

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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COMPLAINT

Case No. CV 01 - 7269 GHK (VBKx)

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Edward Michael O'Brien

Plaintiff,

v.

The American Optometric Association, the California Optometric Association;

Johnson & Johnson Vision Products, Inc. d/b/a Vistakon,

Bausch & Lomb, Inc., CIBA Vision Corp.,

and Eyexam 2000, Inc. d/b/a LensCrafters, Inc.,

Defendants.

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Council:

Edward Michael O'Brien , *pro se*

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## I. PRELIMINARY STATEMENT

1. Plaintiff, Edward Michael O'Brien ["PL"] having suffered injury of the type federal and state laws were designed to prohibit, brings this antitrust action for treble damages and punitive damages to remedy personal and market injuries caused by Defendants ["DF"] and others. DF injured PL and thousands (perhaps millions) of other consumers and bona fide competitors by conspiring to create, and establish (1) certain sales policies, unfair business advantages and restrictions and (2) certain forms of competition preclusion against rivals. DF have accomplished their anticompetitive and monopolistic goals by restraining consumer access to eye-care prescriptions and/or optometric services needed to obtain contact lenses ["CL"] and by restricting and/or eliminating the supply of CL to mail order companies, pharmacies, buying clubs, department stores, mass merchandise outlets, and other alternative channels of distribution.

2. If their trade had not been illegally restrained, contact lenses would now be more widely available to consumers at much lower cost. PL seeks to (1) obtain compensation for damages sustained from DF's anticompetitive acts, (2) remove restraints on trade and commerce unlawfully placed by DF, (3) remedy economic and social problems caused by those restraints, (4) assess penalties that will tend to curtail similar offenses and injuries in future, and (5) make high quality CL more readily available to all consumers at significantly lower cost. Toward these desirable ends, PL complains and alleges as follows:

3. In 1992, PL was a player on the California Golden State Professional Golf Tour and was, formally, (1) a "professional golfer" according to United States Golf Association criteria and (2) sole proprietor of the Golf O'Brien Company founded and registered with California tax authorities in 1990. From 1993 thru 1994, Plaintiff worked his golf business (website and software development and sales) while attending Oral Roberts University in Tulsa, Oklahoma as a fulltime multimedia major (3.8 gpa) and advisor to the ORU golf team.

4. In 1995, after obtaining substantial funding from a family inheritance, disabled and unemployed PL purchased much needed Johnson & Johnson (Vistakon) "Accuve" contact lenses professionally prescribed and sold by Dr. J. Norman Long, O.D. at Eye Exam 2000, 3855 State Street in Santa Barbara, California 93105. In 1997, having moved to Sacramento, California, PL was in need of replacement lenses, and, after undergoing another (unwanted) eye exam conducted by a certain optometrist at a now defunct office on "L" street, was presented with only one choice, Bausch & Lomb contact lenses of the same type as the J & J Vision (Vistakon) purchased in Santa Barbara. PL purchased a year's supply of lenses, and was given a copy of his prescription after declaring intent to move to Hawaii within the month.

5. In 1997-1999, in residence at Princeville, Hawaii and subsisting only on U.S. Veterans Administration disability benefits (\$775./ mo.), PL, 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 (in a 36 month period), monopolistically tied to sale of replacement lenses, themselves fixed for minimum (excessive) price, precluded PL's purchase of any and all replacement contact lenses and, thereby, injured (and continues to injure) PL in many quantifiable and qualifiable ways including (1) increased physical disability, (2) decrease in semi-professional golf performance, (3) decrease in ability to operate a golf centered (teaching) business, and (4) emotional distress due to loss of adequate physical navigation, social interaction and many other of life's enjoyments.

6. On New Years Day, 1999, PL seriously contemplated suicide, but his faith in Jesus Christ stayed his hand, and, eventually, Mr. O'Brien's purpose in living was restored. PL decided in April of 1999 to file antitrust complaints against those companies who have severely injured him and American society until (1) a judgment or settlement obtained permitting resumption of productive business activity and decency of personal lifestyle, and (2) punitive damages obtained sufficient to avenge and curtail personal injury and to preclude DF from injuring countless other consumers in the future via anticompetitive business practices.

7. Defendants acted willfully and in formal combinations and contracts to (1) restrain trade (competition) in relevant markets (sec. 1 violation), (2) monopolize and/or attempt to monopolize relevant markets (sec. 2 violation), (3) discriminated in price and distribution to customers (sec. 13(e)), (4) tie professional eye examinations to replacement purchases of contact lenses (sec. 14 violation), (4) fix minimum price for tied eye examinations (sec. 1 violation), and (5) fix minimum price for contact lenses (sec. 1 violation).

8. "Conspiracies under sec. 1 and 2 of Sherman Act (15 USCS s 1 and 2) are reciprocally distinguishable from and independent of each other even though objects of conspiracies may partially overlap; conspiracy in restraint of trade may stop short of monopoly, but conspiracy to monopolize may not be content with restraint short of monopoly; therefore, one may be convicted, without violating double jeopardy clause of Fifth Amendment, of both conspiracy in restraint of trade in violation of sec. 1 of Sherman Act (15 USCS s 1) and conspiracy to monopolize trade in violation of sec. 2 of Act (15 USCS s 2)." [*American Tobacco Co. v United States (1946)*, 328 US 781, 90 L Ed 1575, 66 S Ct 1125.]

9. "Section 1 of Sherman Act (15 USCS s 1), prohibiting combinations in restraint of trade, and sec. 2 (15 USCS, s 2), prohibiting monopolies, closely overlap, and same kind of predatory practices may show violations of all." [*Maryland & Virginia Milk Producers Assn. v United States (1960)*, 362 US 458, 4 L Ed 2d 880, 80 S Ct 847.]

10. "Monopolization in contravention of 15 USCS, sec. 2 occurs whenever one with monopoly power commits unreasonable restraint of trade in violation of 15 USCS, sec. 1." [*Auburn News Co. v Providence Journal Co. (1980, DC RI)*, 504 F Supp 292.]

11. "An additional inference of monopoly power can be made from an overwhelming market share. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1703-04, 16 L. Ed 2d 778 (1966)." [ *Ibid.*, p 303]

12. Defendants combined, conspired and exercised (as if members of one company) monopoly power in relevant markets to preclude competition, fix prices above competitive levels, and unlawfully tie service(s). Consequently, DF restrained trade and consumer liberty in violation not only of sec. 1 but sec. 2 of the Sherman Antitrust Act and 15 U.S.C., sec. 13 and 14 (Clayton Act).

## II. JURISDICTION AND VENUE

1. This complaint is brought under authority of Title 15, Section 15 of the United States Codes ["USC"].

2. This complaint also alleges violations of state antitrust and/or unfair competition laws under State of California Civil Codes: Business and Professions, sections 16700, et seq., and seeks damages, civil penalties, and related relief under state laws as well as federal laws.

3. This Court has jurisdiction over this action pursuant to 28 U.S.C., sections 1331, 1337, and 1391 (c).

4. At time of cause of action, each corporation named as a defendant transacted business, did business, was found, or resided in the Eastern District of California.

## III. DEFINITIONS

1. "Alternative Channels" means mail order companies pharmacies, buying clubs, department stores, mass merchandise outlets, and other distribution alternatives other than approved optometrists ["AO"] that sell or could sell CL to consumers. "Alternative Channel" includes both wholesale and retail sellers. DF and their AO generally use pejorative labels to refer to Alternative Channels, such as "diverters," "grey market," or "unauthorized distributors."

2. "Contact Lens" means a medical device made of plastic that is placed on the eye and used to correct vision. A Contact Lens may be hard (rigid plastic) or soft (flexible plastic). A soft Contact Lens may be daily wear (removed every night, cleaned, and reinserted the next day) or extended wear (left in the eye over night). A Contact Lens may be "disposable" or "frequent replacement" (marketed to be discarded and replaced in short time periods, usually every seven days) or "conventional" (marketed for wearing longer periods of time, up to a year or more, with cleaning and reinsertion).

3. "Contact Lens Manufacturers" means businesses that manufacture, market, and sell CL. "Defendant Manufacturers" means Vistakon (Johnson & Johnson), Bausch & Lomb, and CIBA.
4. "Defendant AO Trade Associations" means collectively, AOA, CLASS, and CLASS's Constituent Groups.
5. "Fitter" is an AO authorized under state law to examine the eyes, prescribe a lens to correct vision problems, and fit a CL on the eye. Under most states' law, Fitter usually means an ophthalmologist or optometrist. In some states, a Fitter may be a dispensing optician or ophthalmic dispenser.
6. "AO" means an ophthalmologist, optometrist, or optician. "Three AO" means ophthalmologists, optometrists, and opticians collectively. An ophthalmologist has an M.D. degree from a medical school. An optometrist has an O.D. degree or its equivalent from an optometric school. The educational requirements for an optician vary from state to state, but usually include specialized training or an apprenticeship with an optician or ophthalmologist. This action does not challenge any actions taken by opticians.
7. "Replacement Lens" means a CL that is sold to replace a CL for which a prescription or work order has already been written.
8. "Vision Services" means the diagnosing and treatment of vision problems. This includes diagnosing, examining, and refracting the eye, and fitting CL on the eye.

#### IV. PLAINTIFF

1. Edward Michael O'Brien is the founding president and chairman of SAVIORG corporation, a California public charity [ FEIN: 77-0298874 ], and Golf O'Brien Company, a sole-proprietorship (Santa Barbara, CA software company), both established in 1990 at 3460 Constellation Road, Lompoc, California 93436. Mr. O'Brien has been a customer of one or more DF since June, 1995.

#### V. DEFENDANTS

1. The American Optometric Association ("AOA") is organized and exists under the laws of the State of Ohio, with its principal place of business at 243 No. Lindberg Blvd., St. Louis, Missouri 63141. TEL (314) 991-4100, FAX (314) 991-4101. During the period covered by this complaint, members of AOA engaged in the business of marketing and selling Contact Lenses in each of the United States of America and in the Eastern District of California.

2. Bausch & Lomb, Inc. ["Bausch & Lomb"] is organized and exists under the laws of the State of New York, with its principal place of business at One Bausch & Lomb Place, Rochester, New York 14604-2701. Tel: (716) 338-6000, FAX: (716) 338-6007. During the period covered by this complaint, Bausch & Lomb engaged in the business of marketing and selling CL in each of the United States of America and in the Eastern District of California. Bausch & Lomb is included within the term Defendant Manufacturers.

3. Ciba Vision Corp. ["CIBA"] is organized and exists under the laws of the State of Georgia, with its principal place of business at 11460 Johns Creek Parkway, Duluth, Georgia 30097. TEL: (770) 476-3937. During the period covered by this complaint, CIBA engaged in the business of marketing and selling CL in each of the United States of America and in the Eastern District of California. CIBA is included within the term Defendant Manufacturers.

4. Beginning in 1989 and continuing to the present, certain optometrists acted collectively as the Contact Lens and Anterior Segment Society, Inc. a/k/a CLASS ["CLASS"]. CLASS was organized by and comprised of six practice management groups: (1) the American society of Contact Lens specialists a/k/a the "Dirty Dozen"; (2) society of Eye Care Specialists a/k/a the "Obscene Thirteen," an unincorporated association represented by Robert Davis of Oak Lawn, Illinois; (3) Eye Care Management Group, an unincorporated association represented by Paul Klein of Ft. Lauderdale, Florida; (4) Vision Enhancement Council International, an unincorporated association represented by Walter West of Brentwood, Tennessee; (5) Society of Contact Lens Specialists a/k/a the "Younger Dirty Dozen Plus Two," an unincorporated association represented by Wayne Cannon of Columbia, South Carolina; and (6) National Association of Contact Lens Specialists a/k/a "The Moustache Group," an unincorporated association represented by Walter Choate of Madison, Tennessee (collectively referred to as CLASS's Constituent Groups). CLASS's efforts were assisted and financed by Defendant Manufacturers. CLASS was incorporated on September 16, 1992, under the laws of the State of Tennessee, with its principal place of business in Brentwood, Tennessee. During the period covered by this complaint, members of CLASS and CLASS's Constituent Groups engaged in the business of marketing and selling Contact Lenses in each of the United States of America and the Eastern District of California. CLASS and each of CLASS's Constituent Groups are included within the term Defendant AO Trade Associations.

5. Defendant AO include: John A. Gazaway of Eagle Grove, Iowa; Paul Klein of Fort Lauderdale, Florida; James C. Leadingham of Ashland, Kentucky; Lee Rigel of East Lansing, Michigan; Ronald Snyder of Fort Lauderdale, Florida; Jack Solomon of Fort Lauderdale, Florida; William David Sullins, Jr., of Athens, Tennessee; and Stanley Yamane of Jacksonville, Florida. Each of the Defendant AO are optometrists and are members of AOA, CLASS, and/or CLASS's Constituent Groups.

6. Johnson & Johnson Vision Products, Inc. d/b/a Vistakon, a Johnson & Johnson Company ["Vistakon"], is organized and exists under the laws of the State of Florida,

with its principal place of business at 7500 Centurion Parkway, Suite 100, Jacksonville, Florida 32256. TEL: (800) 843-2020. During the period covered by this complaint, Vistakon engaged in the business of marketing and selling CL in each of the United States of America and in the Eastern District of California. Vistakon is included within the term Defendant Manufacturers.

7. Eyexam 2000 (d/b/a LensCrafters, Inc.) is organized and exists under the laws of the State of California, with its principal place of business at La Cumbre Center, State Street, Santa Barbara, California 93109. TEL: (805) 682-9417

## VI. CO-CONSPIRATORS

1. The following individuals are known by Plaintiff States to be co-conspirators in the violations of federal and state laws alleged in this complaint: Douglas Becherer of Belleville, Illinois; Wayne Cannon of Columbia, South Carolina; Ronald Cedrone of Portland, Maine; Walter Choate of Madison, Tennessee; Harold Davis of Oak Lawn, Illinois; Robert Davis of Oak Lawn, Illinois; Lawrence DeCook of Newton, Iowa; L. Edward Elliott of Modesto, California; Barry Farkas of New York, New York; Arthur Giroux of Alexandria, Virginia; David Hansen of Des Moines, Iowa; Jon Hayashida of Los Angeles, California; Richard Hopping of Fullerton, California; Timothy Kime, of Toledo, Ohio; Robert Koetting of St. Louis, Missouri; Kenneth Lebow of Virginia Beach, Virginia; Jerry Lieblein of San Diego, California; Jack Melton of Oklahoma City, Oklahoma; Melvin Remba of Los Angeles, California; James Scholles of Cincinnati, Ohio; Joseph Shovim of Scranton, Pennsylvania; Wayne Wood of Jacksonville, Florida; and Walter West of Brentwood, Tennessee.

2. The following associations are known to be co-conspirators in the violations of federal and state laws alleged in this complaint: the California Optometric Association; Optometric Society of the City of New York; the Wisconsin Optometric Association.

3. Various other corporations, partnerships, business entities, and individuals not named as defendants, both unknown and known to PL, have participated as co-conspirators in the violations of federal and state law alleged in this action, and have performed acts and made statements in furtherance of those violations.

## VII. TRADE AND COMMERCE

1. The activities of defendants and the co-conspirators that are the subject of this complaint are within the flow of and substantially affect interstate commerce. A not insubstantial volume of trade and commerce is involved and affected by the violations alleged in this complaint. Damages claimed by PL exceed \$75,000.00.

2. Substantial quantities of DF's Contact Lenses are shipped in interstate commerce.
3. Substantial quantities of materials used to provide Vision Services to and/or from DF are shipped in interstate commerce.
4. The manufacture, marketing, and/or distribution of CL in the United States occurs, at least in part, through use of various channels of interstate transportation and communication.
5. The marketing and/or provision of Vision Services in the United States occurs, at least in part, through use of various channels of interstate transportation and communication.

### VIII. MARKET ADVANTAGES FOR AN AO

1. A Contact Lens is a "medical device" under federal law. In addition to Contact Lenses, toothbrushes and crutches are also "medical devices." Federal law does not require the purchaser of CL to have a prescription or work order. Federal law does not require a license to sell, dispense, or fit CL.
2. State law may require either a prescription or work order for a consumer to purchase CL. State law generally requires a license to dispense an initial pair of CL. State law may require a license to sell CL.
3. Under the law of states in which prescriptions or work orders are required, only an AO can offer Vision Services and then write the prescription or work order needed for optical products, such as CL, that correct or lessen vision problems. The AO, as a result of providing Vision Services, determines the characteristics of an appropriate CL for a consumer. A consumer usually must have a prescription or work order from an AO listing these characteristics to purchase an initial pair of CL.
4. Under the laws of some states, a consumer may buy and a business may sell Replacement Lenses without the purchaser presenting a prescription or work order to the seller.
5. This exclusive legal authority to provide Vision Services and then to write the prescription or work order for Contact Lenses gives an AO a competitive advantage over Alternative Channels when selling CL. The use of these exclusive powers has led to AO's selling most CL.
6. Vision Services and even the initial pair of CL can be sold separately in the vast majority of states. Under a bill passed in 1992 and unlike most states, Maine prohibits the release of the prescription or work order for Contact Lenses to the consumer. The laws of most states either require or allow AO to release prescriptions or work orders for CL to

the consumer, which in turn enables consumers to purchase CL separately from Vision Services.

7. Using these market advantages before Alternative Channels emerged as competitors, optometrists and other AO could and did commonly charge their patients from one to five times more to purchase CL than their cost from the CL Manufacturer or its distributor for the same CL. Many optometrists and other AO derive a significant portion of their income from the sale of Replacement Contact Lenses.

8. State law generally provides that the initial pair of CL be fitted on the consumer's eyes by an ophthalmologist or optometrist, and sometimes an optician.

9. Under all state laws, the sale of Replacement Contact Lenses *never* requires that a consumer purchase CL solely from an AO acting as a Fitter.

10. If the prescription or work order is written for a specific brand of CL, Federal Drug Administration ["FDA"] regulations prohibit the substitution of any other brand for the brand specified unless the parameters of the substitute brand are identical to those of the specified brand.

## IX. DEVELOPMENT OF A MARKET FOR ALTERNATIVE CHANNELS

1. Prior to 1988, Defendant Manufacturers sold Contact Lenses directly to Alternative Channels, as well as to the Three AO's. Alternative Channels had a very limited market presence and posed little competition to AO's in the sale of Contact Lenses.

2. Commencing in 1987 in test markets and in 1988 nationally, Vistakon began to market and sell a new type of soft Contact Lens, which is now known as a "disposable" Contact Lens. Bausch & Lomb and CIBA began to market and sell comparable Contact Lens, labeled "frequent replacement" Contact Lenses, shortly thereafter.

3. The introduction of "disposable" and "frequent replacement" Contact Lenses created increased demand in what was a flat, stagnant market and greatly increased the volume of sales of Contact Lenses. Consumers replace "disposable" and "frequent replacement" Contact Lenses at much shorter intervals than they replace "conventional" soft Contact Lenses. With this dramatic increase in sales volume attributable to the introduction of, and rapid sales growth in, "disposable" or "frequent replacement" Contact Lenses, came an increase in the number, size, and potential volume of sales of Contact Lenses by Alternative Channels.

4. Alternative Channels applied a significantly smaller markup, and consequently sold Contact Lenses for significantly less than the vast majority of the Three AO's. Alternative Channels also offered consumers desirable and valuable conveniences, such as shop by mail services and more and better located sales outlets.

5. Unlike many AO's, Alternative Channels sold Replacement Lenses without requiring consumers to pay for either an unnecessary office visit or an unnecessary eye exam.

## X. EXERCISE AND MAINTENANCE OF MONOPOLY POWER

1. "Plaintiff claiming violation of 15 USCS, sec. 2 must establish three things, possession of monopoly power in relevant market, willful acquisition or maintenance of that power, and causal antitrust injury." [*Forro Precision, Inc. v International Business Machs. Corp (1982, CA9 Cal)*, 673 F2d 1045.]

2. "This circuit has rejected the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. Specific intent to monopolize is sufficient and that intent may be inferred from conduct. *Lessing v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir. 1964). But, where as here there is not proof of market power, the conduct to support an inference of specific intent to monopolize, should be of a kind clearly threatening to competition or clearly exclusionary. *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 854 n. 4 (9th Cir. 1977)" [*Ibid.*, p. 1048.]

3. Although it can be shown, via expert testimony, that Defendants controlled at least 70% of relevant market(s), calculation of exact marketshare can be questioned on diversity of agency inter *monopoly* ( ie. manufacturers role in market, optometrists role in market, ophthamologists role in market, private-foundations role, etc.). Nevertheless Defendants, collectively and separately, had sufficient marketshare (market power) in CL related markets at time of cause-of-action to justify claim their specialized exclusionary practices were, collectively and separately, attempt(s)-to-monopolize even if collective *monopoly*, and the unlawful increase of same, is difficult to prove prior to discovery and trial.

4. Defendants, in combination, contractually and with coordinated action, monopolized relevant markets and violated (15 U.S.C., sec. 2). DF willfully, intentionally, and long-term acquired, maintained and exercised monopoly power for distribution, prescription, fitting and sale of contact lenses. DF, thereby, restrained intrastate and interstate trade by (1) precluding competition in relevant market(s), (2) raising prices above competitive levels, (3) tying examinations and certain brands, and (4) establishing barriers to competition in CL and related markets. DF's actions caused antitrust injury to PL and many thousands of other consumers and businesses. Total damages to date resulting from Defendant's actions are estimated in the billions of dollars. Damages will continue unless private and/or public civil actions restrain and/or stop DF's unlawful conduct and establish precedent via punitive measures such that businesses and consumers in CL and related markets will, in future, be relieved of actual and potential antitrust injury at the hands of DF. { Plaintiff, family and friends will be contact lens consumers for many decades to come. }

5. "Section 2 of the Sherman Act makes it unlawful for a firm to 'monopolize'. 15 U.S.C. s 2. The offense of monopolization has two elements: '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.' United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)." [United States of America v. Microsoft Corporation, United States Court of Appeals (DC Cir.), Case Nos. 00-5212, 00-5213, Decision of June 28, 2001, II., p 9]

6. "While merely possessing monopoly power is not itself an antitrust violation, see Northeastern Tel. Co. v. AT & T, 651 F.2d 76, 84-85 (2d Cir. 1981), it is a necessary element of a monopolization charge, see Grinnell, 384 U.S. at 570. The Supreme Court defines monopoly power as 'the power to control prices or exclude competition.' United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level. 2A Phillip E. Areeda et al., Antitrust Law p 501, at 85 (1995); cf. Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1335 (7th Cir. 1986) (defining market power as 'the ability to cut back the market's total output and so raise price')." [*Ibid.*, II. A]

7. It cannot be argued that Johnson & Johnson (Vistakon), Ciba and Bausch & Lomb did not, in combination and/or conspiracy (at time of cause of action), possess sufficient marketshare in contact lens markets to constitute *monopoly power*. What might appear to the unresearched eye as an oligopoly composed of three, autonomous contact lens manufacturing companies is actually a contact lens *monopoly* composed of noted manufacturers and eye care professionals under the unitary dominion of the American Optometrist Association. Reiterated for emphasis, DF actions that (1) exclude competition, (2) cutback total output (goods and services) from CL markets, (3) raise and/or maintain high prices for contacts and examinations, and (4) tie eye examinations and purchase of certain brands to initial and replacement purchases of contact lenses, evidence the unlawful exercise of monopoly power.

## XI. JOINT ACTIVITIES BY AO'S AND THEIR TRADE ASSOCIATIONS

1. In response to the growth of Alternative Channels, Defendant AO's, individually and through Defendant AO's Trade Associations, combined, conspired, and agreed to a plan of action designed to restrict competition from, increase the costs of, and erect barriers to entry for their competitors, Alternative Channels.

2. This plan of action took two forms. First, AO's sought to limit the ability of Alternative Channels both to purchase and sell Contact Lenses. In antitrust parlance, AO's sought exclusive dealing arrangements with Contact Lens Manufacturers. Second, AO's sought to control and limit consumers' ability and opportunity to purchase Contact

Lenses from Alternative Channels. In antitrust parlance, AO's sought to tie the sale of Vision Services to the sale of Contact Lenses.

3. AOA and other Defendant AO's Trade Associations have long acted to coordinate the activities of the Three AO'S, including joint activities to maintain and expand the market advantages enjoyed by AO's. These joint activities include opposing sales by Contact Lens Manufacturers to Alternative Channels, developing ways to discipline Contact Lens Manufacturers who make such sales, opposing and limiting ready access by consumers to both the legal and the market information needed to purchase Contact Lenses from Alternative Channels, and otherwise opposing and restraining purchase of Contact Lenses by consumers from Alternative channels.

## XII. EFFORTS TO STRENGTHEN MARKET ADVANTAGES

1. The AO's sought to preserve their market advantages by maintaining and increasing the difficulty experienced by any consumer who sought to buy Contact Lenses separately from Vision Services. By June 16, 1987, the Licensure and Regulation Committee of AOA had gathered, analyzed, and disseminated detailed information concerning the federal and state laws and regulations affecting the sale of Contact Lenses through Alternative Channels. AOA, through the Committee, suggested how this legal framework could be used to disadvantage the sale of Contact Lenses through Alternative Channels.

2. From 1986 onward, the Licensure and Regulation Committee and the Contact Lens Section of AOA repeatedly sought to pass an AOA resolution endorsing state legislation and regulations to prohibit sales of Contact Lenses through Alternative Channels. By 1988, AOA passed a reworded version of a resolution proposed by the California Optometric Association advocating state legislation to prohibit sales of Contact Lenses through Alternative Channels.

3. For the most part having failed in these legislative campaigns to secure passage of legal prohibitions, AO's and Defendants' Trade Associations undertook other and further efforts to eliminate or restrain Alternative Channels. For example, the Wisconsin Optometric Association and other state Optometric Associations worked to prevent (or at least discourage) the release to consumers of patient records and prescriptions or work orders so as to limit consumer access to information needed to purchase Contact Lenses.

4. In fact, Eyexam 2000 refused to give PL his patient records and prescription when requested on two separate occasions.

5. As part of efforts in various states to hinder or eliminate the sale of Contact Lenses through Alternative Channels, AOA through its state affiliates and other Defendant AO's Trade Associations encouraged and advised their members' to avoid or discourage release of Contact Lens prescriptions or work orders, even when release was permitted or required under state law.

6. AOA and other Defendant AO's Trade Associations urged AO's to write prescriptions or work orders that specified brands, had limited duration, or otherwise limited consumer access to competitive alternatives.

### XIII. DECEPTIVE ACTIVITIES

1. AOA and CLASS encouraged the writing and publication of articles in their own publications and generally in the trade press that denigrated, regardless of the facts or competing viewpoints, the sale of Contact Lenses through Alternative Channels.

2. Defendant AO Trade Associations had frequently claimed that the purchase of Contact Lenses by consumers from Alternative Channels gave rise to patient ocular health care problems. Because support for this claim was at best anecdotal, in 1987 and again in 1988, AOA considered either sponsoring or conducting a scientific study to test this claim. On both occasions, AOA rejected undertaking such an effort because AOA concluded it would have to publish any such study and that the purchase of Contact Lenses by consumers from Alternative Channels probably did not give rise to ocular health care problems.

3. AOA continued to represent to the public that the purchase of Contact Lenses by consumers from Alternative Channels did give rise to ocular health problems.

4. In January 1990, AOA falsely represented to the Food and Drug Administration that a survey supported the conclusion that consumers who obtained Contact Lenses through Alternative Channels encountered ocular health problems as a direct result.

5. Defendants sought to restrain or foreclose competition by making representations to mislead the public to believe that Contact Lenses must be purchased from AOA members (both as a legal matter and as a way to avoid ocular health problems), that federal law required a license to sell or a prescription to buy Contact Lenses, and/or that state laws imposed restrictions on the purchase or sale of Contact Lenses that state law did not in fact impose.

6. Defendants sought to limit or foreclose competition by misleading the public to believe that Contact Lenses for both health and legal reasons could lawfully be sold only by a Trade Association member functioning as the Fitter for those Contact Lenses.

7. Defendants misled individual Trade Association members into believing that a member would be personally liable for any damages that flowed from his or her patient wearing Contact Lenses if a member wrote a prescription that could be filled by Alternative Channels.

#### XIV. JOINT ACTIVITIES AMONG TRADE ASSOCIATION MEMBERS AND MANUFACTURERS

1. As a major element of their concerted effort to prevent consumers from obtaining Contact Lenses through Alternative Channels, AO's and Defendants' Trade Associations sought assistance from Defendant Manufacturers and others. The AO's, individually and through their associations, sought agreements from the Defendant Manufacturers that manufacturers would sell Contact Lenses only to the Three AO's, and not to Alternative Channels either directly or indirectly, even though such sales were lawful in every state.

#### XV. AO'S AS "GATEKEEPERS"

1. The Three AO's can adversely impact the business of each manufacturer of Contact Lenses if they collectively denigrated or refused to provide the brands of Contact Lenses offered by that manufacturer. According to DF, consumers seeking Contact Lenses must first obtain Vision Services from an AO to determine the appropriate Contact Lenses. The initial purchase and most replacement purchases of Contact Lenses require either a prescription or work order, on which the AO has the power to designate which specific manufacturer brand of Contact Lenses can be sold or purchased.

2. In addition, a manufacturer of Contact Lenses normally gains new consumers only when that consumer follows the advice, suggestion, or direction of an AO to purchase a specific brand of Contact Lenses. Because either a prescription or work order is needed under most states' laws for the initial purchase of Contact Lenses, consumers usually can only purchase the brand specified on the prescription or work order. Furthermore, unless a consumer incurs the expense and inconvenience of obtaining a new prescription or work order, all Replacement Lenses that consumer purchases usually will be the same brand as specified on the initial prescription or work order.

3. Moreover, normally only AO's know, but do not generally convey to their patients, the differences between and among different brands and types of Contact Lenses. This asymmetry of information contributes; to consumers overwhelmingly buying the brand and type of Contact Lens specified by the AO from whom the consumer purchased Vision Services.

4. Thus, as "gatekeepers," AO's have the power to direct or channel consumers either to or away from any specific manufacturer's brand of Contact Lenses. That is, AO's both legally and practically control the selection and use by consumers of specific brands of Contact Lenses. Both AO's (individually and through their associations) and Contact Lens Manufacturers know that AO's act in the marketplace as such "gatekeepers."

5. PL swears under oath that his AOs at Eyexam 2000 in Santa Barbara, California and at a certain now defunct professional office in Sacramento, California acted to monopolize and/or to increase monopoly(s) in CL markets controlled by DF, by tying the sale of initial and/or replacement CL to (1) an eye examination and (2) purchase of Johnson & Johnson "Acuvue" and/or Bausch & Lomb contact lenses in the exact manner alleged above.

## XVI. AO'S USING THEIR POWER AS "GATEKEEPERS"

1. "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contribution to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." [15 U.S.C., sec. 13 (e)]

2. Using and threatening more use of their power as "gatekeepers," AO's and Defendants' Trade Associations exerted pressure on Contact Lens Manufacturers to agree to eliminate, or at least restrain, the supply of Contact Lenses to Alternative Channels and agreed to assist the AO's efforts to limit ready access by consumers to their prescriptions or work orders.

3. In response to this pressure, Defendant Manufacturers agreed to alter and altered their sales policies or practices so that the Three AO's became the only authorized purchasers of Contact Lenses (Replacement or otherwise) from Defendant Manufacturers.

4. "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the united States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefore, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." [15 U.S.C., sec. 14]

5. In response to AO's pressure, Defendant Manufactures agreed to alter and altered their sales and distribution practices to limit ready access to the prescription, work order, or other information a consumer would need to purchase Contact Lenses from Alternative Channels. This agreement constituted an "agreement or understanding [to deal

exclusively and, thereby...] to substantially lessen competition or tend to create a monopoly in any line of commerce" and violated sec. 14.

## XVII. JOINT ACTIVITIES AMONG MANUFACTURERS

1. AOA and the other Defendant AO's Trade Associations provided each Defendant Manufacturer with information on the Contact Lens sales policies of the other Defendant Manufacturers. Members of AOA's Industrial Relations Committee and Contact Lens Section conveyed this information to Defendant Manufacturers.
2. Defendant Manufacturers also communicated with one another through Manufacturer Trade Associations, through the TRW Contact Lens Credit Group and by other means.
3. Manufacturers monitored the sales policies and practices of other Contact Lens Manufacturers. None wanted to adopt formally, either first or alone, a sales policy to sell to Alternative Channels because of the risk that the Three AO's would retaliate by channeling consumers away from the Manufacturer's brands of Contact Lenses.
4. Once one Contact Lens Manufacturer agreed to adopt and adopted a restricted distribution policy, the other Contact Lens Manufacturers were under pressure to adopt a similar position.
5. Contact Lens Manufacturers were aware that the AO's needed the agreement and support of Manufacturers to foreclose or otherwise inhibit competition from Alternative Channels.
6. In response to such pressure from AO's and Defendant AO's Trade Associations, Contact Lens Manufacturers (including Defendant Manufacturers) issued policy statements limiting sales solely to businesses with an AO actually fitting the Contact Lenses on the premises and thus refused to sell Contact Lenses directly or indirectly to Alternative Channels.
7. Defendant Manufacturers intended and achieved the intent of the announced policies to compel competing Contact Lens Manufacturers to adopt and enforce similar sales policies to restrain sales of Contact Lenses by Alternative Channels.

## XVIII. COMMUNICATIONS AMONG THE CONSPIRATORS

1. Numerous opportunities for reaching anti-competitive agreements were and are present in markets for the sale and distribution of Contact Lenses. For example, the formal and informal parts of meetings of Defendants AO's Trade Associations provide such opportunities for AO's. The formal and informal parts of meetings of trade associations of

which Defendant Manufacturers are members -- such as the Contact Lens Institute and the TRW Contact Lens Credit Group -- provide such opportunities for Contact Lens Manufacturers. The formal and informal parts of trade shows, educational programs and state optometric association meetings provide such opportunities for AO's and Contact Lens Manufacturers.

2. The transaction of business between AO's and Contact Lens Manufacturers provide additional opportunities for reaching anti-competitive agreements. Contact Lens Manufacturers know, expect, and use AO's as a source of information on the actions of other Contact Lens Manufacturers.

3. In addition, leaders among the AO's serve on Advisory panels for contact Lens Manufacturers to provide marketing and practice management information to those Contact Lens Manufacturers.

4. Defendants used these opportunities to reach, implement, and further anti-competitive agreements. Specific illustrative communications among the Defendants for the specific purpose of reaching, implementing and furthering their anti-competitive agreements follow.

5. Beginning in about 1985, AOA focused effort on the issue of sales of Contact Lenses to consumers by Alternative Channels, particularly pharmacy sales. The original analysis of this issue was done by both AOA's State Licensure and Regulatory Committee, a committee within the State Legislative Center, and AOA's Contact Lens section.

6. By December 1985, AOA's Contact Lens Section had already drafted and proposed an AOA "position paper" concerning sales of Contact Lenses by Alternative Channels, focusing on pharmacies and mail order houses. The "paper" sought a formal public AOA resolution that called for the absolute prohibition of Contact Lens sales by these Alternative Channels. In early 1986, AOA's Contact Lens Section urged an AOA resolution banning all Alternative Channel sales of Contact Lenses, and prepared for dissemination papers supporting this position.

7. AOA rejected the approach urged by AOA's Contact Lens Section as apparently "self-serving" and because it thought a public relations campaign would give publicity to Alternative Channels, which could be contrary to its members' economic interests.

## XIX. LIMITING CONSUMER ACCESS TO PRESCRIPTIONS

1. AOA's Contact Lens Section turned to considering the AO's role as "gatekeeper" to restrain competition from Alternative Channels. The Section sought to publish articles calling for AO's to use the power to write prescriptions to discourage consumers from purchasing Contact Lenses from Alternative Channels. The Section sought an AOA resolution that all Contact Lenses should be dispensed only by AO's. This effort was

coordinated with AOA's Licensure and Regulation Committee and AOA's Inter-Associational Inter-Profession committee.

2. On July 7, 1987, AOA's Contact Lens Section unanimously adopted a resolution to that effect. The Section's resolution was revised once again prior to being submitted to the AOA Board of Trustees in February of 1988 and was defeated by the AOA Board in March 1988.

3. In summer 1988, the AOA House of Delegates passed a resolution advocating laws and regulations that restricted the ability of Alternative Channels to sell Contact Lenses that responded to a resolution proposed by the California optometric Association. The California proposal sought to ban sales by Alternative Channels and non-AO's, and called upon AOA to enlist the support of the Contact Lens Institute and the Contact Lens Manufacturers for that effort.

4. As part of AOA's effort to pass restrictive laws and regulations, in June 1987, AOA's Licensure and Regulation Committee published a compilation of state and federal laws and distributed the publication to every state affiliate and others. In addition to the legislative material, the publication described how the "gatekeeper" power of AO's could be used to disadvantage AO's competitors, including Alternative Channels. The publication urged recipients to consider the materials even if they were "not currently addressing the issue of the sale of contact lenses through pharmacies and mail order businesses." AOA's Contact Lens Section directly offered its support to a California Optometric Association effort to pass restrictive California state laws.

5. Beginning also in 1987-1988, AOA began to develop and publicize information about an AO's power to limit prescriptions or work orders for contact Lenses. AOA counseled members, state optometric associations, and other AO's to consider writing prescriptions that limited the quantity of Contact Lenses that could be purchased, limited the numbers of refills, and set expiration dates. As part of AOA's efforts, Solomon, Chairman of AOA's Contact Lens Section, wrote articles encouraging AO's to restrict consumers' access to prescriptions and work orders, and other information needed for a consumer to purchase Contact Lenses from Alternative Channels.

6. Similarly, several state optometric societies, with the assistance of AOA, counseled members to consider imposing limits on prescriptions in an effort for AO's to make it more difficult for patients to purchase Contact Lenses from Alternative Channels or competing AO's. The limits considered were as to quantity, number of refills, and the setting of expiration dates.

7. AOA's Contact Lens Section developed and conducted a survey of its members in 1989, trying to support its position that opposing sales of Contact Lenses to Alternative Channels was justified by health care concerns. Although the survey was severely flawed scientifically and did not support the Section's position, AOA nonetheless represented to the United States Food and Drug Administration that the survey supported AOA's

contention that consumers who obtained Contact Lenses through Alternative Channels encountered health problems as a direct result.

## XX. LIMITING DISTRIBUTION OF CONTACT LENSES TO PROVIDERS OF VISION SERVICES

1. On or about September 5, 1989, the President, officers, and other representatives of AOA -- Sullins, Elliott, Gazaway, Hopping, Rigel, and Leadingham -- met with representatives, including the president and CEO, of Bausch & Lomb in Rochester, New York. At the time, Bausch & Lomb was the leading soft Contact Lens Manufacturer in terms of overall sales volume.

2. AOA participants complained that Bausch & Lomb did not adequately control the sale of its Contact Lenses. The participants discussed and agreed to work to control access by Alternative Channels to Bausch & Lomb Contact Lenses, to ensure that Contact Lenses would be a prescription item only, to work toward an industry and profession-wide standard limiting a Contact Lens prescription as to time, and restraining brand substitution.

3. In a letter dated October 16, 1989, the President of the professional products Division of Bausch & Lomb, Harold Johnson, who had participated in the September 5, 1989 meeting, thanked AOA for meeting with Bausch & Lomb, encouraged AOA (and Bausch & Lomb) to "lean on each other," and confirmed that the participants in the meeting had shared their "thoughts relating to mail order contact lenses and drug store dispensing."

4. In October 1989, AOA officers and representatives -- Sullins, Kime, Hopping, Gazaway, Hunter, and Elliott -- met with officers and executives of Vistakon in Ponte Vedra Beach, Florida. At the time, Vistakon was the preeminent Contact Lens Manufacturer of "disposable" and "frequent replacement" Contact Lenses.

5. AOA and Vistakon participants in the meeting took and exchanged notes of the meeting to ensure that everyone understood the discussions had and the agreements reached.

6. Pursuant to agreements reached at the meeting, Vistakon agreed to:

a. Give to AOA for possible disciplinary action the names of AO's who were known to sell Contact Lenses to Alternative Channels for resale.

b. Send a letter to all pharmacy and drug store associations indicating that Vistakon would not sell Contact Lenses through pharmacies or drug stores, irrespective of any state laws that might authorize such sales as legal.

c. Change the packaging for its "disposable" Contact Lens so as to read in substance "For prescription use only by a licensed optometrist, ophthalmic physician, or optician," and to try to use the word "unlawful" in its revised packaging to describe sales from other sources.

d. Alter its Contact Lens sales policy to state that the only authorized sales of Vistakon lenses would be to the Three AO's.

7. Pursuant to the agreements reached at the meeting, AOA agreed to:

a. publicize and endorse Vistakon's letter to pharmacy and drug store trade associations.

b. publicize and endorse Vistakon's sales policy.

c. pass on to state optometric associations the name of any optometrist identified as a source of Contact Lenses for Alternative Channels for possible action, including action to seek to revoke the optometrist's license.

8. Both AOA and Vistakon implemented the agreements reached in their October 1989 meeting.

9. Representatives of AOA met with representatives of CIBA in the Fall of 1989 to discuss concerns with sales of Contact Lenses by drug stores, pharmacies, mail order, and other Alternative Channels

10. In December 1989, CLASS was founded (but not incorporated) by leading optometrists from CLASS'S Constituent Groups. The first formal meeting of CLASS was held in 1990, in Ft. Lauderdale, Florida, with fiscal and administrative assistance from Defendant Manufacturers. A significant purpose for the creation of CLASS was to use the professional and economic influence of its members to reach agreements with Contact Lens Manufacturers to alter their sales policies so that Alternative Channels would be disadvantaged as compared to AO's.

11. From their inception, CLASS and CLASS'S Constituent Groups threatened not to prescribe the Contact Lenses of any manufacturer that sold Contact Lenses to Alternative Channels and threatened to use their influence to persuade other AO's to do the same.

12. On behalf of AOA and CLASS (and CLASS'S Constituent Groups), Rigel wrote to CIBA requesting that CIBA endorse the policy statement issued by Vistakon pursuant to which Vistakon had opposed and said it would seek to prevent sales of its Contact Lenses to Alternative Channels. CIBA did so.

13. In the first half of 1990, Rigel and Yamane (both members of CLASS), at the specific direction of AOA, wrote letters to other Contact Lens Manufacturers asking them to express their sales policy in certain uniform terms that effectively would eliminate sales of Contact Lenses to, erect barriers to entry for, or otherwise raise the costs of doing

business by, Alternative Channels. Rigel and Yamane wrote that the Manufacturer's response, or failure to respond, would be publicized in a membership publication of AOA's Contact Lens Section, of which Rigel was chair.

14. Because Vistakon and Bausch & Lomb had already agreed to restrain their sales of Contact Lenses to Alternative Channels, neither Rigel nor Yamane wrote the letter described in the immediately preceding paragraph to Vistakon or Bausch & Lomb.

15. In June 1990, Bausch & Lomb announced a sales policy pursuant to which Bausch & Lomb would sell Contact Lenses only to the Three AO's, indicating that it did so in response to AOA's request.

16. AOA and Vistakon met in December 1990 to further discuss these and other agreements and to further the implementation of their agreements.

#### XXI. LIMITING DISTRIBUTION TO THOSE WITH A FITTER ON THE PREMISES

1. At a meeting in Scottsdale, Arizona in November 1991, CLASS and each of CLASS'S Constituent Groups solicited from Vistakon individually and from the other Defendant Manufacturers generally their agreements to eliminate sales of Contact Lenses to, or at least raise the cost of doing business for, Alternative Channels. In advance of the meeting, CLASS instructed the Contact Lens Manufacturers to have senior sales and marketing employees prepared to answer questions such as:

2. Is mail order and drug store dispensing of contact lenses in the best interest of the contact lens industry?

3. Are the (contact lens] "movers and shakers" and the suppliers "moving and shaking" in harmony?

4. AOA, CLASS, and CLASS'S Constituent Groups agreed to prevent or reduce the channeling by AO's of consumers away from Defendant Contact Lens Manufacturers' Contact Lenses, but only if Defendant Contact Lens Manufacturers eliminated, or at least severely restricted, supply of the Manufacturers' Contact Lenses to Alternative Channels.

5. Representatives of AOA met with representatives of CIBA in December 1991 to discuss similar "matters of mutual concern."

6. During the first week of January 1992, Solomon on behalf of AOA, and Harold Johnson on behalf of Bausch & Lomb met to discuss "diversion," other marketing issues, and how to respond to those issues.

7. Officers of AOA and senior executives of Vistakon met at Amelia Island, Florida in mid-January 1992. Leadingham, DeCook, Gazaway, Hopping, and Elliott (then President

of AOA) participated in the meeting. Shortly after the meeting Vistakon released a newly worded sales policy and undertook a campaign of strictly enforcing this new sales policy, eliminating sales to any purchasers, including wholesale distributors, who did or might sell Contact Lenses to Alternative Channels.

8. Vistakon prepared, issued, and enforced a "Do Not Sell" list of Alternative Channels to its Authorized Distributors and others, warning that sales to those on the list would result in being terminated as an Authorized Distributor or active account. Vistakon periodically updated this "Do Not Sell" list.

9. Representatives of AOA and Bausch & Lomb met in March 1992 in Atlanta to discuss sales of Bausch & Lomb Contact Lenses by Alternative Channels and other marketing issues.

10. Pursuant to agreement with AOA and CLASS (and CLASS's Constituent Groups), Vistakon, Bausch & Lomb, and CIBA altered their sales policies to require that their Contact Lenses be sold only to AO's who both actually examined patients and fit Contact Lenses on patients' eyes. This new requirement was referred to as requiring a "Fitter on the Premises."

11. Pursuant to an agreement with AOA and CLASS (and CLASS'S Constituent Groups), Defendant Manufacturers sought to foreclose or lessen competition from Alternative Channels by describing Contact Lenses in the product labeling or in packaging inserts, and other statements made to mislead the public to a belief that Contact Lenses (1) must be sold either by an AO or by an entity with a "Fitter on the Premises" and/or (2) that federal law required a prescription as a precondition for the sale of Contact Lenses and/or (3) that state law imposed more restrictions on the sale of Contact Lens than state law did in fact impose.

12. AOA relayed written and verbal complaints from optometrists concerning the sale of Contact Lenses through Alternative Channels to Defendant Manufacturers and then conveyed the Manufacturer's response back to the complaining optometrist, thus putting the influence of AOA behind the individual optometrist's complaint.

13. Once Defendant Manufacturers restrained the sale of Contact Lenses to Alternative Channels, AOA policed the market and informed Defendant Manufacturers when Alternative Channels were selling the Manufacturer's Contact Lenses.

14. Contact Lens Manufacturers exchanged customer and sales information at meetings of the Contact Lens Credit Group. The formation of the group was urged by CIBA and created and hosted by TRW. This group of credit managers of Contact Lens Manufacturers met for the ostensible sole purpose of exchanging credit information. The group met in New Orleans on May 26-27, 1988 and at various other places in 1989-91. Topics discussed at these meetings included which Defendant Manufacturers were selling Contact Lenses to identified Alternative Channels, the resale of Contact Lenses and

distribution of Contact Lenses in general. In addition, participants exchanged information on which customers they considered Alternative Channels.

15. Through the TRW Contact Lens Credit Group and other industry meetings, Contact Lens Manufacturers conveyed to each other, coordinated, and monitored their sales to Alternative Channels.

## XXII. ANTI-COMPETITIVE EFFECTS OF THESE JOINT ACTIVITIES

1. As a result of the agreements and concerted actions described above, the supply of Contact Lenses to Alternative Channels, which had been plentiful was severely restrained, and in some instances virtually eliminated, and prices paid by consumers for Contact Lenses increased to or were maintained at substantially higher levels than prices would have been in a free and competitive market.

12. Consumers who bought their Contact Lenses either from AO's or any Alternative Channel paid higher prices for Contact Lenses than they would have if there had been unrestrained competition from and among Alternative Channels.

13. Consumers who could still buy their Contact Lenses from Alternative Channels paid higher prices for Contact Lenses than they would have paid to Alternative Channels that had unrestrained access to supply and faced price competition from AO's and other Alternative Channels in a free and competitive market.

14. Restricted distribution imposed on Alternative Channels a not less than 10% to 20% increase in their costs of obtaining Contact Lenses. The out-of-pocket increase in costs borne by Alternative Channels included: (1) the loss of benefits from direct transactions with Manufacturers, such as credit sales, free diagnostic and sample Contact Lenses, professional and advertising allowances, promotional discounts, and the right to return defective merchandise; (2) the added markups imposed by the few remaining sources of Contact Lenses for Alternative Channels; and (3) the additional costs of finding and securing supply. Restricted distribution, because supply was both uncertain and necessarily covert, also hampered the efforts of Alternative Channels to provide the conveniences sought by consumers and normally provided by Alternative Channels.

15. Restricted distribution hampered the growth of Alternative Channels as a percent of total retail market, both as to existing Alternative Channels and potential entrants.

16. The Three AO's foreclosed actual and potential competition to Defendant Manufacturers by agreeing not to prescribe, sell, or distribute any Contact Lens provided by a manufacturer that did not establish and enforce a sales policy to limit its Contact Lens distribution to businesses operated by AO's actually fitting Contact Lenses on the premises.

17. Entry into Contact Lens markets by, or competition in those markets from, Alternative Channels was deterred if Alternative Channels were unwilling or unable to develop retail outlets with a Fitter on the premises.

18. As a result of this conspiracy, any purchaser of Contact Lenses manufactured by Defendant Manufacturers from Alternative Channels paid prices higher than prices available directly from Defendant Manufacturers or from authorized distributors for Defendant Manufacturers' products.

19. The net price of Contact Lenses to Alternative Channels became and is higher because either the actual price of the lens to Alternative channels exceeded the price at which Contact Lenses were otherwise available directly from either Defendant Manufacturers or their authorized distributors, or the conspiracy prevented Alternative channels from obtaining an adequate supply of Contact Lenses from either the Defendant Manufacturers or the authorized distributors of Defendant Manufacturers.

20. The foregoing contract, combination, and conspiracy constitutes a continuing violation of section 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. s 1, 2 unreasonably restraining and monopolizing trade and commerce in the sale of Contact Lenses.

21. This unlawful contract, combination, and conspiracy and its effects are continuing to date.

22. The affects of this unlawful contract, combination, and conspiracy will continue unless judgment is given to stop it. Injury to the person, business and/or property of countless consumers, including PL, will continue by reason of such continuing violation unless the relief and damages prayed for in this complaint are granted.

### XXIII. FIRST CLAIM FOR RELIEF - 15 USCS, SEC. 1, 2, 13 and 14

#### RESTRAINTS AND MONOPOLIZATION AGREED TO BETWEEN AND

#### AMONG ALL DEFENDANTS

1. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through the immediately preceding paragraph with the same force and effect as if here set forth in full.

2. Beginning at a time unknown to Plaintiff, but at least as early as 1985 and continuing through 1998, Defendant AO's and other AO's, operating at least in part through Defendant AO's Trade Associations, entered into a contract, combination, or conspiracy in restraint of interstate trade and commerce for the purpose and with the effect of restricting competition from, increasing the costs of, and erecting barriers to entry for Alternative Channels and of limiting individual consumers' (including PL) ability and

opportunity to use Alternative Channels. This contract, combination and conspiracy was accomplished with the knowing aid and assistance of the remaining Defendants and their co-conspirators.

XXIV. SECOND CLAIM FOR RELIEF - SHERMAN ACT SECTION 1 - CAL. CODES, SEC. 16755 - RESTRAINTS AGREED TO AMONG AO'S AND THEIR TRADE ASSOCIATIONS

1. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through the immediately preceding paragraph with the same force and effect as if here set forth in full.

2. Beginning sometime in 1988, the exact date unknown, and continuing thereafter unabated, Defendant AO's, Defendant AO's Trade Associations and their co-conspirators have illegally restrained the sale of Contact Lenses in violation of section 1 of the Sherman Act, (15 U.S.C. s 1) and California Business and Professions Codes (sec. 16755), to gain unfair competitive advantages in the sale of Contact Lenses.

3. Unlawful restraints consist of continuing agreements, understandings, and concerted actions between and among defendants and among defendants and their co-conspirators, to foreclose or limit severely competitive alternatives that could be offered by Alternative Channels.

4. Unlawful restraints in violation of Sherman Act section 1 and California Code in a market for Contact Lenses have had the following anti-competitive effects, among others:

a. actual and potential competition between AO's and others have been restrained or eliminated;

b. prices to consumers for Contact Lenses have been raised to excessive levels, maintained, and stabilized;

c. actual and potential competitors of defendants in this market have been injured in their business and property as a result;

d. consumers, including PL, have been denied the benefits of a free, open, and competitive market;

e. consumers, including PL, for whom Contact Lenses are either medically indicated or individually desired have been denied the benefits of a free, open, and competitive market and, thereby, the public and PL's general welfare and economy have been injured.

5. These restraints and their effects are continuing and will continue unless the relief requested below is granted. Plaintiff has no adequate alternative remedy at law.

6. As a result of the violations of law alleged in this claim, Plaintiff has been injured in his person and property (damages estimated at \$1,000,000.).

XXV. THIRD CLAIM FOR RELIEF - SHERMAN ACT SECTION 1 - RESTRAINTS AGREED TO AMONG AO'S AND MANUFACTURERS

1. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through the immediately preceding paragraph with the same force and effect as if here set forth in full.

2. In violation of section 1 of the Sherman Act, 15 U.S.C. s 1, defendant AO's, Defendant AO's Trade Associations, and Defendant Manufacturers, and their co-conspirators entered into a contract, combination, and conspiracy in unreasonable restraint of trade and commerce in the sales of Contact Lenses.

3. This unlawful contract, combination, and conspiracy and the effects thereof are continuing and will continue unless the relief requested below is granted.

4. As a result of the violations of law alleged in this claim, Plaintiff has been injured in his person and property in an amount stated above.

XXVI. FOURTH CLAIM FOR RELIEF - SHERMAN ACT SECTIONS 1 AND 2 RESTRAINTS AGREED TO AMONG MONOPOLIZING MANUFACTURERS

1. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through the immediately preceding paragraph with the same force and effect as if here set forth in full.

2. In violation of section 1 and 2 of the Sherman Act1 (15 U.S.C. s 1, 2) Defendant Manufacturers and their co-conspirators, having sufficient marketshare in relevant markets to constitute a monopoly, entered as one organization into contracts, combination, and conspiracies in unlawful restraint of trade and commerce, and in concerted attempt to increase and/or establish monopoly in relevant markets for the sale of Contact Lenses.

3. Restraints and monopolization of markets for CL were by means and overt acts described above.

4. Defendant Manufacturers acting in concert clearly and without pro-competitive justification intended and accomplished by their actions to:

a. control the supply and price of Contact Lenses in relevant markets;

- b. eliminate actual and potential competition in the markets; and
  - c. exclude and foreclose other persons from participating in or entering the markets.
5. This restraint has had among other things the following effects:
- a. actual and potential competing sellers of Contact Lenses have been restrained, suppressed, and eliminated;
  - b. purchasers of Contact Lenses, including PL, have had to pay prices raised, maintained, or stabilized at excessive levels;
  - c. actual and potential competing sellers have been injured in their business and property;
  - d. in place of a free, open, and competitive market, restraints in the relevant markets have been established or maintained;
  - e. patients and other consumers, including PL, have been denied the benefits of a free, open, and competitive market; and
  - f. the public and PL's general welfare and economy have been injured.
6. The effects of these restraints are continuing and will continue unless the relief sought is granted.
7. As a result of the violations of law alleged in this claim, Plaintiff and many other persons have been injured in their business and property in an amount that will be established at trial of this action.
8. Alleged unlawful contracts, combinations, and conspiracies, including Defendant Manufacturers monopolization in CL market(s), and the effects thereof are continuing and will continue unless the relief requested below is granted.

#### XXVII. FIFTH CLAIM FOR RELIEF - VIOLATION OF CALIFORNIA LAW

- 1. PL repeats and realleges each and every allegation contained in all paragraphs above with the same force and effect as if set forth in full herein.
- 2. The aforementioned practices (Defendant's practices) violate California Codes: Business and Professions, sec. 16755.
- 4. Defendants continuous agreement, combination, conspiracy, and concert of actions through year 2001 constitutes unreasonable restraint of trade and commerce by monopolists and, as such, constitutes violation of California Business and Professional

Code Sections 16700 et seq., commonly known as the Cartright Act, California Business and Professions Code Sections 17200, commonly known as the Unfair Competition Act.

5. Specifically, Defendants violated California Business and Professions Code: sec. 16727, 16750-16761:

"16750. (a) Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefore in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him or her, interest on his or her actual damages pursuant to Section 16761, and preliminary or permanent injunctive relief when and under the same conditions and principles as injunctive relief is granted by courts generally under the laws of this state and the rules governing these proceedings, and shall be awarded a reasonable attorneys' fee together with the costs of the suit."

"This action may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant."

4. "16755. (a) Any violation of this chapter is a conspiracy against trade, and any person who engages in any such conspiracy or takes part therein, or aids or advises in its commission, or who as principal, manager, director, agent, servant or employee, or in any other capacity, knowingly carries out any of the stipulations, purposes, prices, rates, or furnishes any information to assist in carrying out such purposes, or orders there under or in pursuance thereof, is punishable, as follows:

(1) If the violator is a corporation, by a fine of not more than one million dollars (\$1,000,000) or the applicable amount under paragraph (3), whichever is greater.

(2) If the violator is an individual, by imprisonment in a state prison for one, two, or three years, by imprisonment for not more than one year in a county jail, by a fine of not more than the greater of two hundred fifty thousand dollars (\$250,000), a fine of the applicable amount under paragraph (3), or by both a fine and imprisonment.

(3) If any person derives pecuniary gain from a violation of this chapter, or the violation results in pecuniary loss to a person other than the violator, the violator may be fined not more than an amount equal to the amount of the gross gain multiplied by two or an amount equal to the amount of the gross loss multiplied by two, whichever is applicable."  
[ California Codes: Business & Professions, sec. 16755 ]

5. "...or the violation results in pecuniary loss to a person other than the violator...", quoted above, refers not only to PL but all persons, "other than the violator", who can prove "pecuniary loss" from Defendants' conduct.

## XXVIII. COMMENT

1. In year 2000, PL returned to Eyexam 2000 in Santa Barbara, CA and asked for a copy of his prescription and a printout of his record from 1995. PL was told to fillout a form and the record would be sent to him from archives. Subsequent communication was not received from Eyexam 2000.
2. On July 29, 2001, PL returned to Eyexam 2000 and again requested copy of prescription and record. This time PL spoke to his former optometrist, Dr. Long, who stated that a copy of PL's record and prescription could not be obtained by PL because they were "outdated".
3. Contact Lens market domination by DF can be graphically seen at a commercial internet website named *elens.com* [ <http://www.elens.com/elens/main.html> ]. Bausch & Lomb, Johnson & Johnson, and Ciba are featured prominently on the site while a few competitors - evidencing real "elasticity of demand" - are listed obscurely in the left-hand column.
4. DF's competitors found on referenced website:
  - (a) Biocompatibles Eyecare, Inc.
  - (b) Coopervision, Inc.
  - (c) American Hydron Biometrics
  - (d) Wesley Jessen, Inc.

## XXIX. CONCLUSION

1. DF injured PL and many others when they restrained trade and breached 15 USC, sec. 1 because restraints allowed DF to charge excessively high prices for Vision Services tied to excessively priced Contact Lenses sold to PL.
2. DF injured PL and many others when they monopolized CL markets and breached 15 USC, sec. 2 because preclusion of competition allowed DF to charge excessively high prices for Vision Services tied to excessively priced Contact Lenses sold to PL.
3. DF injured PL and many others when they dealt exclusively in CL markets and breached 15 USC, sec. 13 because exclusive dealings allowed DF to charge excessively high prices for Vision Services tied to excessively priced Contact Lenses sold to PL.
4. DF injured PL and many others when they unlawfully tied examinations (vision services) to sale of contact lenses and breached 15 USC, sec. 14 because tying allowed

DF to charge excessively high prices for Vision Services tied to excessively priced Contact Lenses sold to PL.

5. For violations of 15 USC, sections 1, 2, 13, and 14, Defendants are collectively and separately liable for payment of compensatory and punitive damages claimed below and to be evaluated by this court at or before trial.

### XXX. PRAYER FOR RELIEF

1. WHEREFORE Plaintiff, Edward Michael O'Brien, requests:

A. That the Court adjudge and decree that the defendants have committed the violations of federal and state law alleged herein and have, thereby injured Plaintiff and many other consumers and businesses in a manner antitrust laws were enacted to prevent;

B. That the Court enjoin defendants from tying the sale of Vision Services to the purchase of Contact Lenses, fixed in price above levels that would have obtained without Defendants restraint of trade, monopolization, exclusive dealing, tying, and excessive pricing.

C. That the defendants and their directors, officers, employees, agents, and successors be enjoined and restrained from, in any manner, directly or indirectly, continuing or maintaining the violations of section 1 and 2 of the Sherman Act and section 13 and 14 of Clayton Act in which they are alleged to have been engaged, or from committing any other violations of statutes having a similar purpose or effect;

D. That pursuant to sections 4 and 4c of the Clayton Act, 15 U.S.C. 15, 15c the Court enter judgment against defendants, jointly and severally, for three times \$1,000,000. (\$3,000,000.) the amount of damages sustained by PL as a result of defendants' violations of (15 U.S.C. s 1, 2, 13 and 14);

E. That Plaintiff be awarded costs of suit, including reasonable attorney's fees;

F. That PL be granted, pursuant to the supplemental claims specified above in California Codes: Business and Professions, sec. 16755 (3), punitive damages comprised of twice the "pecuniary gain" derived from Defendants unlawful conduct and totaling not less than \$1,000,000,000.

G. That Plaintiff be granted such other and further relief as the Court may deem just and proper.

EXECUTED this \_\_\_\_\_ day of \_\_\_\_\_ in Santa Barbara,  
California

By \_\_\_\_\_

Edward Michael O'Brien

*pro se*