

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 02-16292-B

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EDWARD MICHAEL O'BRIEN,

Appellant,

v.

THE AMERICAN OPTOMETRIC ASSOCIATION,

JOHNSON & JOHNSON VISION PRODUCTS, INC. d/b/a VISTAKON,

BAUSCH & LOMB, INC., CIBA VISION CORP.,

and EYEXAM 2000 d/b/a LENSRAFTERS, INC.,

Appellees.

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BRIEF OF THE APPELLANT

Attorney of Record:

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Appeal from The  
United States District Court  
Middle District of Florida

Civil Action No. 01-7269 GHK (VBKx)  
*In re Disposable Contact Lens Litigation*  
MDL 1030: Case No. 3:02-cv-592-J-20HTS

The Honorable  
Harvey E. Schlesinger  
Presiding

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### CASES

*Ad West Mktg., Inc. v. Hayes*, 745 F.2d 980, 983-84 (5th Cir. 1984)

*Brock v. Unique Racquetball & Health Clubs*, 786 F.2d 61 (2nd Cir. 1986)

*Buggeln & Smith, Inc. v Standard Brands, Inc.* (1939, DC NY), 27 F Supp 399

*Cartier v. Jackson*, 59 F.3d 1046, 1048 (10th Cir. 1995)

*Deters v. Equifax Credit*, 202 F.3d 1262, 1268 (10th Cir. 2000)

*In re Disposable Contact Lens Antitrust Litigation*, CTO dated Dec. 5, 1994

*Monk v. United Life & Acci. Ins. Co.* (1942, DC Pa), 2 FRD 372

*Percival v. Luce* (1940, CA9 Nev), 114 F2d 774

*Re Multidistrict Civil Actions Involving Air Crash Disaster near Dayton* (1975, *Jud Pan Mult Lit*), 386 F Supp 908

*Sun-Maid Raisin Growers Assoc. v. Neustadter Bros.* (1940, CA9 Cal), 115 F2d 126

*United States v. Charley*, 189 F.3d 1251, 1254 1270 (10th Cir. 1999)

*United States v. Intern. Business Machines Corp.*, 539 F. Supp. 473 (1982)

*United States v. I.B.M.*, 539 F. Supp. 473, 476 (S.D.N.Y. 1982)

*United States use of Federal Housing Administration v. Jackson* (1938, DC Or) 25 F Supp 79

*United States v. Olano*, 507 U.S. 725 (1993)

*Wright Ex Rel. Trust Co. of Kansas v. Abbot Labs.*, 259 F.3d 1226 (10th Cir. 2001)

*Waltzer v. Transidyne General Corp.* (1983, CA6 Mich) 697 F2d 130

## CODES

Federal Rules of Evidence, sec. 103(a)

Federal Rules of Civil Procedure, Rules 4, 7, 37 and 55

Federal Rules of Criminal Procedure, Rule 52(d)

Title 15, United States Codes, sec. 1, 2 and 14

28 USCS, sec. 1074

28 USCS, sec. 1407, n 64

12 Fed Rules Evid Serv 2204

## OTHER AUTHORITIES

10 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure, sec. 2682 at 411 (2d ed. 1983)

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## STATEMENT OF INTEREST

APPEAL by Edward Michael O'Brien taken from final Orders dismissing all claims in case issued on October 11, 2002 and October 28, 2002 at the United States District Court in the Middle District of Florida. A timely notice of appeal was filed on November 12, 2002 pursuant to Fed. R. App. P. 4(a)(4)(A)(iv). Case docketed/numbered by the United States Court of Appeals for the Eleventh Circuit on April 11, 2003. [Excerpts of Record ("ER") inter A.]

## STATEMENT OF JURISDICTION

1. Complaint was brought to the United States District Court in the Central District of California under authority of Title 15, Section 15 of the United States Codes.
2. Court had jurisdiction pursuant to 28 U.S.C., sections 1331, 1337, and 1391 (c). At time of cause of action, each corporation named as a defendant transacted business, did business, was found, or resided in the Central District of California.
3. Transfer of case to the United States District Court in the Middle District of Florida (MDL 1030), pursuant to 28 U.S.C., sec. 1407 and Order by the Judicial Panel On Multidistrict Litigation did not obviate jurisdictional claims.
4. Appellate Court jurisdiction predicated on 28 U.S.C., sec. 1291; courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

## STATEMENT OF ISSUES

1. Whether or not the Hon. Harvey E. Schlesinger, presiding judge at MDL 1030 in the United States District Court in the Middle District of Florida ["MDF"] plainly erred and/or abused judicial discretion by issuing an Order on October 28, 2002 dismissing all claims brought by Appellant Edward Michael O'Brien against defendants Bausch & Lomb, Inc. and Lenscrafters, Inc. in light of appellant's *Proof of Service* filed in the United States District Court in the Central District of California ["CDC"] on October 2, 2001 and contained in motions filed at MDL 1030 on August 16, 2002, August 21, 2002, October 21, 2002 and November 12, 2002. [ER inter B. (# 2, 3, 4, 5)]
2. Whether or not transferee court's Order on August 12, 2002, (a) incorrectly stating date of transfer via Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C., sec. 1407, (b) compelling appellant to file a second Reply to defendants (American Optometric Association ["AOA"] and Ciba Vision Corporation ["CIBA"]) Motions To Dismiss timely filed/served at CDC in December, 2001 (c) effectively providing AOA

and CIBA opportunity to file second Motion To Dismiss in reply to appellant's second Reply and (d) issued without citation to authority or other rationale, was abuse of discretion sufficiently prejudicial to appellant's case to merit reversal of Court's subsequent decisions for dismissal. [ER inter A.]

3. Whether or not denial of Appellant's motion for entry of default/default judgment against Johnson & Johnson, Inc. ["J&J"] via improper strike of motion was district court's error in judgment and/or abuse of discretion sufficiently prejudicial to appellant's case to merit remand of case for entry of default/default judgment against J&J.

4. Whether or not facts (a) case adjudicated at the United States District Court in the Central District of California ["CDC"], (b) Appellant's opposition to transfer of case was reviewed and decided upon by the Judicial Panel on Multidistrict Litigation ["JPMDL"], (c) case was transferred to the United States District Court in the Middle District of California ["MDF"], (d) case was adjudicated in transferee court prior to Judge Schlesinger's Order on October 11, 2002 and (e) Appellant specified unique cause-of-action not estopped by settlement agreement, compels the United States Court of Appeals for the Eleventh Circuit ["USCA11"] to conclude district court's ruling all appellant's claims estopped by MDL 1030 Settlement Agreement (2001) was an error in judgment and/or abuse of discretion based on an erroneous legal conclusion.

#### STATEMENT OF REVIEW CRITERIA

1. Appellant O'Brien asks the United States Court of Appeals for the Eleventh Circuit to review this case for (a) abuse of discretion, (b) plain error, (c) erroneous legal conclusion, and (d) error in judgment.

2. "The Court reviews a district court's evidentiary rulings for an abuse of discretion." [*Wright Ex Rel. Trust Co. of Kansas v. Abbot Labs.*, 259 F.3d 1226 (10th Cir. 2001)(citing *Deters v. Equifax Credit*, 202 F.3d 1262, 1268 (10th Cir. 2000)]. "An abuse of discretion occurs where the district court clearly erred or ventured beyond the limits of permissible choice under the circumstances." [*Ibid.*]

3. "Issue concerning excluded evidence can be considered on appeal even though no offer of proof was made where trial court is aware of, and transcript discloses general nature of, evidence which is excluded. *Walatzer v Transidyne General Corp.* (1983, CA6 Mich) 697 F2d 130, 12 Fed Rules Evid Serv 2204, 36 FR Serv 2d 359." [Federal Rules of Evidence, Rule 103, n 25]

4. "Party is required to have made offer of proof, not simply to have shown in some fashion substance of proposed testimony, before appellate court will determine whether evidence was properly excluded at trial. *James v Bell Helicopter Co.* (1983, CA5 Tex) 715 F2d 166, CCH Prod Liab Rep sec. 9786, 14 Fed Rules Evid Serv 363." [*Ibid.*, n 25]

5. "In *United States v. Olano*, 507 U.S. 725 (1993), the Supreme Court interpreted the plain error provision of Fed. R. Crim, P. 52(b), which is substantively identical to the

plain error provision of Federal Rule of Evidence 103(d); both Rules permit an Appellate Court to take notice of 'plain errors ' affecting substantial rights although they were not brought to the attention of the court. Indeed, Rule 103(d) was patterned after Fed. R. Crim. P. 52(d). Consequently, the Court's interpretation of 'plain error' in *Olano* is instructive on the application of the plain error standard of Rule 103. *See, e.g. United States v. Thompson*, 82 F.3d 849 (9th Cir. 1996) (applying *Olano* in the analysis of evidentiary error under Rule 103).

6. The *Olano* Court identified three limitations on a Court's power to reverse in response to errors...First, there must be an error. Second, the error must be plain, which means it must be clear or obvious. Thus, even more deference is given to the Trial Court than under the deferential abuse of discretion standard of review. Finally, the plain error must affect substantial rights, which means in most cases that it must have been prejudicial in the sense of affecting the outcome of the case." [Rule 103: History; Ancillary Laws and Directives: Lexis Law Pubs. 1998]

7. "We will not disturb the court's determination without a clear showing that it was based on a clearly erroneous factual finding or an erroneous legal conclusion or that it manifests a clear error of judgment." *Cartier v. Jackson*, 59 F.3d 1046, 1048 (10th Cir. 1995).

8. An error is harmless "...unless a substantial right of [a] party is affected." Fed. R. Evid. 103(a). "[A]n error affecting a substantial right of a party is an error which had a substantial influence on the outcome or [which] leaves one in grave doubt as to whether it had such effect." *United States v. Charley*, 189 F.3d 1251, 1270 (10th Cir. 1999).

9. "There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer." [FRCP, Rule 7(a)]

10. "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." [FRCP, Rule 55(a)]

11. "Although under this rule default should be entered by clerk without application to court, rule is not limitation and court, having power, will grant motion and enter default. *United States use of Federal Housing Administration v Jackson* (1938, DC Or) 25 F Supp 79" [FRCP, Rule 55, n 20]

12. "Decisions to enter judgment by default are committed to the district court's sound discretion, and our review is for abuse of discretion." *Dennis Garberg & Assocs. v. Pack-Tech Int'l Corp.*, 115 F.3d 767, 771 (10th Cir. 1997).

13. " (b) *The term 'Settlement Class' means all purchasers of Vistakon, Bausch & Lomb and CIBA Vision replacement contact lenses...*

(g) *The term 'purchasers of Vistakon, Bausch & Lomb and CIBA Vision replacement contact lenses from eye care practitioners' means any natural person who bought, or on whose behalf someone bought, Johnson & Johnson, CIBA Vision, and/or Bausch & Lomb replacement contact lenses (as defined herein) from an eye care practitioner (as defined herein).*

(h) *The term 'replacement contact lenses' means contact lenses that are sold or dispensed to replace the initial contact lenses."*

[United States District Court in the Middle District of Florida, MDL 1030: Settlement Agreement (2001): citation left to the discretion of the Court:]

## STATEMENT OF CASE HISTORY

### 1. Case History:

a. On July 23, 2001, Plaintiff, Edward Michael O'Brien, mailed each named defendant an identical letter that included the first two pages of a complaint (draft) declaring cause of action. Plaintiff then wrote, "If you are interested in discussing terms of settlement, we will be delighted if both of us can avoid litigation expense."

None of defendants responded to letter offering discussion/settlement prior to Plaintiff's file of formal complaint.

b. Plaintiff O'Brien filed Complaint against named defendants in the United States District Court for the Central District of California on August 10, 2001.

c. On August 23, 2001 the Clerk of the Court followed assigned Magistrate Judge's approval of the Complaint (that it was neither frivolous nor malicious on its face) and mailed formal Summons to Plaintiff for subsequent service to Defendants.

d. On September 1, 2001, Plaintiff O'Brien, having been formally approved by magistrate judge for civil action *pro se* and *in forma pauperis*, mailed Request For Service of Process, pursuant to FRCP 1915 (c) because expense of service would produce financial hardship for Plaintiff.

e. On September 25, 2001, Clerk of Court mailed Court's order denying Plaintiff's Request For Service of Process.

f. On October 2, 2001, Plaintiff, via Priority Mail stamped envelope, mailed (1) a copy of Complaint, (2) a copy of Summons, (3) a Request For Waiver of Service, and (4) a Proof of Service to each named Defendant in this case. [Cite]

g. On October 23, 2001, Plaintiff received a letter from counsel for American Optometric Association ["AOA"] stating certain objections to PL's service of process and

requesting changes and/or modifications as a condition for returning Waiver of Service of Process.

h. On October 26, 2001, Plaintiff O'Brien mailed AOA documents satisfying specified objections noted above, and, effectively, extending time for return of Waiver of Service of Process by AOA to November 26, 2001.

i. On October 27, 2001, Plaintiff received a signed Waiver of Service of Process from counsel for Ciba Vision Corporation ["CIBA"]. No other correspondence included in tender of waiver.

j. Defendants, Johnson & Johnson Inc. ["JJ"], Bausch & Lomb, Inc. ["BL"] and Eyexam 2000 d/b/a Lencrafters, Inc. ["LC"] did not return Waiver of Service or file/serve Answer to the Complaint within time limits specified in Federal Rules of Civil Procedure ["FRCP"], Rule 4 and 7.

k. On November 30, 2001, CIBA filed/served Motion To Dismiss the Complaint noticed for hearing on January 7, 2002.

l. On December 26, 2001 AOA filed/served Motion To Dismiss the Complaint noticed for hearing on February 4, 2002.

m. On January 2, 2002 Plaintiff filed motions to oppose Defendants motions to dismiss and requested Summary Judgment against CIBA and AOA.

n. On January 8, 2002, via United States District Court, Central District of California ["CDC"] *Minute Order*, CDC denied Plaintiff's request for Summary Judgment but sustained Plaintiff's opposition to CIBA and AOA's motions to dismiss stating case to continue, "Unless Plaintiff secures counsel, he shall be limited to asserting claims [beyond motions to dismiss] solely on his own behalf".

o. Following denial of their motions to dismiss, CIBA and/or AOA obtained a Conditional Transfer Order ["CTO"] from the Judicial Panel on Multidistrict Litigation ["JPMDL"] dated January 18, 2002. Order conditionally transferred case to the United States District Court, Middle District of Florida ["MDF"] for inclusion in MDL Case No. 1030. Case was conditionally transferred as a "tag-along" action pursuant to 28 U.S.C., sec. 1407 and original MDL 1030 order, "On December 5, 1994, the Panel transferred two civil actions to the United States District Court for the Middle District of Florida for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C., sec. 1407. With the consent of that court, all such actions have been assigned to the Honorable Harvey E. Schlesinger." [*In re Disposable Contact Lens Antitrust Litigation*, CTO dated Dec. 5, 1994]

p. On January 28, 2002 CDC issued *Minute Order* declaring stay of all proceedings "...pending resolution of the conditional order."

q. On February 12, 2002 Plaintiff O'Brien filed NOTICE OF MOTION and MOTION TO VACATE CONDITIONAL TRANSFER ORDER which caused JPMDL to issue Stay of Transfer pending resolution of Plaintiff's opposition.

r. Cost of duplication and mailing caused Plaintiff to be unable to serve copies of its MOTION TO VACATE to all names on the extensive JPMDL service list. Consequently, JPMDL struck Plaintiff's Opposition to Transfer for inadequate service on February 25, 2002.

s. On February 28, 2002, JPMDL issued an order lifting its stay and thereby, and without additional action, finalized transfer of the case to MDF (MDL 1030).

t. Dated August 7, 2002, MDF sent Plaintiff a *Notice To Counsel* stating, "This is to advise you that on June 27, 2002, the above-referenced case 01-cv-7269-GHK (VBKx) was transferred to the Jacksonville Division of the Middle District of Florida from the U.S.D.C. Central California. This case has been assigned to the Honorable Harvey E. Schlesinger, and has been assigned the above styled case number. The case has been assigned to Magistrate Judge Howard T. Snyder for all magistrate matters."

u. Court's August 7, 2002 mailing of *Notice To Counsel*, referred to in Plaintiff O'Brien's last motion filed in this Court, was followed by Court Clerk's NOTICE OF DESIGNATION UNDER LOCAL RULE 3.05 AND DEADLINE FOR FILING OF CASE MANAGEMENT REPORT issued and mailed to Plaintiff on August 9, 2002 for action including service to all concerned parties.

v. On August 12, 2002 MDF(MDL 1030) issued an Order calling for answers to complaint by all defendants and a reply to same by plaintiff.

w. On August 16, 2002 Plaintiff O'Brien filed and served PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTIONS FOR (1) ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST DEFENDANTS.

x. On August 21, 2002 Plaintiff O'Brien filed and served PLAINTIFF'S REPLY TO AN ORDER (AUG. 12, 2002) ISSUED BY THE UNITED STATES DISTRICT COURT.

y. By October 11, 2002 Defendants AOA, J&J and Ciba had filed and served second answers to compliant and Defendants B&L, LC and COA had not appeared or otherwise defended.

z. On October 11, 2002 the Court granted defendants AOA, J&J and Ciba motions to dismiss the complaint and directed Plaintiff O'Brien file proof of service to B&L, LC and COA.

aa. On October 21, 2002 Plaintiff O'Brien filed and served REPLY TO ORDER OF OCTOBER 11, 2002.

bb. On October 28, 2002 the Court issued an Order dismissing all claims against defaulted defendants.

cc. On November 14, 2002, PA filed MOTION FOR RELIEF FROM DISTRICT COURT'S ORDER OF DISMISSAL, PURSUANT TO FRCP 60(b) and 61 OR, IN THE ALTERNATIVE, NOTICE OF APPEAL, PURSUANT TO FRAP 3 AND 4 .

dd. On December 9, 2002 Judge Schlesinger ordered plaintiff's motion for relief denied (unrationalized). Court's Order affirming dismissal of all claims against answered defendants did not specify denial of Plaintiff O'Brien's request for Entry of Default and Default Judgment against unanswered defendants. As specified in MOTION FOR RELIEF, plaintiff's Notice of Appeal was conditioned on district court's denial of Rule 60/61 motion for relief from dismissals *and* entry of default. Court's unspecified denial of plaintiff's motion triggered file of plaintiff's NOTICE OF APPEAL.

ee. On or about December 9, 2002 Court Clerk for the Middle District of Florida mailed PA affidavit forms requiring PA to (1) respecify (in more detail) his claim for *in forma pauperis* status (via notarized documents) and (2) get certification from plaintiff's bank, the Bank of Hawaii, regarding personal bank account(s) that might indicate qualification for IFP status.

ff. At significant relative expense, plaintiff complied with district court's requirements and returned IFP related documents to the district court on December 15, 2002.

gg. On March 20, 2003 the Clerk of the United States Court of Appeals for the Eleventh Circuit mailed Appellant O'Brien a letter rejecting plaintiff-appellant's request to proceed on appeal IFP and demanding \$105. in fees due and payable.

hh. On April 3, 2003, at great personal expense, plaintiff-appellant mailed \$105. to the appellate court.

ii. On April 11, 2003 Clerk of USCA11 mailed Appellant briefing packet and appeal case number. Filing and service of Brief of the Appellant declared due forty (40) days following date of USCA11 communication.

#### STATEMENT OF FACTS

1. In 1995, after obtaining substantial funding from an inheritance (father's death), disabled and unemployed Appellant purchased much needed Johnson & Johnson (Vistakon) "Accuve" contact lenses, professionally prescribed and sold by Dr. J. Norman Long, O.D. at Eyexam 2000, 3855 State Street in Santa Barbara, California 93105.

2. In 1997, having moved to Sacramento, California, Appellant was in need of more lenses, and underwent another (unwanted) eye exam conducted by a certain licensed

optometrist, whose name is not known to Appellant, at a now defunct optometrist office on "L" street. Appellant was presented with only one choice of contact lenses, Bausch & Lomb, similar to, but not exactly same as, the J & J Vision (Vistakon) lenses purchased in Santa Barbara. Appellant O'Brien purchased a year's supply of contact lenses, and was given a copy of his prescription after declaring intent to move to Hawaii within the month.

3. In 1997-1999, in residence at Princeville, Hawaii and subsisting only on U.S. Veterans Administration disability benefits (\$775./ mo.), Appellant, after supply of contact lenses had run out, tried on many occasions to purchase the same or similar contact lenses, but was unable to do so at any retail store or professional office on Kauai (even by mail-order) without first paying for a third eye examination. Excessive cost of a third exam, monopolistically tied to sale of contact lenses, themselves fixed for minimum (excessive) price, precluded Appellant's purchase of any and all replacement contact lenses and, thereby, injured (and continues to injure) Appellant in many quantifiable and qualifiable ways including (a) increased physical disability, (b) decrease in professional golf performance, (c) decrease in ability to operate a golf centered (teaching) business, and (d) emotional distress due to loss of adequate physical navigation, social interaction and many other of life's necessities and enjoyments.

4. Appellant decided in April of 1999 to file antitrust complaint at the United States District Court in the Central District of California against commercial companies and non-profit organizations who severely injured him and millions of other consumers worldwide.

#### SUMMARY OF THE ARGUMENT

1. Dismissal of all claims against defendants in default of answer was abuse of discretion based on plain error because only grounds for dismissal (absence of proof of service of Complaint/Summons) was contradicted by evidence in case record. At least three (3) documents in record at MDL 1030 on October 11, 2002, filed (offered) by appellant on three separate occasions, provided Judge Schlesinger with evidence of proof of service for default judgment. [ER inter B. (#s 1,2,3,4,5)]

2. MDF (MDL 1030) Order on August 12, 2002, (a) one-hundred and sixty-five (165) days after finalized transfer by JPMDL (via denial of Appellant's Motion to Vacate Transfer on February 28, 2002) to MDF(MDL 1030), (b) requiring appellant's second "response" to AOA and CIBA's motions to dismiss following appellant's first reply to same accepted in transferor court, (c) authorizing reply by AOA and/or CIBA to Appellant's "response", effectively permitting defendants second motion to dismiss with appellant's first/second replies in hand, was, considering reply by AOA alleged cause that was the only cause used by Court to dismiss claims against AOA/CIBA on October 11, 2002, an abuse of discretion sufficiently prejudicial to Appellant's case to merit reversal of dismissal orders. [ER inter A. and B.(1)]

3. District Court's acceptance of Johnson & Johnson, Inc. ["J&J"] answer to complaint, in form of Motion To Dismiss (filed/served one-hundred and seventy-seven (177) days beyond time limits), and rejection (strike) of appellant's motion for entry of default/judgment against J&J for improper reason, was sufficient error in judgment by Court Clerk and/or Presiding Judge to validate appellant's claim for Court's abuse of discretion sufficiently prejudicial to appellant's case to merit remand for entry of default/judgment against J&J.

4. District Court's ruling all of appellant's claims estopped by MDL 1030 Settlement Agreement (2001) was erroneous legal conclusion and dismissal of all claims against AOA, CIBA and J&J, based exclusively on same, was error in judgment and/or abuse of discretion and sufficiently prejudicial to appellant's case for the United States Court of Appeals for the Eleventh Circuit to vacate district court's Order issued October 11, 2002 and remand case for further proceedings.

#### ARGUMENT

1. District Court's dismissal of all claims against defendants in default of answer via Order on October 28, 2002 was an abuse of discretion based on plain error because only grounds for dismissal (absence of proof of service of Complaint/Summons) was contradicted by evidence in case record. At least three (3) documents in record at MDL 1030 on Oct. 28, 2002, filed by appellant on three separate occasions, provided judge with sufficient evidence of proof of service for his entry of default/default judgment against Bausch & Lomb, Inc. and/or Eyexam 2000 d/b/a Lenscrafters, Inc. and/or Johnson & Johnson, Inc. [ER inter A. and B.(1, 2, 3, 4, 5)]

a. Judge Schlesinger's decision that insufficient evidence was offered to prove service to defaulted defendants should be reversed because (1) evidence was offered and clearly manifest, (2) judge's error was "plain" in that it denied existence of evidence plainly manifest in records, and (3) error negatively affected Appellant O'Brien's substantial right to default judgment because denial of default judgment affected the outcome of the case prejudicially. Dismissal of case exclusively on absence of required proof of service was abuse of discretion based on plain error.

b. On October 21, 2002 Plaintiff O'Brien, in response to MDF (MDL 1030) Order issued October 11, 2002 demanding a copy of appellant's *Proof of Service* proving service of COMPLAINT and SUMMONS to defendants in default of answer, mailed REPLY TO ORDER OF OCTOBER 11, 2002 REITERATING REQUEST FOR ENTRY OF DEFAULT AND DEFAULT JUDGMENT, AND REQUEST FOR SETTLEMENT OPT-OUT AND REMAND OF CASE TO ORIGINAL JURISDICTION. Reply contained a copy of the *Proof of Service* proving questioned service to defaulted defendants. Court's Order issued October 28, 2002 stated "Plaintiff having failed to provide the Court with proof of service as to the remaining three defendants in this case per Order dated October 10, 2002 (Doc. No.58), this case is DISMISSED." Because appellant did provide proof of service to B&L, LC and J&J,

Order was abuse of discretion based on erroneous determination adequate proof of service not in record.

c. Court's Order issued October 28, 2002 demonstrates Court clearly erred and/or abused discretion when it dismissed all claims against defaulted defendants on grounds refuted by documents (evidence) in case record. Valid proof of service in form of appellant's *Proof of Service* (signed/dated October 2, 2001) was itself proven mailed to the Court by *Certificate of Service* (signed/dated October 21, 2002). Tender (offer) of appellant's *Proof of Service* satisfied Court's demand for evidence of service to B&L,LC and J&J. This fact was cited in appellant's MOTION FOR RELIEF filed/served on November 12, 2002. [ER inter B.]

d. "There are three remaining defendants in this case: California Optometric Association, Bausch & Lomb, Inc., and Eyexam 2000 Inc., d/b/a Lenscrafters, Inc. Plaintiff shall have eleven (11) days to file proof of service as to these three defendants or the action will be dismissed and the case closed." [United States District Court in the District of Maryland, MDL 1332: Order issued October 11, 2002]

e. Appellant's Proof of Service (signed/dated October 2, 2001) does not contain the name/address of California Optometric Association ["COA"]. Plaintiff, after naming COA a defendant in the Complaint, considered it superfluous (unnecessary) to include COA with Defendant American Optometric Association who was served Complaint/Summons and was included inter *Proof of Service*. Therefore, COA was automatically dismissed (voluntarily dismissed) with lapse of time limits to serve process...never served.

f. Judge Schlesinger had strong reason to believe COA had never been served process because case record showed COA not named in any document other than face of complaint.

g. Court's Order on October 28, 2002 does not specify any exact form of Proof of Service required as evidence. District Courts (in years 1999 thru 2003) accepted appellant's same *Proof of Service* without any objection raised by defendants or the courts. MDF (MDL 1030) accepted Appellant's Proof of Service inter prior motions and Defendants did not object then or at any time thereafter. There was no reason for plaintiff to believe that the *Proof of Service* requested by the Court proving service to defaulted defendants was to be different in form or content from Proof of Service supplied to the Court by appellant on October 21, 2002 and in prior filings.

f. When Judge Schlesinger wrote, "Plaintiff having failed to provide the Court with proof of service as to the remaining three defendants in this case per Order dated October 10, 2002 (Doc. No. 58), this case is DISMISSED," he effectively declared Proof of Service (three copies) in record to be unsatisfactory fulfillment of requirement in Order issued October 11, 2002, "...proof of service as to these *three* defendants...". [emphasis added]

g. Obviously, appellant provided satisfactory evidence of proof of service to two(2) of the three(3) persons named in complaint who had not appeared or otherwise defended.

h. It was abuse of discretion for Judge Schlesinger to demand evidence he believed did not exist. Judge knew (or very strongly suspected) COA had not been served process because no Proof of Service or other document in case record listed COA among those served. Was appellant supposed to pull-a-rabbit-out-of-a-hat to satisfy Court's proof of service requirement? With at least three (3) copies of questioned *Proof of Service* (signed/dated Oct. 2, 2001) lodged in record proving service of process to all defendants named in complaint except COA, it was clearly abuse of discretion to obscure the issue and, without specification in Orders, make absence of proof of service to COA the reason for dismissal of all claims against B&L and LC.

i. Evidence in record unequivocally proves service of Complaint and Summons to Bausch & Lomb, Inc. and Eyexam 2000, d/b/a Lenscrafters, Inc. if not to the California Optometric Association. Therefore, Plaintiff complied with Court's Order sufficiently to merit default judgment against unanswered defendants excluding COA. Judge Schlesinger clearly abused discretion by requiring proof of service to COA as well as B&L, LC and J&J as inflexible condition for grant of Appellant's motion for Entry of Default and Default Judgment, and as rationale for dismissal of entire case.

j. Judge Schlesinger abused discretion by dismissing case exclusively on rationale that was plain error.

k. Service of Complaint/Summons to AOA, CIBA, proven by at least three (3) copies of same Proof of Service in case record, has been proven adequate and effective via defendants' timely return of waiver of service and/or answers to Complaint devoid of objections to form/substance of appellant's service of process.

l. In decision to dismiss case, Court's exclusion of *Proof of Service* to B&L, LC and J&J was not harmless error because is adversely affected appellant's right to default judgment, pursuant to FRCP 55. Court's decision was clearly harmful, prejudicial and a denial of due process.

m. "A constitutional error, such as a decision whether to admit or exclude evidence is considered harmless unless a substantial right of a party is affected. Fed. Rules Evid. Rule 103(a) 28 U.S.C.A." [*U.S. v. Charley*, 189 F. 3d 1251, 1254]

Note: If Complaint, served to defendants on October 2, 2001 (present in MDL 1332 records), had been defective for absence of adequate proof of service, or otherwise, the Court would have mentioned this fact when it commanded second answers on August 12, 2002. No mention was made.

2. MDF (MDL 1030) Order on August 12, 2002, (a) one-hundred and sixty-five (165) days after finalized transfer (via denial of appellant's Motion to Vacate Transfer on February 28, 2002) by JPMDL to MDF(MDL 1030), (b) requiring appellant's second "response" to AOA and CIBA's motions following appellant's first reply to same

accepted in transferor court, (c) authorizing reply by AOA and/or CIBA to appellant's "response", effectively permitting defendants second motion to dismiss with appellant's

first/second replies in hand, was, considering reply by AOA alleged cause that was only cause used by Court to dismiss claims against AOA/CIBA on October 11, 2002, an abuse of discretion sufficiently prejudicial to appellant's case to merit reversal of dismissal orders. [ER inter A. and B.(1)]

a. "Where no reply is ordered and none is filed, pleadings are closed with filing of answer. *Percival v Luce* (1940, CA9 Nev) 114 F2d 774; *Sun-Maid Raisin Growers Assoc. v Neustadter Bros.* (1940, CA9 Cal) 115 F2d 126; *First Presbyterian Church v Rabbitt* (1941, CA9 Cal) 118 f2d 732" [FRCP, Rule 7, n 9]

b. District Court can order plaintiff's reply to answer but not, expressly or effectively, defendant's second answer in form of reply to motion to dismiss.

c. "Pleadings are closed where issue is joined by service of answer containing no counterclaim. *Buggeln & Smith, Inc. v Standard Brands, Inc.* (1939, DC NY) 27 F Supp 399" [FRCP, Rule 7, n 9]

d. No defendant in case included counterclaim with answers joining issues.

e. "If issues of case are created by complaint and answer, there is no need for ordering reply. *Monk v United Life & Acci. Ins. Co.* (1942, DC Pa) 2 FRD 372" [FRCP, Rule 7, n 14]

f. Issues of case were created by complaint and first answers. Appellant's reply (motion to deny) to defendants answers, was an inadvertent (pro se) mistake re FRCP 7(a) but, because mistake not objected to, reply was nevertheless lodged/docketed on 01/02/02 (ER inter A.). There was, therefore, no legal need for transferee court to require appellant's second reply to defendants answers, ordered ten(10) months after close of pleadings.

g. "...under Federal Rules, pleadings were closed with filing of the answer..." [*First Presbyterian Church of Santa Barbara, Cal. v. Rabbitt*, 118 F.2d 732]

h. Transfer of case, pursuant to 28 U.S.C., sec. 1407 and JPMDL transfer order, does not reopen pleadings. There is no procedure, code or precedent for presiding judge to reopen individual pleadings after transfer to an MDL proceeding.

i. Transferee court's order for second reply, was itself an abuse of discretion considering (1) defendants first answers, in form of motions to dismiss, were heard but not granted in transferor court, (2) second reply not authorized by FRCP 7(a) or any other federal/local/mdl rule, (3) district court's Order on August 12, 2002 not rationalized by statute or case precedent, and (4) unrequested opportunity for "second answers" gave unfair advantage to defendants who were in possession of appellant's Reply to first answers.

3. District Court's apparent acceptance of Johnson & Johnson, Inc. answer to complaint, in form of Motion To Dismiss (filed/served one-hundred and seventy-seven (177) days

beyond time limits), and rejection (strike) of appellant's motion for entry of default/default judgment against J&J for improper reason, was sufficient error in judgment by Court Clerk and/or Presiding Judge to validate appellant's claim for Court's abuse of discretion sufficiently prejudicial to appellant's case to merit remand for entry of default/judgment against J&J.

a. J&J's Motion To Dismiss filed August 15, 2002 was well beyond time limits for answer, pursuant to FRCP 4, 6 and 7(a) and J&J's letter of agreement mailed to appellant on dated December 21, 2001 proves gross, intentional untimeliness of defendant's answer.

b. J&J admitted service of Complaint and Summons by Appellant O'Brien on December 28, 2001 (pursuant to parties' above referenced gentlemen's agreement) via MEMORANDUM IN SUPPORT OF MOTION OF JOHNSON & JOHNSON VISION CARE, INC. TO DISMISS FOR FAILURE TO STATE A CLAIM filed on August 15, 2002 (See page 3, footnote 3.). J&J's filing was conveniently right after MDL 1030 issued Order on August 12, 2002 alerting long defaulted J&J. [ER at B.(1)]

c. J&J's letter dated June 25, 2002 contains untrue statements and must be discounted for same. [ER at B.(1)]

d. No Proof of Service in any other of appellant's federal cases in the Central District of California, the United States Court of Appeals for the Ninth Circuit, the Eastern District of California, the District of Maryland, or the United States Court of Appeals for the Fourth Circuit contained appellant's signature in addition to mailing agent's signature. Proof of Service integral with PLAINTIFF'S REPLY TO AN ORDER (AUG. 12, 2002), mailed on August 21, 2002 to MDL 1030, understandably did not contain second signature by the appellant. Appellant always assumed that a Proof of Service filed integrally with pleadings, motions or other papers, was "signed" via appellant's signature on the pleadings, motions or other papers. No defendant in any of appellant's other cases, or in this case, ever objected to the absence of appellant's signature on any Proof of Service. If, technically, local rules at MDL 1030 require a second signature by counsel (other than the signature of mailing agent) it was well within the liberality accorded pro se litigants to overlook the discrepancy. "Nitpicking" strike of appellant's very critical motion was unnecessary, improper and suspect especially in light of fact strike permitted defendant J&J to escape what it so richly deserved for failure to defend within time limits. In fact, strike was so glaringly unnecessary that it smacks of collusion between lawyer(s)/clerk.

4. District Court's ruling all Appellant O'Brien's claims estopped by MDL 1030 Settlement Agreement (2001) was an error in judgment and/or abuse of discretion grounded on an erroneous legal conclusion.

a. Copy of the MDL 1030 Settlement Agreement (2001), essential for adjudication of this case, is not in appellant's files and, oddly, no longer available on the internet.

Nevertheless, Settlement Agreement (2001) is briefly quoted (from appellant's motion filed at CDC) and referenced herein to support appellant's allegations in hopes USCA11 better able to locate and review copy.

b. This case was not rightly estopped by finalized settlement agreement at MDL 1030 because Appellant never qualified for membership in a settlement class so estopped via purchase(s) of *replacement* contact lenses.

c. Framers, signers and judge in aforesaid settlement agreement did not intend to preclude all purchasers of defendants products from litigation in future. Such a preclusion would have exempted defendants from any and all private prosecution. Clearly specified for estoppel were those would be litigants who purchased *replacement* contact lenses from defendants following an *original* purchase of same.

d. *Original* purchaser has a qualitatively different cause-of-action under Title 15 than *replacement* purchaser. Original purchaser suffered, primarily, from overcharge(s) due to defendants illegal monopolization (sec. 2) while replacement purchaser brings action for damages primarily for defendants restraint of trade (sec. 1) via illegal tie of eye exams (sec. 14). Settlement Agreement (2001) required remedy for defendants alleged sec. 1 violation(s), but did not, of course, evaluate or require any remedy for sec. 2 violation. Sec. 1 or 14 violation does not imply or require a sec. 2 violation, even if sec. 2 violation implies and/or requires a sec. 1 violation. [Title 15, United States Codes, sec. 1, 2 and 14]

e. Appellant's sec. 2 claim was unique to MDL 1030 and not estopped by the letter or spirit of the Settlement Agreement (2001). Dismissing case exclusively on Settlement Agreement (2001) estoppel criteria was an error in judgment caused by an erroneous legal conclusion.

f. Appellant's cause-of-action predicated on defendants sec. 2 violations was completely foreign at MDL 1030, even though related evidence was brought forth in discovery prior to settlement of all cases. Had case not been erroneously estopped abundance of material evidence at MDL 1030 would have strengthened Appellant's chances of victory against long-term, consumer abusive monopoly.

g. Appellant did not purchase *replacement* contact lenses from sellers of Bausch & Lomb, Inc. lenses or sellers of lenses manufactured by Johnson & Johnson, Inc. B&L lenses are significantly different in substance, quality of construction (grind) and range of style from J&J lenses, and Appellant made only one, original purchase from each of defendants' two "lines" of contact lenses in two different cities from two different optometrists.

h. When appellant attempted to make *replacement* purchases of B&L, J&J, or CIBA lenses at LenCrafters, Inc. in Santa Barbara, California, he was prohibited from doing so by same phenomena complained of by all class-actions at MDL 1030 beginning in 1994. Where actual sales of *replacement* contact lenses injured class-action plaintiffs financially and otherwise, preclusion of *replacement* lens purchase(s), due to (1) cost of tied eye exam (2) monopolized pricing of lenses and (3) denial of prescription injured

Appellant O'Brien physically, mentally and professionally. Thwarted purchase provides no antitrust standing.

i. Lack of standing was not cited as cause for MDF(MDL 1030) Order of dismissal issued October 11, 2002. Appellant's standing based on two(2) separate, *original* purchases, was not questioned.

j. Quote included in appellant's motion for denial of defendants motion to dismiss has been parsed from the Settlement Agreement (2001) and is now most instructive, " The term 'replacement contact lenses' means contact lenses that are sold or dispensed to replace the initial contact lenses." Specification was taken from a website linking copy of the MDL 1030 Settlement Agreement (2001) when such copies were available before start of 2003.

k. Appellant did not purchase *replacement* lenses from same optometrist (or same manufacturer) and, thereby, incur cost of compulsory second exam from same optometrist. Clearly, Appellant O'Brien is not a "replacement contact lens" purchaser and, therefore, not to be included in any class of same.

l. Judge erred in legal conclusion (misinterpreted specifications) re Settlement Agreement (2001) regarding subsequent litigation estoppel criteria. Case was, therefore, erroneously (and very expensively) ordered dismissed almost an entire year from date of commencement on grounds case estopped before it commenced.

m. If not in estopped class then not estopped from action against defendants subsequent to settlement. Court's dismissal of all appellant's claims against answered defendants was error in judgment rationalized by an erroneous conclusion re Settlement Agreement (2001) terms, definitions and criteria.

## CONCLUSION

1. There is grave doubt in reasonable mind that Judge Schlesinger's decision to exclude (deny) evidence of service of process and thereby dismiss all of Appellant's claims was not "[A]n error affecting a substantial right of a party...an error which had a substantial influence on the outcome...". Therefore, reversal of dismissal(s) justified.

2. There can be no doubt that abuse of discretion, plain error and/or erroneous legal conclusion occurred when the district court ventured beyond limits of permissible choice and, after unexplained delay (total inaction) of eight (8) months from date of JPMDL transfer, ordered second answers to complaint and, following defendants submission of second answers, ordered dismissal of the entire case on settlement estoppel grounds.

3. Orders dismissing this case at the United States District Court in the Middle District of Florida should be vacated and case remanded to the MDF or CDC for (a) entry of default and default judgment against Bausch & Lomb, Inc. and Eyexam 2000 d/b/a Lenscrafters, Inc. and (b) resumption of prosecution against remaining defendants.

4. Defendants Johnson & Johnson, Inc., together with Ciba Vision, Inc. and Bausch & Lomb, Inc., are liable for default judgment.

PRAYER

1. Appellant Edward Michael O'Brien prays for this Court to (a) vacate Orders issued on October 11, 2002 and October 28, 2002 at the United States District Court in the Middle District of Florida dismissing MDL Case No. 3:02-cv-592-J-20HTS and (b) remand case to MDL 1030 at the United States District Court in the Middle District of Florida or to district court in the Central District of California for immediate Entry of Default and Default Judgment against Johnson & Johnson, Inc. and/or Bausch & Lomb, Inc. and/or Eyexam 2000 d/b/a Lenscrafters, Inc. and resumption of proceedings.

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Respectfully submitted,

May 20, 2003

by \_\_\_\_\_

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief uses a monospaced face and contains 826 lines of text.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2003, I mailed, via US Priority Mail, four (4) copies of BRIEF OF THE APPELLANT and APPELLANT'S EXCERPTS OF RECORD to the United States Court of Appeals for the Eleventh Circuit and one (1) copy of same documents to the below listed persons;

CLERK OF THE COURT

United States Court of Appeals

for the Eleventh Circuit

56 Forsyth St. N.W.

Atlanta, Georgia 30303

~

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I further certify that the above documents were filed and served, pursuant to Fed. R. App. P. 25 and Rule 32-4(3) of 11th Cir. Rules.

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