 2001 WL 493244 (M.D. Fla. Feb. 8, 2001). As part of the settlement of that matter, AOA also agreed to not restrict where consumers could obtain their replacement contact lenses, to not oppose the release of contact lens prescriptions, and to not make claims that eye health was impacted by the retail channel from which the lens was purchased.

56. Despite the litigation, other manufacturers continued to engage in practices similar to that alleged in *Disposable Contact Lenses*. The conduct became so pervasive that, on September 15, 2006, the Commerce, Trade and Consumer Protection Subcommittee of the House Energy and Commerce Committee held a hearing entitled *Contact Lens Sales: Is Market Regulation the Prescription?*.

57. In 2009, CIBA Vision, Alcon’s predecessor, was fined by the German Federal Cartel office in the amount of €11.5 million for fixing minimum resale prices of contact lenses and restricting internet and wholesale prices of its contact lenses. CIBA Vision was charged with having utilized an internal “price maintenance” program whereby it enforced minimum resale prices for contact lenses in violation of European Community and German law.

58. Two of the Manufacturer Defendants—J&J and B&L—were fined by China’s competition authority in 2014 for mandating minimum retail prices in violation of, respectively, European Community and German law and China’s Anti-Monopoly Law.

Other Practices to Limit Retail Price Competition

59. ECPs and the ABB have engaged in other practices to limit retail price competition. For example, before the Manufacturer Defendants implemented MRPM agreements, ABB not only facilitated the exchange of retail price information among ECPs, but also urged ECPs to adopt uniform pricing. ABB publishes a quarterly pricing survey, called the Retail Price Monitor, which calculates average prices for the biggest-selling contact lens lines. The survey relies on the prices

1 of more than 450 practices. The Retail Price Monitor “makes it easy” for ECPs to set contact lens
 2 prices and “maximize contact lens margins.” ABB also operates yourlens.com, which ECPs can
 3 use to order contact lenses online, and which provides suggested retail prices. As stated in ABB’s
 4 promotional materials, “Yourlens.com takes the guesswork out of setting your online prices by
 5 utilizing our Retail Price Monitor suggested prices.”

6 Implementation of Unlawful MRPM Agreements Through UPPs

7 60. Alcon was the first of the Manufacturer Defendants to announce a MRPM policy in
 8 June 2013. Alcon implemented its first UPP for its DAILIES TOTAL1® contact lenses. In January
 9 of 2014, Alcon extended its policy to three other lines of contact lenses: DAILIES® AquaComfort
 10 Plus® Multifocal and DAILIES® AquaComfort Plus® Toric contact lenses. And in June of 2014,
 11 Alcon implemented a UPP on its AIR OPTIX® COLORS contact lenses. Alcon has sought the
 12 written consent of ECPs to its UPPs.

13 61. In February of 2014, B&L implemented UPP for its ULTRA™ line of contact
 14 lenses.

15 62. In June of 2014, J&J announced MRPM policies for all of its major contact lens
 16 lines. At the same time, J&J announced that it would discontinue contact lens lines that would not
 17 be subject to a UPP. The contact lens lines subject to an RPM policy are as follow: 1-Day
 18 ACUVUE® MOIST®, 1-DAY ACUVUE® MOIST® for ASTIGMATISM, 1-Day ACUVUE®
 19 TruEye®, ACUVUE® OASYS® with HYDRACLEAR®, ACUVUE® OASYS® for
 20 ASTIGMATISM, and ACUVUE® OASYS® for PRESBYOPIA. These policies became effective
 21 on July 1, 2014 for a six-month supply of ACUVUE® OASYS® with HYDRACLEAR® and on
 22 August 1, 2014 for the remaining contact lens lines.

23 63. According to J&J, its MRPM policies will impact roughly 9.66 million consumers,
 24 or 69% of the 14 million consumers of J&J contact lenses.

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1 64. Laura Angelini, President of J&J, announced J&J's policy in a written
2 communication to ECPs on June 24, 2014. A trade article described the announcement as follows:

3 Last week, in a letter addressed to [ECPs] dated June 24, 2014,
4 Laura Angelini, president, Johnson & Johnson Vision Care – North
5 America, announced the company's launch of its "Enterprise
6 Strategy" and "roadmap for the future," part of which includes
7 resetting the price of specific contact lens products in the U.S.
8 according to a new "unilateral pricing policy."

9 Now, all wholesale customers will receive the same pricing for
10 certain existing contact lenses already offered in the company's
11 portfolio, Angelini told VMail. The policy applies to the company's
12 number one reusable, Acuvue Oasys, its number one disposable,
13 Acuvue Moist, and its 1-Day Acuvue TruEye, which Angelini
14 described as the company's "strategic brands." The new policy also
15 sets minimum retail pricing, which has been communicated to all its
16 customers. In addition, manufacturer's rebates have been eliminated
17 by building those discounts into the retail price of these legacy
18 products rather than requiring customers to send in proof of
19 purchase to obtain rebates.

20 Angelini described this new pricing as a "holistic multifaceted
21 pricing policy to refocus the conversation between the doctor and
22 the patient on eye health and product performance rather than price.
23 This gives the optometrist the ability to improve his or her capture
24 rate in the office," she told VMail. "Now the patient has no
25 incentive to shop around."

26 The letter to [ECPs] described the three areas in which the company
27 would "demonstrate support for the profession and the
28 professional—Prescribers, Portfolio and Preferred Partners."

1 A letter prepared by J&J and disseminated to its customers made clear that retailers cannot sell their
2 contact lenses below a certain price; if they do, their supply will be cut off.

3 65. In September of 2014, CV became the last major contact lens manufacturer to
4 implement a UPP, which it imposed on its Clariti contact lens line. CV acquired the Clariti contact
5 lenses line through its purchase of Sauflon, another contact lens manufacturer, for \$1.2 billion in
6 August of 2014. The UPP had been instituted by Sauflon prior to the acquisition (in January 2014),
7 and CV elected to maintain the MRPM policy post-acquisition.

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66. Under the MRPM policies, contact lens retailers are not allowed to offer discounts on these lines where the discounted price would be below the MRPM policy price. As Dr. Milicent Knight, head of Professional Affairs for J&J, said at the Senate Hearing, “Retailers maintain the right to offer store coupons, rebates or promotions (discounts) under the ACUVUE Unilateral Pricing Policy, provided that the final net price for the product covered by the UPP remains at or above the UPP Minimum Retail Price, after discounts are applied.”

67. MRPM policies are enforced by the Manufacturer Defendants’ threats to cut off supply to retailers that refuse to observe minimum price levels and through other coercive means. As Dr. Knight also explained to the United States Senate:

Johnson & Johnson Vision Care, Inc. has three separate processes for proactive Market Price monitoring. First, there are internal resources (J&J employees) dedicated to researching, confirming and notifying sellers of UPP violations. In addition, Johnson & Johnson Vision Care, Inc. has retained two (2) independent firms to assist in monitoring Market Prices. The first of these firms monitors all on-line pricing and advertising, the second conducts in-store price validations nationwide. All customer types, regardless of size, geography, distribution method, etc. are included in one or more of these monitoring efforts. If a customer is found to be in violation of the UPP, then Johnson & Johnson Vision Care, Inc. will no longer sell products subject to the policy to that customer.

68. J&J expanded on its enforcement measures in a November 5, 2014 circular sent to its customers stating, “If you sell product below the UPP price, [J&J] and its authorized distributors [such as ABB] will refuse to accept new orders from you. In addition, [J&J] will exercise its right to repurchase your current inventory of products subject to the UPP price.”

69. In a prepared statement presented at the Senate Hearing, Alcon made a similar point:

As a result of this situation, Alcon chose to create an environment in which ECPs might more likely spend time learning about the new technology and explaining it to patients, all while having the opportunity to make a reasonable profit margin. It did so by adopting its Unilateral Pricing Policy, or UPP, when it launched DAILIES TOTAL1® in 2013. That policy provided that Alcon would not supply DAILIES TOTAL1® to customers who resold it for less than the price announced by Alcon.

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1 70. B&L made a similar point in announcing its UPP:

2 [E]ach customer is free to advertise or charge whatever price it
3 wants, but should understand that Bausch + Lomb will cease to
4 supply, and will prohibit its authorized distributors from supplying,
5 Bausch + Lomb Ultra® contact lenses to any customer that resells
6 or advertises Bausch + Lomb Ultra® contact lenses to the end
7 consumer (e.g., patient) for sale at less than the MRP.

8 71. The Manufacturer Defendants actually carry out these threats as to the contact lens
9 lines where the ECP or retailer sells below the UPP. In an article that appeared in the *Review of*
10 *Cornea And Contact Lenses* in June of 2014, influential ECP Gary Gerber stated:

11 Manufacturers employing UPP have the ability to “cut off” a doctor
12 who does not abide by their pricing policy. Some practitioners
13 question the ability and willingness of manufacturers to enforce
14 these rules. To date, I’m aware of several instances where a
15 manufacturer with a UPP has prohibited an online vendor from
16 selling below the UPP. The hope is that all manufacturers with UPP
17 lenses will follow suit, should other resellers not play by the rules.

18 72. Similarly, ABB CEO Angel Alvarez has stated publicly that the Manufacturer
19 Defendants are very serious about policing their respective UPPs and that he knew firsthand that
20 some ECPs had been given a “warning” for violating them. He said manufacturers are “holding the
21 gun” and are willing to lose business in order to police their UPPs. Alvarez has stated that
22 “Unilateral Pricing Policy will bring a Fundamental Shift to the optical industry,” calling them a
23 “business-focused industry shift that many manufacturers have implemented.”

24 73. Similarly, Alcon Vice President Jim Murphy confirmed that Alcon warns violators
25 that they are selling below the MRPM and gives them an opportunity to cure. After a third-party
26 auditor confirms a violation, the retailer is communicated with and “asked to make a correction”
27 within five days. If the violator refuses to increase its price, Alcon punishes the violator by
28 prospectively denying access to the product for up to one year.

29 ABB, ECP, and AOA’s Role in the Conspiracy

30 74. ABB and ECPs colluded with Manufacturer Defendants in developing the MRPM
31 agreements in order to increase profit margins, combat price discounts from online retailers, big
32 box stores, and buying clubs and, eventually, eliminate competition at the retail level altogether.

1 Manufacturing Defendants agreed to collude with ECPs because a prescription from an ECP is
 2 necessary in order for Manufacturing Defendants to sell their contact lenses.

3 75. Robert Atkinson, President of Information Technology and Innovative Foundation,
 4 testified at length on the collusion between Manufacturer Defendants and ECPs at the
 5 aforementioned Senate Hearing:

6 But how do optometrists convey this desire to prescribe UPP lens to
 7 producers? . . . In the case of the eye care industry, the collusion
 8 may not be in a smoke-filled room, but it's collusion all the same.
 In this case, it's professional collusion through norms that is leading
 producers to adopt UPP policies.

9 In the optometry profession these anticompetitive social norms are
 10 expressed in a variety of means, particularly in articles in
 11 professional journals and on social media channels that send a clear
 12 message to optometrists that they should prescribe doctors'-only
 lenses. For example, in an article in Review of Cornea and Contact
 Lens Gary Gerber, OD, writes:

13 "One of the biggest benefits to practitioners of UPP is that it
 14 instantly creates a perfectly level playing field; volume discounts
 15 for large practices and online retailers go away. While this may
 16 create friction with buying groups, the benefits outweigh any
 17 ancillary issues. More importantly, however, it forces practices to
 focus on something other than price to keep prescriptions in their
 office—if all 'retailers' sell the lenses for the same price, the
 method and environment under which they are sold will be the
 factors that determine where a patient decides to purchase their
 lenses.

18 He goes [on] to in essence to say, with UPP, optometrists will
 19 prescribe the UPP lens:

20 "Manufacturers also benefit from UPP because retail price erosion
 21 can be stopped. With a 'race to the bottom' from aggressive price
 22 cutting eliminated, motivations to fit a particular lens increase; this
 23 has the ability to support and protect brand equity. . . . All things
 24 being clinically equal (which of course they rarely are), savvy
 practitioners will give serious thought to prescribing UPP lenses.
 For example, if you have a patient with astigmatism and they can
 wear a UPP lens, and a non-UPP lens is clinically equivalent, a
 smart doctor will choose the UPP option."

25 Finally, he states what is obvious to everyone in the industry:

26 "Finally, the actual price mandated by UPP has so far been higher
 27 than lenses that do not have a UPP. This has afforded higher profit
 28 margins and created a new sense of excitement surrounding contact
 lenses." Likewise, in an article in Review of Optometric Business,
 Paul Karpecki, OD, FAAO writes in favor of UPP, stating "One
 other exciting development: Independent practice optometry

1 becomes reinvigorated with contact lens prescribing as a profitable specialty and practice differentiator.”

2 We see similar statements on optometrist social media sites. On the
3 Facebook site “ODs on Facebook”, a post from a person listed as
4 Steve Silberberg (who lists himself as “ODwire.org supporting
5 member”) on the topic “J&J goes to universal pricing” writes with
6 regard to having to give “No more rebates etc. and 1-800 etc. goes
7 away if they all follow B&L Alcon and now J & J. Cooper next.” In
8 other words he is saying with UPPs competitors like 1-800 Contacts
9 that sell for less will go out of business. And he is not so subtly
10 encouraging CooperVision to also use UPP pricing. Another
11 ODwire.org supporting member listed as Stephen McDaniel writes
12 in response to J&J adopting UPP pricing, “Wow, great news. Now I
13 might actually fit more of their lenses. Hopefully Cooper gets on
14 board with this soon.” In other words, he is saying that he prescribes
15 lenses based on what level of profit he makes. And he is implying
16 that if CooperVision doesn’t also adopt UPP then he will not
17 prescribe their lenses. Another member, listed as Joe DiGiorgio,
18 OD, writes in response to a question of how to tell your patients that
19 these prices of industry regulated lens: , “I think I’ll tell my patients
20 that the onliner must have been selling counterfeit contacts. Why
21 else would they suddenly raise their prices to what I’m selling
22 them.”

23 And they express this collective desire in meetings with industry
24 representatives. For example, in the Facebook OD site, a person
25 listed as Kerry Kordet Giedd [“Giedd”], writes, “At the Ultra launch
26 last week with 300+ ODs from around the country present there was
27 a Huge applause (honestly, it was quite an overwhelming response)
28 when B&L (Bausch and Lomb) announced the UPP. Without a
doubt they were largely pleasing their OD base when they followed
Alcon’s lead on the UPP. . . . I think B&L will gain far more than
they lose in practitioner [sic] loyalty and support of this policy.”

19 (Footnotes omitted). Former General Counsel of 1-800 Contacts R. Joe Zeidner gave similar
20 testimony at the same hearing.

21 76. ECPs have consistently spoken out in support of the MRPM policies, touting their
22 benefits both to ECPs and to the Manufacturer Defendants. Some of these ECPs are actually
23 employed by the Manufacturer Defendants. For example, Barry Eiden, OD, told an audience at the
24 Global Contact Lens Forum that the new pricing policies represented “one of the monumental
25 changes in contact lenses in my career.” Dr. Eiden is employed as a consultant for Manufacturer
26 Defendants Alcon, B&L and CV. He is also an ECP and the past Chair of the Contact Lens and
27 Cornea Section of the AOA.

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1 77. Other ECPs paid by the Manufacturer Defendants have lent support to the new
2 pricing policies. For example, Kerry Kordet Giedd, mentioned in Robert Atkinson’s testimony
3 above, pledged her support in industry publications at the same time that she was being paid as a
4 consultant by Alcon and CV. Similarly, David L. Kading, OD, consults for Alcon, and has publicly
5 stated that the new pricing policies are “fantastic” because they set “an even playing field and it
6 also does not support companies who want to price cut their products in an effort to increase
7 utilization.” Dr. Kading continued, “As a doctor, it allows me to let patients know they won’t find
8 the lenses cheaper anywhere else.”

9 78. Other ECPs and their agents and trade associations--including ABB, the AOA and
10 state-level optometric associations--have enthusiastically endorsed and supported UPPs
11 implemented by Manufacturer Defendants. A poll on Healio.com/Optometry posted after the
12 Senate Hearing queried ECPs regarding the concept of the MRPM policies. An astounding 85% of
13 the 204 ECPs who responded said they supported them. ABB also conducted a poll of ECPs and
14 found similar results. According to ABB CEO Alvarez, 82% of the hundreds of doctors surveyed
15 support Manufacturer Defendants’ UPPs.

16 79. The AOA has also been highly supportive of the Defendant Manufacturers’ use of
17 MRPM policies. David Cockrell, President of the AOA, testified in support of the Manufacturer
18 Defendants’ actions at the Senate Hearing, and the AOA submitted written comments in support of
19 those actions as well. The AOA and state associations of optometrists have also been active in
20 opposing legislative efforts in certain states to condemn the Defendant Manufacturers’ use of
21 MRPMs.

22 80. J&J publicly acknowledged the role that ECPs played in its formulation of a UPP.
23 J&J President Angelini said that J&J was motivated to implement its UPP based on feedback
24 received from ECPs regarding price erosion. In her June 24, 2014 letter addressed to ECPs,
25 discussed above, Angelini explained:

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When I last communicated with you about six months ago, I shared that Johnson & Johnson Vision Care, Inc., North America (JJVC), was in the process of carefully assessing our overall strategy so that we could best meet the needs of our customers, and asked for your feedback on what we were doing well and areas where we could improve. Thanks to your open and candid responses, we were able to define our strategy and implement the changes and actions you told us were needed. . . . You, the [ECP] who prescribes our products, have our unwavering support for your clinical, business, and patient needs. . . . To further demonstrate our commitment to prescribers, beginning this week, many of you will begin to hear from your JJVC Sales Representative about our new pricing strategy within the United States. This includes a Unilateral Pricing Policy (UPP) We believe the multifaceted nature of this new pricing strategy and the variety of elements that comprise the program will allow you to refocus the critical doctor/patient conversation on eye health and product performance, rather than cost. Also, by removing the complexity of rebates and building these savings into our new pricing, we believe we will be able to reach more patients with instant savings, while providing a simpler approach for everyone.

81. In a follow-up letter sent to ECPs on or about December 17, 2014, Ms. Angelini confirmed that J&J had extended an invitation to ECPs one year previously to “share your thoughts” on how J&J “could build and enhance our partnerships to help you meet the evolving needs of your patients and practices. Since then, your open and candid feedback *was instrumental* in helping us create Our Enterprise Strategy,” which included the “new pricing strategy” of by J&J’s MRPM policy. (Emphasis added). Angelini welcomed continued feedback from ECPs, promising that they “can reach me and my leadership team at any time....”

82. Robert Ferrigno, President North America for CV, made a similar point in connection with CV’s adoption of a MRPM policy on one of its product lines, stating that his company held twelve focus groups and met with 100 ECPs before acting.

83. One ECP on Dr. Gerber’s September 13, 2014 “Power Hour” podcast noted that Manufacturer Defendants’ representatives actively counsel ECPs on how to sell contract lenses subject to UPPs. He stated, “you don’t have to push the annual supply, because it doesn’t matter – they [the parties] are going to spend the same amount of money, whether they do it in six month

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1 increments or two month increments.” As the ECP explained, “[s]o, they kind of encourage you to
2 get one box out of each eye and go from there.”

3 84. ECPs have also been instrumental in helping to police the use of UPPs. The website
4 “ODs on Facebook,” for example, gives instances of ECPs informing Alcon’s sales representatives
5 about potential violations and requesting them to take action.

6 85. ABB played a principal role on behalf of ECPs to cause the Manufacturer
7 Defendants to develop and implement the MRPMs. As early as February of 2013, and before any
8 of the Manufacturer defendants had instituted UPPs, ABB CEO Alvarez publicly stated that ABB’s
9 focus was to be “aligned with manufacturers.” A subsequent press statement by CEO Alvarez
10 confirmed ABB’s integral role in developing UPPs:

11 *ABB has been working closely with manufacturers to develop*
12 *[MRPMs], which we believe enable a better overall patient*
13 *experience by supporting competitiveness of prescribing*
14 *practitioners ... Contact lens fitters have always been and will*
15 *always be a focus of our organization. We do everything possible to*
16 *help them succeed.*

17 (Emphasis added).

18 86. ABB also issues publications, such as its quarterly *Retail Price Monitor*, that allow
19 ECPs (and the Manufacturer Defendants) to monitor the pricing of contact lenses in order to ensure
20 that prices set pursuant to MRPM agreements are being followed. According to ABB’s website:
21 “[t]he ABB OPTICAL GROUP Retail Price Monitor provides [ECPs] with the retail pricing
22 structure of brand name lenses charged by private practitioners and leading online retailers. . . . The
23 Retail Price Monitor is a benefit to ECPs looking to consolidate purchasing and maximize
24 margins.” CEO Alvarez stated in a press release issued in August of 2014 that the company’s third
25 quarter Retail Price Monitor “will show ECP’s that they can continue to have a retail strategy by
26 promoting annual supplies and staying within the limits of UPP.”

27 87. As one ECP put it, “One of the biggest benefits to practitioners of UPP is that it
28 instantly creates a perfectly level playing field; volume discounts for large practices and online
retailers go away.” This same commentator agreed that the Manufacturer Defendants “also benefit
from UPP because retail price erosion can be stopped.”

1 88. The 2014 third quarter issue of the ABB publication *Profit Advisor*, which was sent
 2 to ECPs across the country, stated that the MRPM policies were one of the first “business-focused
 3 shifts” in the industry. It went on to advise ECPs to charge more than the UPP:

4 You know that competitors around the corner or the country cannot
 5 sell their contact lens for less than UPP. ECPs are staying in line,
 6 too, because the manufacturers are watching them. Sellers who
 7 choose to ignore UPP policy run the risk of being unable to
 8 purchase lenses from the manufacturer.

9 *Remember that UPP specifies the lowest price at which a particular*
 10 *lens can be sold. Can you sell it for more? Indeed, yes, and I*
 11 *encourage you to do so. Increase your price by several dollars--and*
 12 *continue using the best strategy of explaining to your patients and*
 13 *customers that although they may be paying a few dollars more per*
 14 *box, they are receiving the various benefits that you offer. See the*
 15 *Soft Lens Retail Price Matrix for a suggested retail pricing strategy*
 16 *on the UPP products.*

17 In fact, I encourage you to adopt a policy of saying that you’ll
 18 match any legitimate price on these contact lenses. You already
 19 know what the price is; it’s the UPP price. It won’t hurt your bottom
 20 line to match the UPP for annual supplies and for the very small
 21 percentage of customers who call on you to do so. And I expect that
 22 the vast majority of your customers will respond to your value
 23 proposition and pay your retail price. Most patients aren’t looking
 24 for the absolute rock-bottom price....

25 As a result of UPP, I believe that the prescribing practitioner will be
 26 able to obtain a higher percentage of patient revenue.

27 89. ABB CEO Alvarez repeated his advice that ECPs charge their customers more than
 28 the UPP price in a September 13, 2014 broadcast of the “Power Hour” radio hosted by ECP Gary
 Gerber, saying that ECPs should try to reach a gross profit margin of 48%-49%. Dr. Gerber
 concurred, saying that ECPs “should be charging more [than the UPP] because they can.”

Manufacturer Defendants Agree to Implement MRPM Policies

90. Facing pressure from the ECPs and ABB about the competitive threats posed by big
 box retailers, online discounters, and club stores, Manufacturer Defendants agreed with ABB and
 ECP to implement UPPs, unlawful minimum resale price maintenance agreements, on their most

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1 popular contact lenses. Substantial evidence demonstrates that Manufacturer Defendants agreed
2 with one another and with ABB and ECPs to enter into MRPM agreements.

3 91. Industry Structure Conducive to Collusion. As discussed above, the four
4 Manufacturer Defendants account for 97% of the contact lens industry sales, by revenue, and all
5 four firms have implemented UPPs. There are high barriers to entry in light of the extensive capital
6 costs and specialized knowledge required to manufacture contact lenses, in addition to barriers
7 posed by patents and FDA regulatory approval. There are no close substitutes for disposable
8 contact lenses, and demand is relatively inelastic.

9 92. Opportunities to Conspire. Some Manufacturer Defendants were members of the
10 Contact Lens Manufacturers' Association ("CLMA") and were the *only* members of the Contact
11 Lens Institute ("CLI"), the activities of which are described below. As members of these trade
12 associations, Manufacturer Defendants had regular opportunities to meet, exchange information,
13 and signal intentions to one another.

14 93. Participation in the CLI provided Manufacturing Defendants with several
15 opportunities to exchange competitive information. CLI's was created to represent the interests of
16 its members. CLI has no members other than the Manufacturer Defendants. Its board of directors
17 consists of one executive from each of the Manufacturer Defendants: CLI's Chair is J&J President
18 Laura Angelini; its Vice-Chair is Andrew Sedgwick, Vice-President of Global Commercial
19 Strategy & Business Development for CV; the Treasurer is Richard Weisbarth, Vice-President of
20 Professional Affairs for Alcon; and Joseph Barr, Vice-President of Clinical and Medical Affairs for
21 B&L, is a Director. As Defendants were implementing MRPM policies, the CLI created a new
22 committee whose purpose is "to develop a collaborative approach by the member companies to
23 help inspire ECPs and their staff to proactively pursue opportunities to fit CLs [contact lenses] and
24 appropriately follow up so that their patients and practice will benefit."

25 94. Through the CLI, Manufacturing Defendants use third-party consultants as conduits
26 through which they gain information in furtherance of and to monitor the conspiracy. The CLI's
27 website explains that "[t]he members of the CLI, together with other participating companies
28 participate in a quarterly statistical program to track manufacturer shipment data of Contact Lens

and Lens Care products which is managed by Veris Consulting [‘Veris’]. The program’s objective is to provide participants with accurate and timely consolidated market data. . . . Each participating company in the CLI Statistical Program has a representative on the CLI Global Statistical Task Force.” According to Veris’ website, the program it established for the CLI “track[s] sales at a detailed level worldwide” and “is more valuable than other sources of market data because sales are reported directly from manufacturers.” Veris states that its work for the CLI “is the only program where the data is reviewed annually by Veris to ensure accuracy. Veris implemented this internal review process to reassure participants that they could be confident in the data.” Indeed, Veris requests that “the finance department at each manufacturer’s headquarters [pull sales information and revenue data] directly from their internal system at the model, or SKU level.” The resulting low margin of error “is extremely important to participants since they use this data for strategic planning” and is reported to the Manufacturer Defendants on a quarterly and annual basis. According to its website, Karen Eftekari, the Veris Senior Manager for this project, “also works with member companies [of CLI] such as Johnson & Johnson and Bausch & Lomb performing high-level data analysis and designing custom reporting tools and dashboards.” The CLI price monitoring program allows the Manufacturer Defendants to keep their fellow manufacturing in line and prevents cheating among the group.

95. ABB’s and ECPs’ Conduct. Defendants’ own statements confirm that they are working together to effectuate the Manufacturer Defendants’ MRPM policies. As noted above, ABB has stated publicly that it “work[ed] closely with manufacturers to develop unilateral pricing policies.” Manufacturer Defendants have likewise stated that they collaborated with ECPs to develop their UPPs. As discussed above, J&J informed its customers that its MRPM policy was developed in response to ECP “feedback,” that ECPs were “instrumental” in formulating the policy, and that J&J’s implementation of its UPP “further demonstrates our support for the profession and the professional.” CV admitted that it decided to use a UPP on its Clariti line of contact lenses in direct response to feedback from Independent ECPs. Plaintiff believes that, during this collaborative process, ABB and ECPs communicated to each Manufacturer Defendant its competitors’ position on MRPM policies.

1 96. Acts Contrary to Economic Self-Interest. The acts of the Manufacturer Defendants
2 in adopting MPRM policies were contrary to each one's independent economic self-interest. In a
3 candid analyst presentation made on September 11, 2014, CV admitted the "Potential
4 Downsides/Challenges" of adopting UPPs included: (a) "Enforcement can be challenging"; (b)
5 "Consumer activism may generate legislative backlash and negative public perceptions"; and (c)
6 "May alienate larger customers who want greater pricing freedom and cross marketing." Yet only
7 days later, it adopted an MPRM agreement on its newly-acquired flagship Clariti line of contact
8 lenses. The other Manufacturer Defendants faced similar adverse impacts, as reflected in the events
9 of 2014 and early 2015, which included complaints to the FTC, the Senate Hearing, a publicly-
10 revealed investigation by the New York AG into Alcon's adoption of MRPM policies, negative
11 consumer backlash and proposed legislation in various state legislatures. Despite these reasons not
12 to implement MRPM policies, all four Manufacturer Defendants proceeded to do so.

13 97. Additional evidence that implementing UPPs is against Defendants' self-interest is
14 slower sales growth while MRPM policies were being adopted. One industry analyst noted that
15 United States contact lens sales growth only increased by 2% through the third quarter of 2014; the
16 analyst attributed the sluggish growth to the implementation of MRPM policies. ABB CEO
17 Alvarez has publicly stated that Manufacturer Defendants are willing to lose business in order to
18 enforce their UPPs.

19 98. Manufacturer Defendants have tried to justify their conduct by claiming that
20 consumers could be injured by purchasing contact lenses from retailers who provide low-quality
21 service. That purported justification is pretextual, a scare tactic used to coerce consumers into
22 purchasing higher-priced lenses from Defendants rather than lower-cost alternatives.. For
23 example, according to a February 18, 2015 article in the *Salt Lake Tribune*, the Chairman of the
24 Utah Senate Business & Labor Committee questioned a contact lens industry lobbyist about this
25 justification during a legislative hearing held on February 17. The lobbyist "could not provide an
26 example of that ever occurring." Indeed, Carol Alexander, a Director of Professional Affairs at J&J,
27 testified during this hearing that she could not identify a single instance where a patient was harmed
28 or placed at risk because he or she was able to buy contact lenses from a source other than

1 optometrists. Ms. Alexander even admitted that the adoption of MRPM policy by J&J was not
2 motivated by concerns about patient risk or harm.

3 99. It was thus contrary to the economic self-interest of any one of the Manufacturer
4 Defendants to attempt to implement an MRPM policy without assurance that its competitors would
5 follow suit. The discounters referred to above collectively possessed sufficient buying power in the
6 disposable contact lens market that no Manufacturer Defendant would be willing to forego those
7 sales or alienate those customers by acting alone. If only some of the Manufacturer Defendants had
8 adopted MRPM policies, discounters such as Costco or Wal-Mart could have shifted market share
9 to those manufacturers that did not dictate a minimum retail price. In fact, after all of the
10 Manufacturer Defendants except for CV had implemented MRPM policies, Costco sent a letter to
11 its customers informing them of the other Manufacturer Defendants' MRPM policies and urging
12 them to switch to CV, only to see CV soon thereafter implement an MPRM policy on its Clariti
13 contact lenses.

14 100. Motive to Conspire, Including Assurances That Competitors Will Also Act. Each of
15 the Manufacturer Defendants had a motive to maintain high retail prices for its contact lenses.
16 They were concerned that low retail prices would put pressure on them to lower wholesale prices.
17 In addition, in order to encourage ECPs to prescribe their contact lenses, the Manufacturer
18 Defendants needed to keep the retail prices high. ABB, as the largest distributor of contact lenses
19 in the United States, was in a position to act as the "hub" in a "hub-and-spoke" conspiracy.
20 Meaning, ABB was in a position to communicate to each Manufacturer Defendant before it
21 implemented its UPP that its competitors also intended to do so.

22 101. Abrupt, Near-Contemporaneous and Fundamental Shift in Pricing Policies. Before
23 June of 2013, none of the Manufacturer Defendants restricted the minimum retail price of its
24 contact lenses. After Alcon imposed the first MRPM policy in June of 2013, all of its competitors
25 followed suit within 15 months. As ABB CEO Alvarez explained, the MRPM policies represent a
26 "Fundamental Shift" in the contact lens market. Contact lenses are the *only* prescription medical
27 device sold in the United States pursuant to an MRPM policy.
28

102. Past Conspiratorial Conduct. Defendants have also demonstrated a propensity to conspire against discounting retailers of contact lenses, as demonstrated by the conduct that was the subject of the *Disposable Contact Lens* litigation described above.

Defendants' Agreement to Enforce UPPs as MRPM Agreements Harms Competition

103. Defendants' agreement to implement MRPM policies has harmed and continues to harm competition by increasing prices for disposable contact lenses subject to UPPs. Prior to June 2013, retailers could compete with one another and with ECPs on price and pass their lower costs on to consumers. The implementation of UPPs threatens to undo recent developments in new retail formats, precluding online, big box and buying club competitors from offering lower prices and greater convenience to consumers. It has been estimated that the elimination of this competition could result in price increases of anywhere from 40% to 112% on J&J brand contact lenses alone. According to testimony at the Senate Hearing, UPPs have been implemented to approximately 40% of the market; that number is predicted to grow to 80% by the end of 2015. Consumers stand to pay hundreds of millions of dollars more each year on their contact lenses.

104. Jay Magure, Vice President of Governmental Affairs for 1-800 Contacts, gave similar testimony during the February 17, 2015, hearing before the Utah Senate Business & Labor Committee. He explained that, because of J&J's adoption of UPPs, 1-800 Contacts was compelled to eliminate rebates of between \$15 and \$100 on numerous J&J ACUVUE® products. The result was that it effectively was forced to raise prices on the vast majority of the contact lenses it sells that are subject to UPPs. Mr. Magure further testified that a survey of 780 doctors conducted by 1-800 Contacts both before and after J&J's implementation of UPPs confirmed that prices for J&J contact lenses subject to UPPs increased by 57%, when compared to pre-UPP levels. In a January 24, 2015 article, Oregonlive.com corroborated this point, noting that 1-800 Contacts sold a 90-lens box of J&J ACUVUE® MOIST® contact lenses one year ago at a price as low as \$57.49, but that same product is now being sold for \$63.74.

105. Defendants' implementation of UPPs seeks to eliminate intrabrand competition. Intrabrand competition allows retailers, such as Wal-Mart or Costco, or online discount retailers to provide lower prices and increased choices to consumers. This was the last viable channel of retail

1 competition in the contact lens industry, given the lack of interbrand competition among the
2 Manufacturer Defendants. Since Defendants' implementation of UPPs, online discount retailers
3 have been forced to publicly explain why their prices have increased. 1-800 Contacts' website
4 explains:

5 We have always stood behind our commitment to beat any price by
6 2%. While we continue this practice on a large portion of our
7 inventory, manufacturer mandated pricing policies have forced us to
8 discontinue this pricing benefit. We aren't allowed to lower the
9 price or offer any kind of discounts or rebates on products affected
by UPP. . . . The [UPP] created by manufacturers sets the minimum
price that contacts can be sold for, which restricts our ability to
offer a lower price than doctors on those lenses.

10 The LensDiscounters.com website similarly informs customers:

11 UPP (Unilateral Pricing Policy) is a strategy used by certain contact
12 lens manufacturers, requiring retailers such as ourselves to price
13 their products at a manufacturer's specified minimum price.
14 Retailers who do not comply will no longer be supplied by the
15 manufacturer. . . . Under the guise of price equality, manufacturers
16 want to give eye care practitioners incentive to prescribe their
17 products vs. their competitor's products on the basis that the patient
18 will be more likely to buy directly from the doctor if the prices for
19 that contact lens are the same online or elsewhere. Initially, this
20 might seem like a fair practice, but it prevents free market pricing --
21 and in the end, results in higher pricing to you, the end consumer. . .
22 . At LensDiscounters.com, we strive to provide a fair and
23 transparent shopping experience to all of our customers and do not
24 believe price controls are in the best interest of our customers. We
25 will do what we can to fight these pricing policies and keep eyecare
26 affordable for our customers. We will continue to keep you
27 informed and will have more information about UPP soon.

28 Meijer's website states the following:

The manufacturers state that they have instituted the UPP for their
customers however, the adoption of the UPP essentially prevents
marketplace competition. This eliminates your ability to shop
around for the best price on these contact lens brands, as well as our
ability to offer relief. . . . The manufacturers have created a "floor"
or a "minimum" price that the lenses may not be priced below. Our
prices had been lower than that "minimum" prior to this change in
policy. The UPP has caused us to raise our prices on these contact
lens brands in order to remain in compliance with this policy.

1 106. Likewise, 1-800-GET-LENS told its customers that “Bausch & Lomb has
2 implemented a Unilateral Pricing Policy (UPP) on all retailers, both online and bricks and mortar.
3 The UPP prevents anyone from selling Bausch & Lomb products below a certain price.” A
4 representative for Costco testified before the Washington Senate Health Care Committee on
5 February 16, 2015 that the Manufacturer Defendants’ implementation of MPRM policies has
6 caused it to raise prices on affected contact lenses by as much as 35%.

7 107. In mid-2014, Costco conducted an analysis of its prices for Alcon’s DAILIES
8 TOTAL1® contact lenses before and after Alcon implemented MRPM. It concluded that the price
9 for a 90-lens pack increased from \$85.00 to \$95.00. It also examined J&J prices, and concluded
10 that J&J’s MPRM policy required Costco to raise its prices an average of 26%. Costco makes
11 similar allegations in the *Costco* Action.

12 108. At a January 29, 2015 hearing before the Mississippi Senate Public Health &
13 Welfare Committee, 1-800 Contacts presented econometric evidence that the use of MRPM
14 policies going forward could cost contact lens consumers as much as \$2 billion annually.
15 Defendants’ conspiracy has thus caused Plaintiffs and members of the Class to pay
16 supracompetitive prices for contact lenses and has substantially eliminated price competition in the
17 market.

18 109. There is no justification for Defendants’ MRPM policies. All Manufacturer
19 Defendants, which collectively account for 97% of contact lens sales by revenues, have adopted
20 UPPs, and it appears that nearly 40% of the market is now covered by UPPs, a number expected to
21 double by the end of this year. As explained in detail above, ECPs and ABB, the key retailers in
22 the disposable contact lens market, have worked hand-in-hand with Manufacturer Defendants in
23 implementing, enforcing and monitoring their MRPM policies, all in an effort to maintain higher
24 prices and, in turn, higher profit margins. Under current market conditions, consumers have no
25 power to restrain Defendants from imposing higher prices. In contrast, there are no pro-
26 competitive benefits to justify Defendants’ MRPM policies. These policies do not prevent free-
27 riding because the ECP is compensated for his or her services (the eye examination), even if the
28 patient fills the prescription elsewhere. Concerns about harm to patients from buying contact

lenses from sources other than ECPs have proven to be pretextual and do not justify the anticompetitive conduct claimed here. Furthermore, the Manufacturer Defendants' MRPM policies do not encourage ECPs to focus more on patient needs instead of contact lens costs.

ANTITRUST IMPACT AND DAMAGES

110. Defendants' unlawful conspiracy has had at least the following effects:

- a. Prices charged by Defendants and their co-conspirators to Plaintiffs and the members of the Class for disposable contact lenses were artificially fixed, raised, stabilized and maintained at artificially inflated and supra-competitive levels in the United States;
- b. Plaintiffs and the other members of the Class paid more for disposable contact lenses than they would have paid in a competitive marketplace, unfettered by Defendants' and their co-conspirators' collusive and unlawful activities;
- c. Competition in the sale of disposable contact lenses was restrained, suppressed and eliminated in the United States; and
- d. As a direct and proximate result of Defendants' illegal combination, contract or conspiracy, Plaintiffs and the members of the Class have been injured in their respective businesses and property, in amounts according to proof at trial.

CLAIMS FOR RELIEF

COUNT 1

Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1

111. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

112. Beginning no later than June of 2013 and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators entered into a continuing agreement, combination and conspiracy in restraint of trade to artificially raise, fix, maintain, and/or stabilize prices for disposable contact lenses in the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

1 113. The contract, combination or conspiracy has resulted in an agreement, understanding
2 or concerted action between and among the Defendants and their co-conspirators in furtherance of
3 which the Defendants and their co-conspirators fixed, raised, maintained, and/or stabilized prices
4 for contact lenses in the United States. Such contract, combination, or conspiracy constitutes a *per*
5 *se* violation of the federal antitrust laws and is, in any event, an unreasonable and unlawful restraint
6 of trade.

7 114. The Defendants' contract, combination, agreement, understanding or concerted
8 action occurred in or affected interstate commerce. The Defendants' unlawful conduct was through
9 mutual understandings, combinations or agreements by, between and among the Defendants and
10 other unnamed co-conspirators. These other co-conspirators have either acted willingly or, due to
11 coercion, unwillingly in furtherance of the unlawful restraint of trade alleged herein.

12 115. In pursuit of the foregoing conspiracy, the Manufacturer Defendants implemented
13 MRPM policies in concert with each other and with Independent ECPs, acting, in part, through
14 Defendant ABB. Non-ECP vendors of contact lenses are coerced into abiding by the UPPs or suffer
15 the loss of the ability to sell the products covered by them. The Manufacturer Defendants agreed, at
16 least tacitly, among themselves to start using MRPM policies, recognizing that the policies could be
17 enforced only if all of them implemented UPPs..

18 116. Where, as here, Defendants have engaged in a *per se* violation of Section 1 of the
19 Sherman Act, no allegations with respect to the relevant product market, geographic market, or
20 market power are required. To the extent such allegations may otherwise be necessary, the relevant
21 market for purposes of this action is disposable contact lenses. The relevant geographic market is
22 the United States. The Manufacturer Defendants possess market power in the market for
23 disposable contact lenses. Collectively, they control roughly 97% of that market.

24 117. As a result of Defendants' unlawful conduct, prices for disposable contact lenses
25 subject to UPPs were raised, fixed, maintained and stabilized in the United States.

26 118. As a proximate result of the Defendants' unlawful conduct, Plaintiffs and Class
27 members have suffered injury in that they have paid supra-competitive prices for disposable contact
28 lenses. Plaintiffs and Class members will continue to be injured in their business and property by

1 paying more for disposable contact lenses manufactured or sold by Defendants and their co-
 2 conspirators than they would pay in the absence of the contract, combination or conspiracy.

3 119. With respect to their claim under the Sherman Act, Plaintiffs seek injunctive relief,
 4 treble damages and attorneys' fees and costs.

5 COUNT 2

6 Violation California Cartwright Act (Cal. Bus. & Prof. Code section 16700, *et seq.*)

7 120. Plaintiff incorporates and realleges, as though fully set forth herein, each and every
 8 allegation set forth in the preceding paragraphs of this Complaint.

9 121. This Count 2 is alleged on behalf a of a California sub-class consisting of:

10 All persons residing in California who purchased disposable contact lenses
 11 manufactured by Defendants for their own use and not for resale from June 1, 2013,
 12 to the present. Excluded from the Class are Defendants, their parent companies,
 13 subsidiaries and affiliates, any co-conspirators, all governmental entities, and any
 14 judges or justices assigned to hear any aspect of this litigation. ("The California Sub-
 15 class").

16 122. Defendants' conduct has occurred in substantial part in the State of California and is
 17 also violative of the Cartwright Act (Cal. Bus. & Prof. Code §§ 16720 *et seq.*), which prohibits
 18 combinations of two or more persons' capital, skill, or acts to restrict trade or commerce. Unlike
 19 the vertical RPM schemes under federal antitrust law, such schemes are viewed as *per se* violations
 20 of the Cartwright Act. *Mailand v. Burckle*, 20 Cal. 3d 367 (1978).

21 123. Plaintiff and the other members of the Class paid supra-competitive, artificially
 22 inflated prices for contact lenses.

23 124. As a direct and proximate result of Defendants' unlawful conduct, Plaintiff and the
 24 members of the Class have been injured in their business and property in that they paid more for
 25 contact lenses than they otherwise would have paid in the absence of that conduct.

26 125. The MRPM policies instituted by the Manufacturer Defendants and the conduct of
 27 all Defendants in implementing them violate the Cartwright Act and should be enjoined
 28 accordingly.

126. As a result of Defendants' violation of the Cartwright Act, the Plaintiff and members of the Class seek treble damages and the costs of suit, including reasonable attorneys' fees. *See* Cal. Bus. & Prof. Code § 16750(a).

COUNT 3

Violation California Unfair Competition Law (Cal. Bus. & Prof. Code section 17200, *et seq.*)

127. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

128. This Count 3 is alleged on behalf of the California sub-class.

129. Defendants' conduct has occurred in substantial part in the State of California The California. California's Unfair Competition Law ("UCL") (Cal. Bus. and Prof. Code §§ 17200 *et seq.*) prohibits acts of unfair competition, which mean and include any "unfair . . . business practices."

130. Defendants' conduct constitutes "unfair" business acts and practices because Defendants' practices have caused and are "likely to cause substantial injury" to Plaintiff and Class Members which injury is not "reasonably avoidable" by Plaintiff and the Class and is "not outweighed" by the practices' benefits to Plaintiff and the Class.

131. As more fully described above, the purpose and effect of Defendants' agreements to implement UPPs on contact lens lines was and is to eliminate the competition engendered by the FCLCA. Defendants' anticompetitive agreements constitute unfair business acts or practices within the meaning of the UCL in that the justification for Defendants' conduct is outweighed by the gravity of the consequences to the general public and because the claim is tethered to a clearly articulated public policy.

132. Plaintiffs and members of the Class have been and are unable to avoid injury, because ECPs, co-conspirators and beneficiaries of the MRPM agreements, are the ones who prescribe the contact lenses that Plaintiffs and members of the Class are required to use, without substitution.

133. Defendants' MRPM policies are contrary to public policy, immoral, unethical, oppressive, unscrupulous and/or substantially injurious to consumers.

10 **PRAYER FOR RELIEF**

13 A. This action may proceed as a class action, with Plaintiff as the designated Class
14 representative (and where appropriate, subclass representatives) and their counsel as Class Counsel;

C. Plaintiff and the Class recover damages sustained by them as provided by the federal antitrust laws and the California Cartwright Act as well as equitable relief including restitution under the UCL, and that a judgment in favor of Plaintiff and the Class be entered against the Defendants in an amount to be trebled to the extent such trebling is permitted by such laws;

27 |||

28 |||

1 E. Plaintiff and the Class be awarded pre-judgment and post-judgment interest, and that
2 such interest be awarded at the highest legal rate from and after the date of service of the initial
3 complaint in this action;

4 F. Plaintiff and the Class recover their costs of this suit, including reasonable attorneys'
5 fees as provided by law; and

6 G. Plaintiff and the Class receive such other or further relief as may be just and proper.

7 **JURY TRIAL DEMAND**

8 Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff demands a trial by jury of all of
9 the claims asserted in this Complaint so triable.

10
11 Dated: March 6, 2015

THE MOGIN LAW FIRM, P.C.

12 By: /s/ Daniel J. Mogin

13 Daniel J. Mogin

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