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17 **UNITED STATES DISTRICT COURT**
 18 **NORTHERN DISTRICT OF CALIFORNIA**

19 BENJAMIN W. HEWITT, GABRIELLE)
 PAVELKO and JOHN WEISSMAN on)
 20 behalf of themselves and all others)
 similarly situated,)
 21 Plaintiffs,)
 22 v.)
 23 ALCON LABORATORIES, INC.;)
 24 BAUSCH + LOMB; COOPER VISION,)
 INC.; JOHNSON & JOHNSON)
 25 VISION CARE, INC.; and ABB)
 OPTICAL GROUP,)
 26 Defendants.)

Case No:

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

COPY

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1 Plaintiffs Benjamin W. Hewitt, Gabrielle Pavelko and John Weissman
2 (“Plaintiffs”), individually and on behalf of all others similarly situated (the “Class” as
3 defined below), upon personal knowledge as to the facts pertaining to themselves and
4 upon information and belief as to other facts, and based on the investigation of counsel,
5 bring this class action for damages, injunctive and other relief, and allege as follows:

6 **NATURE OF THE CASE**

7 **A. Defendants Conspired to Fix, Raise or Stabilize Contact Lens Prices**

8 1. This case arises out of an alleged conspiracy to raise, fix or stabilize the
9 prices of disposable contact lenses (“contact lenses”) in the United States by and among
10 contact lens makers Alcon Laboratories, Inc. (“Alcon”), Bausch & Lomb, Cooper Vision,
11 Inc. (“Cooper Vision”), Johnson & Johnson Vision Care, Inc. (“Johnson & Johnson”)
12 (collectively, “Manufacturer Defendants”); contact lens wholesaler ABB Optical Group
13 (“ABB”); Eye Care Professionals (optometrists and ophthalmologists who sell contact
14 lenses to consumers) represented by ABB; and the main trade association for the
15 industry, the American Optometric Association, commencing on or about June 1, 2013
16 and continuing to the present (“the Class Period”).

17 2. Nearly 39 million Americans wear disposable contact lenses, spending
18 approximately \$4.2 billion annually on these products.

19 3. The four Manufacturer Defendants—Alcon, Bausch & Lomb, Cooper
20 Vision and Johnson & Johnson—control 97% of the United States contact lens market.
21 Defendant ABB also plays an important role in this industry. ABB “is the nation’s
22 largest distributor of soft contact lenses” and supplies “more than two-thirds of Eye Care
23 Professionals¹ in America,” according to the company’s website.

24 4. ECPs play a unique role in the domestic contact lens market. Unlike
25 prescription drugs, which are prescribed by doctors but sold only by pharmacies, ECPs
26 both prescribe and sell contact lenses. When an ECP writes a prescription for a patient,
27

28 ¹ For purposes of convenience, these Eye Care Professionals are referred to in this complaint as
“ECPs”.

1 that ECP prescribes not only the type, power and shape of the lenses, but also the
2 particular contact lens brand. Unless the patient procures a new prescription—by
3 returning to the ECP or visiting another ECP—she is locked into buying the prescribed
4 brand of contact lenses for the length of the prescription, typically from one to two years.

5 5. Federal legislation enacted in 2003 known as the Fairness to Contact Lens
6 Consumer Act, 15 U.S.C. §§ 7601 *et seq.* (“FCLCA”), requires that ECPs give patients
7 copies of their contact lens prescriptions so that consumers can purchase their contact
8 lenses from retailers other than their ECP. The FCLA and its legislative history make
9 clear that the law was enacted specifically to “*promote[] competition, consumer choice*
10 *and lower prices* by extending to contact lens wearers the same automatic right to copies
11 of their own prescriptions and allow for consumers to purchase contact lenses from the
12 provider of their choice.” In 2004, the U.S. Federal Trade Commission (“FTC”) issued
13 the Contact Lens Rule, 16 C.F.R. Parts 315 and 456. The Rule spells out the FCLCA’s
14 requirements, reaffirms that ECPs must give a copy of the contact lens prescription to the
15 patient at the end of her lens fitting, and contains other requirements intended to
16 “increase consumers’ ability to shop around when buying contact lenses.”

17 6. In the decade following the FLCLA’s passage, there was increased price
18 competition from “big box” retail stores, such as Wal-Mart and Meijer, from consumer
19 buying clubs such as Costco, and from internet-based retailers such as 1-800-Contacts, 1-
20 800-GET-LENS and LensDiscounters.com. American consumers benefitted from this
21 increased competition by paying lower prices for contact lenses, and by taking advantage
22 of “beat any price” discounts for contact lenses. During this period, the Manufacturer
23 Defendants did not dictate the prices at which retailers sold Manufacturer Defendants’
24 contact lenses, nor impose restrictions on price reduction or discount programs instituted
25 by retailers that sold Manufacturer Defendants’ contact lens products.

26 7. Beginning in June 2013, however, Defendants entered into a combination
27 or conspiracy to eliminate price competition in the domestic retail market for contact
28 lenses by imposing resale price maintenance (“RPM”) restrictions on many of the

1 Manufacturing Defendants' popular contact lens products. These RPMs, which the
2 Manufacturing Defendants commonly and euphemistically refer to as Unilateral Pricing
3 Policies ("UPP"), restrain competition by prohibiting retailers from selling or discounting
4 certain contact lens product lines below mandated prices.

5 8. As part of this conspiracy, Defendant ABB worked with the Manufacturer
6 Defendants to develop UPPs for several of the most popular lines of contact lenses sold
7 in the United States. In a little over a year commencing in June 2013, the Manufacturer
8 Defendants—in combination and consultation with ECPs and their agent, ABB—all
9 implemented UPP agreements wherein each Manufacturer Defendant established a
10 minimum retail price for its affected contact lens product(s) and threatened to stop
11 supplying contact lenses to retailers who discounted or sold UPP-covered contact lens
12 products below the mandated UPP price. Alcon was the first to do so in June 2013, and
13 soon expanded the reach of the UPP to four of its contact lens lines. Bausch & Lomb
14 implemented a UPP for one of its major contact lens lines in February 2014. Johnson &
15 Johnson took the same course with respect to at least eight of its contact lens product
16 lines in June 2014. Cooper Vision did the same thing with respect to one of its contact
17 lens lines in September 2014.

18 9. According to testimony given at a July 30, 2014 hearing before the United
19 States Senate's Subcommittee on Antitrust, Competition Policy and Consumer Rights
20 investigating Defendants' practices ("Senate Hearing"), the UPP agreements
21 implemented by Alcon, Bausch & Lomb and Johnson & Johnson collectively cover 40%
22 of the United States contact lens market, and will cover 80% of that market by the end of
23 2015.

24 10. Despite the name given to the RPMs by Defendants, they are not
25 "unilateral" pricing policies. Instead, the Manufacturing Defendants combined and
26 agreed to limit retail price competition only after extensive consultation with the
27 independent ECPs and their agent, Defendant ABB. The Manufacturing Defendants have
28 enforced these RPM agreements through warnings, threats and actual retaliation—

1 including supply stoppages—to any retailer who advertises or sells a UPP-covered
2 contact lens product at a price below the pre-established UPP price.²

3 11. This draconian change in contact lens pricing, as the ECPs have since
4 acknowledged, represents a “fundamental shift” in how contact lenses are sold in the
5 United States. The new pricing scheme, and the constraints it imposes on competition,
6 would not have occurred in the absence of a conspiracy among the Defendants. Contact
7 lenses are the *only* prescription medical device sold in the United States pursuant to a
8 UPP.

9 **B. Defendants’ Conduct Restrains Price Competition for Contact Lenses**

10 12. The RPMs were intended to, and have had, the desired effect of restraining
11 competition by eliminating discounting and competitive pricing for contact lenses by big
12 box, internet and warehouse club retailers, thereby decreasing these retailers’ ability to
13 compete with independent ECPs who prescribe and also sell contact lenses. In testimony
14 given recently at a February 17, 2015 hearing before the Utah Senate Business and Labor
15 Commission, for example, Jay Magure, the Vice-President of Governmental Affairs for
16 1-800-Contacts, told regulators that, because of Defendant Johnson & Johnson’s
17 implementation of UPPs, the internet retailer was forced to eliminate rebates of between
18 \$15 and \$100 on numerous Johnson & Johnson ACUVUE®-brand contact lens products.

19 13. Moreover, contrary to the legislative purpose of the FCLCA, American
20 consumers who purchase contact lens products subject to these UPPs are deprived of the
21 benefits of competitive, discounted or lower-priced contact lenses. Mr. Magure, in his
22 recent aforementioned testimony before the Utah Senate Business and Labor
23 Commission, noted that a survey conducted by 1-800-Contacts before and after
24 Defendant Johnson & Johnson’s implementation of UPPs confirmed that prices for
25 contact lenses subject to such UPPs increased 57% when compared to pre-UPP levels.

26 ² See, e.g., Complaint filed in *Costco Wholesale Corporation v. Johnson & Johnson Vision Care, Inc.*,
27 N.D. Cal. Case No. 4:15-cv-00941-DMR (March 2, 2015, Dkt. 1) at ¶ 50 (describing RPM instituted by
28 Defendant Johnson & Johnson: “Under this policy, [Johnson & Johnson] and its authorized distributors
will cease to supply UPP products to any reseller who advertises or sells UPP products to patients below
the UPP price....”)

1 Similarly, in a recent competitor action, warehouse club retailer Costco asserted that it
2 was required to eliminate discounting programs for contact lens products subject to
3 Johnson & Johnson's UPP—a change that resulted in an approximately 30% increase in
4 contact lens prices for consumers.³ And, according to econometric evidence presented by
5 1-800-Contacts at a January 19, 2015 hearing before the Mississippi Senate Public Health
6 & Welfare Committee, the use of RPM policies going forward could cost American
7 consumers as much as \$2 billion annually.

8 14. The RPMs do not serve a procompetitive purpose. They do not prevent
9 free riding—the concept that “one benefits at no cost from what another has paid for.”⁴
10 Contact lens wearers pay ECPs a separate fee for the contact lens fitting on top of the fee
11 for the eye exam. In other words, ECPs are compensated for their services at the time a
12 contact lens prescription is written, and thus cannot suffer from free riding if the patient
13 decides to fill the prescription by purchasing her contact lenses from another reseller.

14 **C. Defendants' Actions Follow A History of Anticompetitive Behavior**

15 15. The RPMs also must be viewed against the lengthy history of prior efforts
16 by Defendants and their predecessors to suppress price competition for contact lenses.

17 16. In the mid-1990s, for example, contact lens makers conspired with ECPs to
18 restrict supply of contact lenses to mail-order houses and other alternative distribution
19 sources. These efforts led to class actions by consumers and 32 state Attorneys General
20 against Alcon's predecessor (CIBA Vision), Bausch & Lomb, Johnson & Johnson, and
21 the American Optometric Association, asserting various antitrust violations. The cases
22 eventually settled and the challenged practices were discontinued.

23 17. In 2009, the German Federal Cartel Office levied a fine of €11.5 million
24 against Alcon's predecessor, CIBA Vision, for fixing minimum resale prices of contact
25 lenses. German regulators determined that CIBA Vision had implemented a “price
26 maintenance” program to enforce minimum resale prices for contact lenses in violation of

27 ³ See note 2, *supra*, at ¶ 63.

28 ⁴ *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 874 F. Supp. 844, 865 (N.D. Ill. 1995).

1 European Community and German law.

2 18. More recently, in May 2014, China's National Development and Reform
3 Commission levied substantial fines against two of the same Manufacturer Defendants
4 named here, Bausch & Lomb and Johnson & Johnson, for adopting UPPs and requiring
5 retailers to adhere to RPM agreements, among other practices, in violation of China's
6 Anti-Monopoly Law.

7 **D. Defendants' Conduct Harms American Consumers**

8 19. Plaintiffs and proposed Class members are American consumers who,
9 during the Class Period, purchased contact lenses manufactured by one of the
10 Manufacturer Defendants that were subject to RPMs.

11 20. Plaintiffs allege that Defendants' RPMs constitute unreasonable restraints
12 of trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and state
13 antitrust and unfair competition laws.

14 21. Defendants' unlawful conspiracy has caused Plaintiffs and Class members
15 to pay millions of dollars more for contact lenses than they otherwise would have paid in
16 the absence of Defendants' conspiracy.

17 **JURISDICTION AND VENUE**

18 22. Plaintiffs bring this action to obtain injunctive relief and to recover
19 damages, including treble damages, costs of suit and reasonable attorneys' fees arising
20 from Defendants' violations of Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1)
21 and the antitrust laws of California and, New York.

22 23. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331,
23 1337(a) and 1367.

24 24. Venue is proper in this District under 15 U.S.C. §§ 15 and 22, and 28
25 U.S.C. § 1391(b) and (c), because at least one of the Defendants resides in this judicial
26 district, is licensed to do business in this judicial district or is doing business in this
27 judicial district.

PARTIES

A. Plaintiffs

25. Plaintiff Benjamin W. Hewitt is a resident of the State of California and has purchased during the Class Period contact lenses manufactured by one of the Manufacturer Defendants that were subject to RPMs.

26. Plaintiff Gabrielle Pavelko is a resident of the State of California and has purchased during the Class Period contact lenses manufactured by one of the Manufacturer Defendants that were subject to RPMs.

27. Plaintiff John Weissman is a resident of the State of New York and has purchased during the Class Period contact lenses manufactured by one of the Manufacturer Defendants that were subject to RPMs.

B. Defendants

28. Defendant Alcon is a United States company headquartered in Fort Worth, Texas that is owned by Novartis. Alcon makes eye care products, including contact lenses.

29. Defendant Bausch & Lomb is a United States company founded in Rochester, New York that is presently headquartered in Bridgewater, New Jersey. Bausch & Lomb was acquired by and became a division of Valeant Pharmaceuticals International, Inc., on August 5, 2013, retaining the Bausch & Lomb name following acquisition. Bausch & Lomb makes eye care products, including contact lenses.

30. Defendant Cooper Vision is a United States company headquartered in this judicial district at 5870 Stoneridge Drive, # 1, Pleasanton, California. Cooper Vision makes eye care products, including contact lenses.

31. Defendant Johnson & Johnson is a United States company headquartered in Jacksonville, Florida. Johnson & Johnson makes eye care products, including contact lenses.

32. Defendant ABB is a United States company headquartered in Coral Springs, Florida. ABB states on its website that it "is the nation's largest distributor of

1 soft contact lenses,” and that it “suppl[ies] more than two-thirds of [ECPs] in America
2 with brand name contact lenses, high grade ophthalmics and fully customizable Gas
3 Permeable Lenses.” ABB wholesales the contact lenses sold by the Manufacturer
4 Defendants and services over 19,000 ECPs nationwide. ABB maintains a distribution
5 center, call center and a GP contact lens manufacturing facility in this judicial district,
6 located at 1750 N. Loop Road, Suite 150, in Alameda, California.

7 33. Various persons that are not named as Defendants have participated in the
8 violations alleged herein and have performed acts and made statements in furtherance
9 thereof. Plaintiffs reserve the right to name some or all of these persons as Defendants at
10 a later date. There is a finite number of co-conspirators, and Plaintiffs believe that their
11 identities can be ascertained through Defendants’ own records.

12 **CLASS ACTION ALLEGATIONS**

13 34. Plaintiffs bring this action in their individual capacities and as a class action
14 pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3), on behalf of the following
15 Class:

16 All persons and entities who purchased disposable contact
17 lenses manufactured by Alcon, Bausch & Lomb, Cooper
18 Vision or Johnson & Johnson, for their own use and not for
19 resale, from June 1, 2013 to the present (the “Class
20 Period”), where the prices for such contact lenses were set
21 pursuant to a Retail Price Maintenance (“RPM”) or
22 Unilateral Pricing Policy (“UPP”) as described herein.
23 Excluded from the Class are Defendants, their parent
24 companies, subsidiaries and affiliates, any co-conspirators,
25 all governmental entities, and any judges or justices
26 assigned to hear any aspect of this action.⁵

27 35. The Class includes subclasses of persons located in California and New
28 York who purchased disposable contact lenses subject to UPPs (the “California Subclass”
and “New York Subclass”).

36. Plaintiffs do not know the exact number of Class members because such

⁵ For purposes of this Complaint, the terms Retail Price Maintenance (“RPM”) and Unilateral Pricing Policy (“UPP”) have the same meaning and are used interchangeably.

1 information is in the exclusive control of Defendants. Plaintiffs believe that, due to the
2 nature of the trade and commerce involved, there are hundreds of thousands of Class
3 members, geographically dispersed throughout the United States, such that joinder of all
4 Class members is impracticable.

5 37. Plaintiffs' claims are typical of the claims of the Class in that Plaintiffs
6 purchased contact lenses subject to a Manufacturer Defendant's RPM. All Class
7 members were damaged by the same wrongful conduct of Defendants and their co-
8 conspirators as alleged herein, and the relief sought is common to the Class.

9 38. Numerous questions of law or fact arise from Defendants' anticompetitive
10 conduct that are common to the Class, including but not limited to:

- 11 a. Whether the Manufacturer Defendants engaged in a contract,
12 combination, and/or conspiracy among themselves and with ABB
13 and the ECPs to fix, raise, maintain, or stabilize prices of contact
14 lenses sold in the United States;
- 15 b. Whether the Manufacturer Defendants' RPM agreements operated
16 as unreasonable restraints of trade;
- 17 c. Whether Defendants' conduct caused the prices of contact lenses
18 sold in the United States to be sold at artificially high and supra-
19 competitive levels;
- 20 d. Whether Plaintiffs and the other members of the Class were injured
21 by Defendants' conduct, and, if so, the appropriate class-wide
22 measure of damages for Class members; and
- 23 e. The scope of any injunctive relief to which Plaintiffs and the other
24 members of the Class are entitled.

25 39. These and other questions of law and fact are common to the Class and
26 predominate over any questions affecting only individual Class members.

27 40. Plaintiffs' claims are typical of the claims of the Class because Plaintiffs
28 purchased contact lenses covered by one or more of the Defendants' UPPs.

1 41. Plaintiffs will fairly and adequately represent the interests of the Class in
2 that he has no conflict with any other members of the Class. Furthermore, Plaintiffs have
3 retained competent counsel experienced in antitrust, class action, and other complex
4 litigation.

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

7 43. This class action is superior to the alternatives, if any, for the fair and
8 efficient adjudication of this controversy. Prosecution as a class action will eliminate the
9 possibility of repetitive litigation. There will be no material difficulty in the management
10 of this action as a class action. Previously, class action litigation involving similar
11 conduct and similar products, and prosecuted on behalf of a similar consumer class, was
12 successfully managed through trial as a class action proceeding under Fed. R. Civ. P. 23.
13 *See In re Disposable Contact Lens Antitrust Litig.*, MDL No. 1030 (M.D. Fla.) (“First
14 Contact Lens Litigation”).

15 44. The prosecution of separate actions by individual Class members would
16 create the risk of inconsistent or varying adjudications, establishing incompatible
17 standards of conduct for Defendants.

18 **TRADE AND COMMERCE**

19 45. Based on testimony and evidence presented to the United States Senate
20 Judiciary Committee’s Subcommittee on Antitrust, Competition Policy and Consumer
21 Rights in July 2014, an estimated 39 million Americans wear contact lenses, spending
22 approximately \$4.2 billion annually on these products.

23 46. During the Class Period, each Manufacturer Defendant (or one or more of
24 its subsidiaries) and Defendant ABB sold contact lenses in the United States in a
25 continuous and uninterrupted flow of interstate commerce and foreign commerce,
26 including through and into this judicial district.

27 47. During the Class Period, the Manufacturer Defendants collectively
28 controlled a majority of the United States contact lens market.

1 48. Defendant ABB is the largest distributor of contact lenses in the United
2 States. More than two-thirds of ECPs in the United States purchase contact lenses from
3 ABB.

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

6 **FACTUAL ALLEGATIONS**

7 **A. The Disposable Contact Lens Market**

8 1. Market Characteristics

9 50. The market for contact lenses in the United States is large and has
10 idiosyncrasies that distinguish it from most consumer goods markets. Nearly 40 million
11 Americans wear contact lenses, and spend \$4.2 billion on them annually.⁶

12 51. For purposes of this Complaint, the term “contact lenses” refers to
13 disposable contact lenses. These lenses were first introduced into the market in 1987.
14 They are now the most popular contact lens style, and account for approximately 90% of
15 contact lenses sold in the United States.

16 52. Contact lenses are a commoditized product. Depending on the contact lens
17 line, contact lenses are designed to be replaced on a daily, weekly or monthly basis.
18 Contact lenses include both spherical lenses, which contain a single refractive power, and
19 specialty lenses, which are crafted to address specific vision conditions such as toric
20 lenses (for people diagnosed with astigmatism), and bifocal or multifocal lenses (for
21 people diagnosed with presbyopia).

22 53. The U.S. Food and Drug Administration (“FDA”) first approved soft
23 contact lenses in 1971. Disposable contact lenses are soft contact lenses. Such lenses are
24 treated as Class II and Class III pharmaceutical devices that require a prescription from
25 an ECP to purchase. Early iterations of contact lenses required significant work on the
26 part of an ECP to fit the lens to the patient; as a result, most consumers purchased their

27
28 ⁶ Statement of R. Joe Zeidner, General Counsel 1-800-Contacts, Hearing Before the S. Committee on the
Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights (July 30, 2014), at p.1.

1 contact lenses directly from their ECP. As contact lens technology improved, however,
2 consumers were able to unbundle the purchase of their contact lenses from the eye exams
3 themselves. As the FTC noted in a 2005 report entitled "*The Strength of Competition in*
4 *the Sale of Rx Contact Lenses: An FTC Report*" ("2005 FTC Report"), "the replacement
5 lens a consumer purchases pursuant to a prescription will be identical, regardless of
6 where it is purchased," such that consumers do not require the expertise or skills of an
7 ECP to buy contact lenses. Nonetheless, to make it more difficult for patients to shop
8 around for contact lenses, ECPs often refused to hand over a copy of the patient's contact
9 lens prescription.

10 54. In 2003, Congress enacted the Fairness to Contact Lens Consumers Act
11 ("FCLCA"). Section 2 of the Act states that when an ECP completes a contact lens
12 fitting, the ECP "shall...provide to the patient a copy of the contact lens prescription" and
13 must do so "whether or not requested by the patient." 15 U.S.C. § 7601. The intent of
14 the Act, as revealed by its legislative history, is to "***promote[] competition, consumer***
15 ***choice and lower prices***" by "extending to contact lens wearers the same automatic rights
16 to copies of their own prescriptions" and thereby allowing "consumers to purchase
17 contact lenses from the provider of their choice." (Bold, italics added).

18 55. The FCLCA authorizes the FTC to prescribe rules to carry out the Act, and
19 "to undertake a study to examine the strength of competition in the sale of prescription
20 contact lenses." 15 U.S.C. § 7607, 7609. Pursuant to its statutory authority, in 2004, the
21 FTC issued the Contact Lens Rule, 15 C.F.R. Parts 315 and 456. That Rule reaffirms that
22 ECPs must give a copy of the contact lens prescription to the patient at the end of every
23 contact lens fitting – even if the patient does not request it – specifically as a means of
24 promoting price competition for contact lenses. According to the FTC, "[t]he release of
25 contact lens prescriptions by eye care providers ***facilitates consumer choice in***
26 ***replacement contact lens suppliers, and greater consumer choice increases consumer***
27 ***welfare.***" FTC, "*Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*
28 (March 2004) ("2004 FTC Report"), at p. 4. (Bold, italics added).

1 2. Market Concentration

2 56. Manufacturer Defendants – Alcon, Bausch & Lomb, Cooper Vision and
3 Johnson & Johnson – are the four major contact lens manufacturers in the United States.

4 57. Collectively, these four companies dominate the domestic market for
5 contact lenses, and account for 97% of U.S. contact lens sales by revenue. Defendant
6 Johnson & Johnson controls 35.3% of the market, defendant Alcon controls 30.5% of the
7 market, defendant Cooper Vision controls 23.9% of the market, and defendant Bausch &
8 Lomb controls 7.2% of the market.⁷ As described in this Complaint, all four
9 Manufacturing Defendants recently have implemented RPM agreements that prohibit
10 retailers from selling certain of the Manufacturer Defendants' contact lenses to
11 consumers below specified minimum prices.

12 58. The retail market for contact lenses is characterized by significant entry
13 barriers, making it unlikely that a new entrant would displace the market concentration
14 held by the Manufacturer Defendants. Barriers to entry include large investments in
15 manufacturing and development costs, as well as regulation by the FDA and the states.
16 Apart from the four Manufacturer Defendants, other contact lens manufacturers in this
17 market are small (collectively comprising 3.1% of the United States market), and
18 specialize in niche products or contact lenses for specific eye disorders. Profits in the
19 industry average 10.1%, with the four Manufacturer Defendants enjoying the highest
20 levels of profitability.

21 59. For purposes of this Complaint, the relevant product market is the market
22 for soft (disposable) contact lenses and the relevant geographic market is the United
23 States. This is the market analyzed by the FTC in the 2004 FTC Report cited in ¶ 60 of
24 this Complaint.

25 3. Retail Channels

26 60. Consumers with a prescription from an ECP can purchase their contact
27 lenses from a variety of sources. These sources include their ECPs, national optical

28 ⁷ Zeidner, *supra*, note 6 at p.7.

1 chains (such as LensCrafters), mass merchandisers (such as Wal-Mart or Target),
 2 wholesale clubs (such as Costco), and online retailers (e.g., 1-800-Contacts or
 3 LensDiscounters.com) or LensDiscounters.com).

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

13 61. The 2005 FTC report cited in ¶ 58 of this Complaint presents data from
 14 Ocular Sciences, Inc. and 1-800-Contacts regarding the share of filled prescriptions and
 15 sales for contact lenses through these various retail channels. The data from Ocular
 16 Sciences, Inc., is set forth below:

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

22 62. The retail channel sales data presented in the 2005 FTC Report (cited in ¶
 23 58, above) for internet retailer 1-800-Contacts is as follows:

Channel	Estimated Share of Filled Prescriptions
Independent MD	4.3%
Independent OD	64.3%
Mass Merchandisers	13.0%
Chain Retailers	9.5%

Mail Order/Internet	8.0%
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63. These data sets led the FTC to conclude, in 2005, that “[m]anufacturers distribute the largest share of lenses through independent ECPs and the smallest through the online mail-order channel.”

64. A more recent industry survey estimates that retail chains’ and mass merchandisers’ share of contact lens sales in the United States will climb to 20.5 % in 2015, while online retailers’ share will reach 9.2% this year.

4. Contact Lens Pricing in Retail Channels

65. Prior to implementation of the RPM agreements, contact lenses were cheaper when purchased online or from big-box stores as opposed to independent ECPs.

66. As noted in the 2004 FTC Report cited in ¶ 60 of this Complaint, a 1998 study found that the average price of a six-lens pack of contact lenses was approximately 19% more expensive when purchased from an independent ECP instead of from one of the other categories of retailers.

67. The 2004 FTC Report also presented a March 2004 study by 1-800-Contacts reflecting similar results, which are set forth below:

<i>Retailer</i>	<i>Focus Toric (CIBA)</i>	<i>Contact Lens</i>	
		<i>FreshLook Colorblends (CIBA) ECPs</i>	<i>Acuvue (Johnson & Johnson)</i>
Optical Chains	\$66.69	\$42.09	\$22.85
Independent Optometrists	\$70.91	\$46.67	\$24.39
Ophthalmologists	\$73.18	\$46.54	\$25.74
ECP Average	\$70.26	\$45.10	\$24.33
		<u>Non-ECPs</u>	
Mass Merchandiser:	\$53.21	\$35.40	\$18.05
1-800 Contacts	\$59.00	\$34.95	\$19.95
Non-ECP Average	\$56.11	\$35.18	\$19.00

68. In the 2005 FTC Report cited in ¶ 58 above, the FTC examined the prices of a six-month supply of ten different contact lenses from 20 online retailers (including four hybrid retailers, or retailers with both an online and offline presence) and from 14

1 offline retailers in Northern Virginia. It found that contact lenses are, on average, “\$15.48
 2 less expensive online than offline” and that “[w]holesale clubs . . . [were] the least
 3 expensive channel overall, offering prices that average around \$30 less than independent
 4 ECPs, around \$9 less than all online outlets, and about \$6 less than pure online retailers.”
 5 The cumulative results of this study are set forth below.

Channel	Average Price of All Lenses
<u>Non-ECPs</u>	
Pure Online Retailer	\$87.77
Hybrid Retailer	\$106.38
Wholesale Club	\$83.18
Mass Merchandiser	\$108.38
Non-ECP Average	\$96.43
<u>ECPs</u>	
Optical Chain	\$109.20
Independent ECP	\$112.35
ECP Average	\$110.78
<i>Price Difference</i>	<i>\$14.34</i>
<i>% Difference</i>	<i>+14.9%</i>

67. Based in part on this study, the FTC concluded that the FCLCA’s provision
 requiring ECPs to provide the patient with a prescription that the patient can then use
 elsewhere had both increased competition, and reduced contact lens prices for consumers,
 across the country.

68. Other studies similarly confirm that consumers obtain significant price
 competition and received lower prices for contact lens from internet retailers. Looking
 solely at the savings that may accrue to consumers from internet sales of contact lens as
 compared to sales of lens from brick-and-mortar retailers, the FTC, as part of a study
 conducted in 200 for the Connecticut Department of Health, calculated that an hour-long

1 trip to a brick-and-mortar retailer had “an implicit time cost of between \$10.96 and
2 \$26.00,” which was “a markup of between 50 and 130 percent over the price of a
3 multipack.”

4 69. Similar pricing differences and consumer price benefits existed prior to the
5 Manufacturer Defendants’ adoption of the UPPs. For example, a July 29, 2014 *Reuters*
6 news article reporting on the decisions by Alcon, Bausch & Lomb and Johnson &
7 Johnson to implement RPMs and “set floor prices for many of their products” reported
8 that “[t]he online channel [for contact lenses] is beginning to garner considerable
9 attention from [ECPs]. Many are seeing this channel as a threat to traditional stores,” said
10 Euromonitor [International, a market intelligence company]. “The pricing strategies on
11 the Internet usually mean a much cheaper price than that found in physical stores.”

12 **B. Prior Efforts to Restrain Price Competition for Contact Lenses**

13 70. Faced with competition by mass merchandisers and internet retailers, the
14 ECPs and contact lens manufacturers have repeatedly attempted to restrain price
15 competition for contact lenses sold by these alternative retailers.

16 71. In 1996, for example, consumers and 32 state Attorneys General filed
17 antitrust lawsuits against Bausch & Lomb, Johnson & Johnson, Alcon’s predecessor
18 (CIBA Vision) and the independent ECP’s trade association, American Optometric
19 Association (hereinafter, “the AOA”). *See In re Disposable Contact Lens Antitrust Litig.*,
20 170 F.R.D. 524 (M.D. Fla. 1996). These lawsuits alleged that the defendant contact lens
21 manufacturers and the AOA “conspired among themselves . . . to restrict the supply of
22 replacement contact lenses to alternative channels of distribution.” In that action,
23 plaintiffs alleged a classic group boycott, that the manufacturers and the AOA restricted
24 wholesale sales to “alternative suppliers” (e.g., mail order houses and pharmacies), and
25 that but-for this conspiracy, the plaintiffs would have paid lower prices for contact lenses.
26 *In re Disposable Contact Lens Antitrust Litig.*, MDL No. 1030, 2001 WL 493244 (M.D.
27 Fla. Feb. 8, 2001). Defendants moved for summary judgment in 2001, but the court
28 denied their motions. *Id.* Employing both a *per se* analysis and an alternative rule of

1 reason analysis, the court evaluated whether “a reasonable fact finder could conclude
2 from the evidence that the ECP community threatened to boycott any manufacturer who
3 did not implement an ECP-only distribution policy and that [d]efendant manufacturers
4 reached a tacit, if not express, agreement with the ECP community and each other to
5 restrict sales to alternate channels.” *Id.*, at *3. In concluding that the plaintiffs had
6 “proffered ample evidence” of a conspiracy to overcome summary judgment, the court
7 pointed to the following pieces of evidence, among others:

8 “A Vistakon [(now Johnson & Johnson)] memo discussing
9 the agenda for the AOA/Vistakon meeting that took place
10 January 15, 1992 stating, *inter alia*, ‘reduc[ing] the possible
11 trend away from prescribing Acuvue/Surevue as a result of
12 patients’[*sic*] buying lenses from outlets other than [*sic*] their
13 own practitioner.’” *Id.*, at *5.

13 “A deposition excerpt wherein Vistakon’s Consumer
14 Products Director was asked why Vistakon changed its
15 policy, stated ‘We couldn’t sell our products and doctors
16 were saying to sales reps, “I am losing patients; therefore, I
17 don’t want to put any more new patients in Acuvue because
18 they will walk out of my door.”’ *Id.*, at *6.

17 “A memo written by Vistakon’s D.R. Yadon, given to
18 Vistakon sales personnel which is entitled ‘Vistakon Gets
19 Tough on Diverters,’ discussing a ‘joint effort between the
20 manufacturers and professional organizations to address this
21 [diversion] problem.’” *Id.*, at *7.

21 “A Memo written by Craig Scott, Vistakon’s Vice President
22 for Marketing to Phillip Keefer discussing ‘our action plan’
23 regarding patient retention The stated objectives were to
24 assist ECPs in retaining patients and to maintain ECPs’
25 ‘positive attitude toward fitting new patients with Vistakon
26 products.’ The two strategies listed to further those ends
27 were to reduce the supply and the demand for diverted
28 products. The memo went on to discuss, *inter alia*,
disguising the prescription from the patient and also
discussed obtaining AOA feedback on the aforementioned
proposals.” *Id.*, at *10.

1 72. After the court denied summary judgment, and following several weeks of
2 trial, the parties settled. Bausch & Lomb paid \$8 million into the settlement fund,
3 offered a benefit package valued at \$121 each to the class members, and agreed to sell
4 its contact lenses to the alternative channels of distribution on a non-discriminatory
5 basis. Johnson & Johnson paid \$25 million into the settlement fund, offered a benefit
6 package valued at \$100 each to the class members, and agreed to sell its contact lenses
7 to the alternative channels of distribution on a non-discriminatory basis. The AOA
8 separately paid \$750,000 into the settlement fund, and also agreed as part of the
9 settlement that it would not restrict where consumers could obtain their replacement
10 lenses, nor oppose the release of contact lens prescriptions. The AOA also agreed not to
11 make claims that eye health was impacted by the retail channel from which the contact
12 lens was purchased.

13 73. While this settlement resolved the issues as to the discriminatory practices
14 of Johnson & Johnson, Bausch & Lomb, and Alcon's predecessor, other manufacturers
15 continued to engage in these anticompetitive pricing practices.

16 74. On September 15, 2006, the Commerce, Trade, and Consumer Protection
17 Subcommittee of the United States House Energy and Commerce Committee held a
18 hearing entitled *Contact Lens Sales: Is Market Regulation the Prescription?*
19 Subsequently, the manufacturer most visibly engaged in restrictive distribution policies
20 abandoned the practice, effectively making the need for the legislation moot.⁸

21 75. In 2009, the German Federal Cartel Office levied a fine of €11.5 million
22 against Alcon's predecessor (CIBA Vision) for fixing minimum resale prices of contact
23 lenses and restricting internet and wholesale prices for its contact lenses. As discussed in
24 ¶ 17, above, CIBA was found to have utilized an internal "price maintenance" program
25 through which it enforced minimum retail prices for contact lenses in violation of
26 European Community and German law.

27
28 ⁸ Zeider, note 6, *supra*, at p.5.

1 76. In 2014, China's National Development and Reform Commission
2 concluded that Defendants Johnson & Johnson and Bausch & Lomb had violated China's
3 Anti-Monopoly Law, finding that both Defendants had unlawfully adopted UPPs and
4 required retailers to adhere to RPM agreements, among other practices. China levied a
5 fine of 3.7 million Yuan against Bausch & Lomb, and a fine of 3.6 million Yuan against
6 Johnson & Johnson for these unlawful and anticompetitive practices.

7 77. Independent ECPs and the ABB have engaged in other practices to limit
8 retail price competition.

9 78. For example, before the Manufacturer Defendants implemented RPM
10 agreements, ABB not only facilitated the exchange of retail price information among
11 ECPs, but also urged ECPs to adopt uniform pricing. ABB publishes a quarterly pricing
12 survey, called the *Retail Price Monitor*, which calculates average prices for the biggest-
13 selling contact lens lines. The survey relies on the prices of more than 450 practitioners.
14 The *Retail Price Monitor* "makes it easy" for ECPs to set contact lens prices and
15 "maximize contact lens margins." ABB also operates yourlens.com, which independent
16 ECPs can use to order contact lenses online, and which provides suggested retail prices.
17 As stated in ABB's promotional materials, "Yourlens.com takes the guesswork out of
18 setting your online prices by utilizing our Retail Price Monitor suggested prices."

19 **C. Implementation of the RPM Agreements Through "UPPs"**

20 1. Actions by Manufacturer Defendants

21 79. Starting in June 2013, each of the Manufacturing Defendants implemented
22 RPM policies for their contact lens products, and also began enforcing those RPMs to
23 prohibit price discounting in the United States contact lens market.

24 80. Alcon. Alcon was the first of the Manufacturer Defendants to announce a
25 RPM policy. Although Alcon initially announced a UPP for a single product line, today,
26 Alcon has RPM policies on four of its contact lens brands. In June 2013, Alcon
27 implemented an RPM policy for its DAILIES TOTAL1® contact lenses. In January
28 2014, Alcon extended the policy to three other lines of contact lenses: DAILIES®

1 AquaComfort Plus® Multifocal and DAILIES® AquaComfort Plus® Toric contact
2 lenses. In June 2014, Alcon further extended its RPM policy to its AIR OPTIX®
3 COLORS contact lenses. Alcon has sought the written consent of ECPs to its UPPs.

4 81. Bausch & Lomb. In February 2014, Bausch & Lomb implemented an RPM
5 policy for its ULTRA™ line of contact lenses.

6 82. Johnson & Johnson. In June 2014, Johnson & Johnson announced RPM
7 policies for all of its major contact lens lines. At the same time, Johnson & Johnson
8 announced that it would discontinue contact lens lines that would not be subject to a UPP.
9 The contact lens lines subject to an RPM policy are as follow: 1-Day ACUVUE®
10 MOIST®, 1-DAY ACUVUE® MOIST® for ASTIGMATISM, 1-Day ACUVUE®
11 TruEye®, ACUVUE® OASYS® with HYDRACLEAR®, ACUVUE® OASYS® for
12 ASTIGMATISM, and ACUVUE® OASYS® for PRESBYOPIA. These policies became
13 effective on July 1, 2014 for a six-month supply of ACUVUE® OASYS® with
14 HYDRACLEAR® and on August 1, 2014 for the remaining contact lens lines.

15 83. According to Johnson & Johnson, its RPM policies will impact roughly
16 9.66 million consumers, or 69% of the 14 million consumers of Johnson & Johnson
17 contact lenses.

18 84. Laura Angelini (“Angelini”), President of Johnson & Johnson, announced
19 Johnson & Johnson’s RPM policy in a written communication to ECPs on June 24, 2014.
20 A July 2, 2014 report in the trade magazine, *Vision Monday*’s weekly e-newsletter,
21 *VMail*, described the announcement as follows:

22 Last week, in a letter addressed to [ECPs] dated June 24,
23 2014, Laura Angelini, president, Johnson & Johnson Vision
24 Care – North America, announced the company’s launch of
25 its “Enterprise Strategy” and “roadmap for the future,” part of
26 which includes resetting the price of specific contact lens
products in the U.S. according to a new “unilateral pricing
policy.”

27 Now, all wholesale customers will receive the same pricing
28 for certain existing contact lenses already offered in the
company’s portfolio, Angelini told VMail. The policy

1 applies to the company's number one reusable, Acuvue
2 Oasys, its number one disposable, Acuvue Moist, and its 1-
3 Day Acuvue TruEye, which Angelini described as the
4 company's "strategic brands." The new policy also sets
5 minimum retail pricing, which has been communicated to all
6 its customers. In addition, manufacturer's rebates have been
7 eliminated by building those discounts into the retail price of
8 these legacy products rather than requiring customers to send
9 in proof of purchase to obtain rebates.

10 Angelini described this new pricing as a "holistic
11 multifaceted pricing policy to refocus the conversation
12 between the doctor and the patient on eye health and product
13 performance rather than price. This gives the optometrist the
14 ability to improve his or her capture rate in the office," she
15 told VMail. '*Now the patient has no incentive to shop
16 around.*' (Bold, italics added).

17 The letter to [ECPs] described the three areas in which the
18 company would "demonstrate support for the profession and
19 the professional – Prescribers, Portfolio and Preferred
20 Partners." Also in June 2014, Johnson & Johnson announced
21 that it would discontinue certain sub-brands of ACUVUE®
22 ADVANCE®, a product line not subject to MRPM policies,
23 on August 1, 2014, and would eliminate the other non-RPM
24 lines on March 31, 2015. A policy letter prepared by Johnson
25 & Johnson and disseminated to its customers made it clear
26 that retailers cannot sell their contact lenses below a certain
27 price. And if they do, their supply will be cut off."

28 85. Cooper Vision. In September 2014, Cooper Vision formally announced an
RPM policy for its Clariti contact lens line, which it acquired through its purchase of
Sauflon, another contact lens manufacturer, for \$1.2 billion in August 2014. In January
2014, Sauflon had instituted a UPP on the Clariti line. In its September 2014
announcement, Cooper Vision stated it intended to maintain the UPP after it purchased
Sauflon.

86. Under the Manufacturer Defendants' RPM policies, contact lens retailers
are not allowed to offer discounts on these lines where the discounted price would be
below the RPM policy price. As Dr. Milicent Knight ("Knight"), head of Professional

1 Affairs for Johnson & Johnson, said at the July 2014 United States Senate Hearing
2 described in ¶¶9 and 50, above, “[r]etailers maintain the right to offer store coupons,
3 rebates or promotions (discounts) under the ACUVUE ® Unilateral Pricing Policy
4 (UPP), provided that the final net price for the product covered by the UPP remains at or
5 above the UPP Minimum Retail Price, after discounts are applied.”

6 87. The Manufacturer Defendants’ RPM policies are enforced by threats to cut
7 off supply to retailers that refuse to observe minimum price levels and through other
8 coercive means. As Knight also explained to the United States Senate:

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

24 88. Johnson & Johnson expanded on its enforcement measures in a November
25 5, 2014 circular sent to its customers about its UPPs. That circular stated “[i]f you sell
26 product below the UPP price, [Johnson & Johnson] and its authorized distributors [such
27 as ABB] will refuse to accept new orders from you. In addition, [Johnson & Johnson]
28 will exercise its right to repurchase your current inventory of products subject to the UPP
price.”

89. In a written statement presented at the July 2014 United States Senate
Hearing, Alcon similarly made clear that it would enforce RPMs by interrupting supply
of contact lens products covered by its UPPs:

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

11 90. Bausch & Lomb made a similar point in announcing its UPP:

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

19 91. The Manufacturer Defendants actually carry out these threats as to the
20 contact lens lines where the ECP or retailer sells below the UPP.

21 92. In an article that appeared in the *Review of Cornea and Contact Lenses* in
22 June 2014, Gary Gerber, an independent ECP, stated the following with respect to RPM
23 policies implemented by the Manufacturer Defendants:

24 “The [UPP] policy applies to anyone selling the lenses,
25 regardless of mode of practice or amount of lenses they buy
26 from the manufacturer. For example, Dr. Small, who buys
27 three boxes per year from Company X, and Dr. Large, who
28 buys 1,000 boxes per year from the same company, are both
required to sell the lenses for the same minimum price.

* * *

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

1
2 93. Defendant ABB, through Chief Executive Officer, Angel Alvarez, also has
3 stated publicly that the Manufacturer Defendants are very serious about policing their
4 respective UPPs—which Alvarez describes as a “Fundamental Shift” in the optical
5 industry—and that he knew firsthand that some ECPs had been given a “warning” for
6 violating them. Alvarez said manufacturers are “holding the gun” and are willing to lose
7 business in order to police their UPPs.

8 94. James Murphy, Vice President and General Manager of Defendant Alcon,
9 also has publicly described the company’s efforts to enforce the UPPs. After a third-
10 party auditor confirms a violation, according to Murphy, the retailer is communicated
11 with and “asked to make a correction” within five days. If the violator refuses to increase
12 its price, Alcon’s policy and practice is to punish the violation by prospectively denying
13 the violator access to the product for up to one year. The clear implication of Alcon’s
14 warning system is that a retailer who has sold contact lenses below the RPM can regain
15 access to the product by agreeing to abide by the RPM.

16 2. ABB and Independent ECPs Colluded With the Manufacturer
17 Defendants to Develop, Agree and Implement RPMs

18 95. Independent ECPs colluded with the Manufacturer Defendants in
19 developing the RPM agreements. Independent ECPs did this in order to increase profit
20 margins, combat price discounts from online retailers and big box stores, and, eventually,
21 eliminate competition at the retail level altogether. Once that competition is eliminated,
22 independent ECPs will be able to charge whatever price they desire for contact lenses, as
23 the UPPs are a *minimum* rather than a *maximum* resale price. The Manufacturer
24 Defendants agreed to collude with independent ECPs because a prescription from an ECP
25 is required for the Manufacturer Defendants to sell their contact lens lines.

26 96. Robert Atkinson (“Atkinson”), President of Information Technology and
27 Innovation Foundation, testified at length on the collusion with ECPs at the July 2014
28 Senate Hearing, described in ¶ 9 above (footnotes omitted):

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

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

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

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

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

Finally, he states what is obvious to everyone in the
industry[.] “Finally, the actual price mandated by UPP has so
far been higher than lenses that do not have a UPP. This has
afforded higher profit margins and created a new sense of
excitement surrounding contact lenses.” Likewise, in an
article in *Review of Optometric Business*, Paul Karpecki, OD,

1 FAAO writes in favor of UPP, stating “One other exciting
2 development: Independent practice optometry becomes
3 reinvigorated with contact lens prescribing as a profitable
4 specialty and practice differentiator.”⁹

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

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

⁹ In his testimony before the United States Senate in July 2014, Mr. Zeidner of 1-800-Contacts also referenced Gerber’s article on these points. Zeidner, note 6, *supra*, at pp. 8-9.

1 97. ECPs have consistently spoken out in support of the RPM policies, touting
2 their benefits both to ECPs and to the Manufacturer Defendants. Some of these ECPs
3 are actually employed by the Manufacturer Defendants. Barry Eiden, OD, for example,
4 told an audience at the Global Contact Lens Forum that the new pricing policies
5 represented “one of the monumental changes in contact lenses in my career.” Eiden is an
6 independent ECP as well as a paid consultant for Manufacturer Defendants Alcon,
7 Bausch & Lomb, and Cooper Vision. He also is the past Chair of the Contact Lens and
8 Cornea Section of the AOA.

9 98. Other ECPs paid by the Manufacturer Defendants have also lent support to
10 the Defendants’ UPPs. For example, Kerry Kordet Giedd, an OD referenced in Mr.
11 Atkinson’s testimony at the Senate Hearing (cited above in ¶ 96), pledged her support
12 for the UPPs in industry publications at the same time that she was being paid as a
13 consultant by Alcon and Cooper Vision. Similarly, David L. Kading, OD, an ECP who
14 consults for Alcon, stated that the new pricing policies are “fantastic” because they set
15 “an even playing field and it also does not support companies who want to price cut their
16 products in an effort to increase utilization.” Kading continued, “[a]s a doctor, it allows
17 me to let patients know they won’t find the lenses cheaper anywhere else.”

18 99. Other ECPs and their agents and trade associations – including ABB, the
19 AOA, and state-level optometric associations – also have enthusiastically endorsed and
20 supported the UPPs, recognizing that they signal an end to retail price competition for
21 contact lenses. A poll on Healio.com/Optometry posted after the July 2014 Senate
22 Hearing (cited in ¶ 9, above) surveyed independent ECPs about the RPMs. Of 204 ECP
23 respondents, 85% said they supported the policies. Another poll, conducted by ABB,
24 similarly found high approval by ECPs of the RPM policies. According to ABB’s Angel
25 Alvarez, 82% of the hundreds of doctors surveyed have voiced support for RPMs.

26 100. The AOA has consistently supported the Manufacturer Defendants’ UPPs,
27 as well. Indeed, David Cockrell, President of the AOA, testified in support of the
28 Manufacturer Defendants’ actions at the Senate Hearing described in ¶ 9, above. The

1 AOA also submitted written comments in support of the Manufacturer Defendants. The
2 AOA and state associations of optometrists have also been active in opposing legislative
3 efforts in certain states to condemn the Defendant Manufacturers' use of UPPs.

4 101. Defendant Johnson & Johnson has publicly acknowledged the role that
5 ECPs played in the formulation of its UPPs. The company's president, Laura Angelini,
6 said publicly that Johnson & Johnson was motivated to implement its RPM policy based
7 on feedback received from ECPs regarding price erosion. In the June 24, 2014 letter
8 addressed to ECPs that is mentioned in ¶ 84, above, Angelini explained:

9
10 When I last communicated with you about six months ago, I
11 shared that Johnson & Johnson Vision Care, Inc., North
12 America (JJVC), was in the process of carefully assessing our
13 overall strategy so that we could best meet the needs of our
14 customers, and asked for your feedback on what we were
15 doing well and areas where we could improve. Thanks to
16 your open and candid responses, we were able to define our
17 strategy and implement the changes and actions you told us
18 were needed You, the [ECP] who prescribes our
19 products, have our unwavering support for your clinical,
20 business, and patient needs To further demonstrate our
21 commitment to prescribers, beginning this week, many of you
22 will begin to hear from your JJVC Sales Representative about
23 our new pricing strategy within the United States. This
24 includes a Unilateral Pricing Policy (UPP) We believe
25 the multifaceted nature of this new pricing strategy and the
26 variety of elements that comprise the program will allow you
27 to refocus the critical doctor/patient conversation on eye
28 health and product performance, rather than cost. Also, by
removing the complexity of rebates and building these
savings into our new pricing, we believe we will be able to
reach more patients with instant savings, while providing a
simpler approach for everyone.

24 102. In a follow-up letter sent by Angelini to ECPs on or about December 17,
25 2014, the Johnson & Johnson president confirmed that the company had, in the preceding
26 year, extended an invitation to ECPs to "share your thoughts" on how Johnson & Johnson
27 "could build and enhance our partnerships to help you meet the evolving needs of your
28 patients and practices. Since then, your open and candid feedback *was instrumental* in

1 helping us create Our Enterprise Strategy,” which included the “new pricing strategy”
2 evidenced by Johnson & Johnson’s RPM policy. (Bold, italics added). Angelini
3 welcomed continued feedback from ECPs, promising that they “can reach me and my
4 leadership team at any time”

5 103. Robert Ferrigno, President North America for Cooper Vision, made a
6 similar point in connection with Cooper Vision’s adoption of a RPM policy on one of its
7 product lines, saying his company held twelve focus groups and met with 100 ECPs
8 before acting.

9 104. Additionally, one ECP appearing on a September 3, 2014 “Power Hour”
10 podcast headed by Gary Gerber OC (author of the *Review of Cornea and Contact Lenses*
11 article described in ¶ 92 above), commented that Manufacturer Defendants’
12 representatives actively counsel ECPs on how to sell contract lenses under the RPM
13 policies. He stated: “You don’t have to push the annual supply, because it doesn’t matter
14 – they [the parties] are going to spend the same amount of money, whether they do it in
15 six month increments or two month increments.” As the ECP explained, “[s]o, they kind
16 of encourage you to get one box out of each eye and go from there.” Johnson & Johnson
17 has also been willing to negotiate the particulars of how large customers implement its
18 RPM policies, as reflected in the complaint filed in the *Costco* Action.

19 105. ECPs also have been instrumental in helping the Manufacturing Defendants
20 police the use of UPPs. The page “ODs on Facebook,” for example, gives instances of
21 ECPs informing defendant Alcon’s sales representatives about potential violations and
22 requesting them to take action.

23 106. Defendant ABB also played a principal role, on behalf of ECPs, to cause
24 the Manufacturer Defendants to develop and implement the UPPs. As early as February
25 2013—before any of the Manufacturer Defendants had instituted UPPs—ABB’s Angel
26 Alvarez stated publicly that ABB’s focus was to be “aligned with manufacturers.” A
27 subsequent press statement by Alvarez made it quite clear that ABB played an integral
28 role in developing the RPMs:

1 Angel Alvarez, chief executive officer and founder of ABB
2 Optical Group, issued a statement to PCON regarding the
3 company's stance on UPPs.

4 "*ABB has been working closely with manufacturers to*
5 *develop [RPMs],* which we believe enable a better overall
6 patient experience by supporting competitiveness of
7 prescribing practitioners," Alvarez said. "Contact lens fitters
8 have always been and will always be a focus of our
9 organization. We do everything possible to help them
10 succeed." (Bold, italics added).

11 107. Additionally, Defendant ABB issues publications that allow independent
12 ECPs (and the Manufacturer Defendants) to monitor the pricing of contact lenses in order
13 to ensure that prices set pursuant to RPM agreements are being followed. It publishes a
14 quarterly *Retail Price Monitor* that facilitates this goal. ABB describes this publication as
15 follows on its website: "[t]he ABB OPTICAL GROUP Retail Price Monitor provides
16 [Independent ECPs] with the retail pricing structure of brand name lenses charged by
17 private practitioners and leading online retailers The Retail Price Monitor is a
18 benefit to ECPs looking to consolidate purchasing and maximize margins." As ABB's
19 Angel Alvarez stated in a press release issued in August 2014, "[o]ur Q3 Retail Price
20 Monitor that will be mailed with our Profit Advisor newsletter will show ECP's that they
21 can continue to have a retail strategy by promoting annual supplies and staying within the
22 limits of UPP."

23 108. As one ECP put it, "[o]ne of the biggest benefits to practitioners of UPP is
24 that it instantly creates a perfectly level playing field; volume discounts for large
25 practices and online retailers go away." This same commentator also agreed that the
26 Manufacturer Defendants "also benefit from UPP because retail price erosion can be
27 stopped."

28 109. The 2014 third quarter issue of the ABB publication *Profit Advisor*, which
was sent to independent ECPs across the country, stated that the RPM policies were one

1 of the first “business-focused shifts” in the industry. It went on to advise independent
2 ECPs to charge more than the UPP:

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

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

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

19 As a result of UPP, I believe that the prescribing practitioner
20 will be able to obtain a higher percentage of patient revenue.
21 (Bold, italics added).

22 110. ABB’s Angel Alvarez repeated his advice that Independent ECPs charge
23 their customers more than the RPM price in a September 3, 2014 broadcast of the “Power
24 Hour” radio hosted by Gary Gerber OD (the author of the Review of Cornea and Contact
25 Lens article cited in ¶ 92, above), saying that ECPs should try to reach a gross profit
26 margin of 48%-49%. Gerber concurred, saying that ECPs “should be charging more
27 [than the RPM] *because they can.*” (Bold, italics added).

1 3. The Manufacturer Defendants Jointly Agreed to Implement RPMs

2 111. There is substantial evidence showing that the Manufacturer Defendants
3 agreed with the ECPs and their agents, including Defendant ABB, to enter into RPM
4 agreements for their contact lens products. There also is substantial evidence showing
5 that the Manufacturer Defendants agreed with one another to enter into RPM agreements.
6 This evidence has led the American Antitrust Institute (“AAI”) to urge the FTC and the
7 Department of Justice “to investigate the minimum price policies in the contact lens
8 industry...because of the evident harm to consumers,”¹⁰ and includes the following.

9 112. Industry Structure Conducive to Collusion. As alleged, above, the four
10 Manufacturer Defendants—Alcon, Bausch & Lomb, Cooper Vision and Johnson &
11 Johnson—control 97% of the market for contact lenses. Contact lenses are a
12 commoditized product, and the contact lens industry is a mature one, with high barriers to
13 entry.

14 113. Opportunities to Conspire. Some Manufacturer Defendants were
15 members of the Contact Lens Manufacturers’ Association (“CLMA”) and were the *only*
16 members of the Contact Lens Institute (“CLI”), the activities of which are described
17 below. As members of this Association, the Manufacturer Defendants had regular
18 opportunities to meet, exchange information, and signal intentions to one another. The
19 CLMA hosts an annual meeting, publishes bi-weekly presidential updates to its members,
20 and regularly publishes a newsletter.

21 114. Information Exchanges. The exchange among competitors of competitively
22 sensitive, non-public information can be indicative of a price-fixing conspiracy, and this
23 conduct itself can violate the antitrust laws. Such exchanges occurred in the context of
24 the CLI. According to the CLI’s website, it was created to “represent[] the interests of its
25 members” CLI has no members other than the Manufacturer Defendants. Its board
26 of directors consists of one executive from each of the Manufacturer Defendants. CLI’s

27
28 ¹⁰ Letter to FTC Chair Edith Ramirez and Assistant Attorney General William J. Baer, from Albert Foer, AAI President, and Sandeep Vaheesan, AAI Special Counsel (Oct. 24, 2014), at p.2.

1 Chair is Laura Angelini, President of Defendant Johnson & Johnson. CLI's Vice-Chair is
2 Andrew Sedgwick, Vice-President of Global Commercial Strategy & Business
3 Development for Defendant Cooper Vision. CLI's Treasurer is Richard Weisbarth,
4 Vice-President of Professional Affairs for Defendant Alcon. And, CLI's Director is
5 Joseph Barr, Vice-President of Clinical and Medical Affairs for Defendant Bausch &
6 Lomb. Contemporaneously with the Manufacturer Defendants' adoption of UPPs, the
7 CLI "newly created" a committee "to develop a collaborative approach by the member
8 companies to help inspire ECPs and their staff to proactively pursue opportunities to fit
9 CLs [contact lenses] and appropriately follow up so that their patients and practice will
10 benefit." The CLI's website further notes that "[t]he members of the CLI, together with
11 other participating companies participate in a quarterly statistical program to track
12 manufacturer shipment data of Contact Lens and Lens Careproducts which is managed by
13 Veris Consulting ["Veris"]. The program's objective is to provide participants with
14 accurate and timely consolidated market data Each participating company in the CLI
15 Statistical Program has a representative on the CLI Global Statistical Task Force."
16 According to Veris' website, the program established by it for the CLI "track[s] sales at a
17 detailed level worldwide" and "is more valuable than other sources of market data
18 because sales are reported directly from manufacturers." Veris states that its work for the
19 CLI "is the only program where the data is reviewed annually by Veris to ensure
20 accuracy. Veris implemented this internal review process to reassure participants that
21 they could be confident in the data." Indeed, Veris requests that "the finance department
22 at each manufacturer's headquarters [pull sales information and revenue data]
23 directly from their internal system at the model, or SKU level." The resulting low margin
24 of error "is extremely important to participants since they use this data for strategic
25 planning" and is reported to the Manufacturer Defendants on a quarterly and annual
26 basis. According to its website, Karen Eftekari, the person at Veris who is the Senior
27 Manager for this work, "also works with member companies [of CLI] such as Johnson &
28 Johnson and Bausch & Lomb performing high-level data analysis and designing custom

1 reporting tools and dashboards.” The CLI functions as one of the vehicles through which
2 the Manufacturer Defendants collude to enforce and monitor their respective RPMs. The
3 CLI price monitoring program allows the Manufacturer Defendants to keep their fellow
4 manufacturing in line and prevents cheating among the group.

5 115. ABB’s and Independent ECPs’ Active Conduct in Developing and
6 Implementing the RPMs. The Manufacturer Defendants’ close relationships with ECPs
7 and with a principal ECP representative, Defendant ABB, enabled the Manufacturer
8 Defendants to collaborate with the ECPs and ultimately with each other to develop the
9 RPM policies. As noted above, ABB has stated publicly that it “work[ed] closely with
10 manufacturers to develop unilateral pricing policies.” Similarly, the Manufacturer
11 Defendants have stated that they collaborated with ECPs to develop the policies. Johnson
12 & Johnson, for example, in its letter to ECPs announcing its RPM policy, stated that it
13 developed the policy in response to ECP “feedback,” that ECPs were “instrumental” in
14 formulating Johnson & Johnson’s policy, and that Johnson & Johnson’s implementation
15 of that policy “further demonstrates support for the profession and the professional.” As
16 also noted above, Cooper Vision has admitted that it decided to use a UPP on its Clariti
17 line of contact lenses in direct response to feedback from Independent ECPs. During this
18 collaborative process, on information and belief, ABB and the ECPs communicated to
19 each Manufacturer Defendant its competitors’ position on RPM policies.

20 116. Acts Contrary to Economic Self-Interest. The acts of the Manufacturer
21 Defendants in adopting RPM policies were contrary to each one’s independent economic
22 self-interest. In a candid analyst presentation made on September 11, 2014, Cooper
23 Vision admitted the “Potential Downsides/Challenges” of adopting RPM policies
24 included: (a) “Enforcement can be challenging”; (b) “Consumer activism may generate
25 legislative backlash and negative public perceptions”; and (c) “May alienate larger
26 customers who want greater pricing freedom and cross marketing.” Yet only days later, it
27 adopted an RPM for its new flagship Clariti line of contact lenses.

28 117. The other Manufacturer Defendants faced similar adverse impacts, as

1 reflected in the events of 2014 and early 2015, which included complaints to the FTC, the
2 July 2014 Senate Hearing (described in ¶ 50), a publicly-revealed investigation by the
3 New York Attorney General into Alcon's adoption of RPM policies, negative consumer
4 backlash, and proposed legislation in various state legislatures.

5 118. Despite these reasons not to implement RPM policies, all four
6 Manufacturer Defendants proceeded to do so. Another consequence in 2014 of doing so
7 was slower sales growth, which was certainly contrary to their individual economic self-
8 interests. One industry analyst has noted that United States contact lens sales growth only
9 increased sluggishly by 2% through the third quarter of 2014, a development that it
10 attributed to the implementation of RPM policies.

11 119. Further demonstrating that the Manufacturer Defendants implemented
12 RPM policies contrary to their individual economic self-interest, Dean Butler, the
13 founder of LensCrafter, has stated that consumers purchase more eye care products –
14 including contact lenses – when shopping online. Similarly, as noted above, ABB's
15 Angel Alvarez has said publicly that the Manufacturer Defendants are willing to lose
16 business in order to enforce their RPM policies, something that is not in their independent
17 economic self-interest.

18 120. Similarly, it is contrary to the economic self-interest of any one of the
19 Manufacturer Defendants to attempt to implement an RPM policy without assurance that
20 its competitors would follow suit. Discounters, such as Costco or Wal-Mart, collectively
21 possess sufficient buying power in the contact lens market that no Manufacturer
22 Defendant would be willing to forego those sales or alienate those customers by acting
23 alone. If only some of the Manufacturer Defendants had adopted RPM policies, these
24 discounters could have shifted market share to those manufacturers that did not dictate a
25 minimum retail price. In fact, after all of Manufacturer Defendants except for Cooper
26 Vision had implemented RPM policies, Costco sent a letter to its customers informing
27 them of the other Manufacturer Defendants' RPM policies and urging them to switch to
28 Cooper Vision, only to see Cooper Vision soon thereafter implement an RPM on its

1 flagship Clariti line.

2 121. Defendants' asserted claims about patient risk or safety have been
3 withdrawn and are pretextual in any event—facts that support an inference of
4 conspiratorial conduct. As reported by *the Salt Lake Tribune*, during testimony before
5 the Utah Senate Business & Labor Committee at a hearing on February 17, 2015, Carol
6 Alexander, a Director of Professional Affairs at Defendant Johnson & Johnson, candidly
7 *admitted* that the company's adoption of RPMs was not motivated by concerns about
8 patient risk or harm

9 122. Motive to Conspire, Including Assurances that Competitors Will Also Act.

10 Each of the Manufacturer Defendants had a motive to maintain high retail prices for its
11 contact lenses. The Manufacturer Defendants were concerned that low retail prices would
12 put pressure on them to lower wholesale prices. In addition, to encourage Independent
13 ECPs to prescribe their contact lenses, the Manufacturer Defendants needed to keep retail
14 prices high. Defendant ABB, the Independent ECPs agent: (a) is the largest distributor of
15 contact lenses in the United States, (b) sells the Manufacturer Defendants' contact lenses
16 to two-thirds of ECPs, and (c) has stated publicly that it “worked with” the Manufacturer
17 Defendants to develop and implement the RPMs. Thus, ABB was in a position to
18 communicate to each Manufacturer Defendant before it implemented an RPM that its
19 competitors also intended to do so.

20 123. Abrupt, Near-Contemporaneous, and Fundamental Shift in Pricing Policies.

21 Before June 2013, none of the Manufacturer Defendants restricted the minimum retail
22 price of its contact lenses. Within a relatively short period of time after Alcon introduced
23 its first RPM policy in June 2013, and touted RPMs as a “Fundamental Shift” in the
24 contact lens market, all of its three main competitors instituted RPMs for their most
25 popular contact lens product lines. This abrupt shift in competitive pricing restrictions by
26 all four Manufacturer Defendants is contrary to the economic interests of any one
27 manufacturer defendant, as described above, and violates the spirit of the FCLCA to
28 “promote[] competition, consumer choice, and lower prices by extending to contact lens

1 wearers the same automatic right to copies of their own prescriptions....” As noted
2 above, contact lenses are the *only* prescription medical device sold in the United States
3 pursuant to an RPM policy.

4 124. Past Conspiratorial Conduct. The Manufacturer Defendants and
5 independent ECPs have also demonstrated a past propensity to conspire against
6 discounting retailers of contact lenses. This history of Defendants’ conspiratorial conduct
7 and prior unlawful restraints on competition in the contact lens market is described in
8 paragraphs 70 through 76 of this Complaint. These unlawful actions by Defendants have
9 resulted in multi-million dollar consumer antitrust settlements and the imposition of
10 substantial fines by government regulators.

11 4. The Manufacturer Defendants RPM Policies Harm Competition

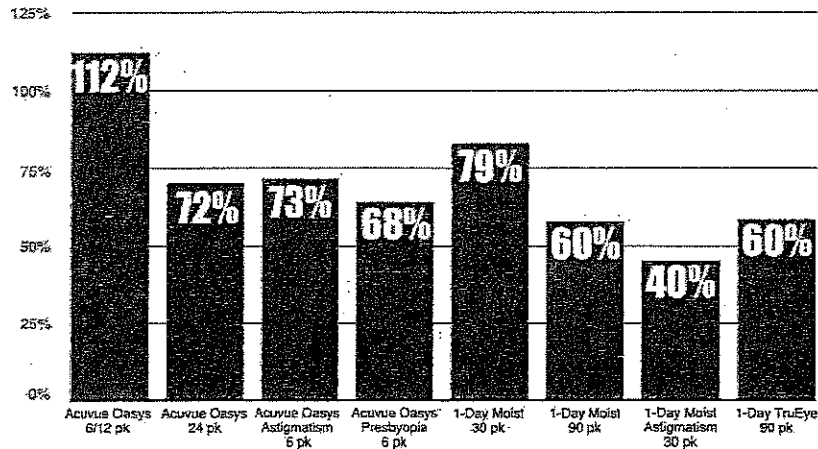
12 123. Defendants’ agreement to implement RPMs has harmed and continues to
13 harm competition, by increasing prices for the contact lenses made subject to them.
14 Consumers ultimately pay the economic cost of this wrongful conduct in the form of
15 higher prices for contact lenses affected by UPPs.

16 124. At the July 2014 Senate Hearing described in ¶ 9, above, Zeidner of 1-800-
17 Contacts presented the following graphic showing a range of a 40% to 112% difference
18 between the lowest internet price for Johnson & Johnson’s affected products and its UPP
19 price.

20 ///

21 ///

Percentage Increase from Lowest Internet Price to J&J's RPM Price



125. George Slover, Senior Policy Counsel for the Consumers' Union, and Atkinson gave similar testimony at the Senate Hearing.

126. Zeidner noted that as of July 2014, RPM policies encompassed 40% of the market and predicted 80% coverage by the end of 2015, especially with ECPs writing prescriptions for contact lenses subject to the policy. As noted above, since his testimony at the Senate Hearing, Cooper Vision adopted an RPM policy on one of its contact lens lines.

127. Similar testimony was given by Jay Magure, the Vice-President of Governmental Affairs for 1-800-Contacts, at the aforementioned February 17, 2015 hearing before the Utah Senate Business & Labor Committee. He noted that because of Johnson & Johnson's adoption of UPPs, 1-800-Contacts was compelled to eliminate rebates of between \$15 and \$100 on numerous Johnson & Johnson ACUVUE® products. The result was that it effectively was forced to raise prices on the vast majority of the contact lenses it sells that are subject to UPPs. In a January 24, 2015 article, Oregonlive.com corroborated this point with a real-world example, noting how 1-800-Contacts sold a 90-lens box of Johnson & Johnson ACUVUE® MOIST® contact lenses a year ago at a price as low as \$57.49, but the same product is now sold by it for a low of

1 \$63.74. In his aforementioned testimony, Magure noted that a survey of 780 doctors
2 conducted by 1-800-Contacts both before and after Johnson & Johnson's implementation
3 of UPPs confirmed that prices for Johnson & Johnson contact lenses subject to such
4 UPPs increased by 57% when compared to pre-UPP levels.

5 128. Internet retailers have also been quite plain about the anticompetitive price
6 impacts of the UPPs. On its firm website, 1-800-Contacts posted this response to a
7 consumer question about why the company no longer beats the prices of others for
8 contact lenses by 2% and why it charges the same as doctors:

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

15 129. The RPMs' deleterious effect on price competition is similarly described on
16 the website of LensDiscounters:

17 UPP (Unilateral Pricing Policy) is a strategy used by certain
18 contact lens manufacturers, requiring retailers such as
19 ourselves to price their products at a manufacturer's
20 specified minimum price. Retailers who do not comply will
no longer be supplied by the manufacturer Under the
21 guise of price equality, manufacturers want to give eye care
22 practitioners incentive to prescribe their products vs their
competitor's products on the basis that the patient will be
23 more likely to buy directly from the doctor if the prices for
that contact lens are the same online or elsewhere.

24 Initially, this might seem like a fair practice, but it prevents
25 free market pricing – and in the end, results in higher pricing
to you, the end consumer At LensDiscounters.com, we
26 strive to provide a fair and transparent shopping experience
to all of our customers and do not believe price controls are
27 in the best interest of our customers. We will do what we can
28 to fight these pricing policies and keep eye care affordable

1 for our customers. We will continue to keep you informed
2 and will have more information about UPP soon.

3 130. Likewise, 1-800-GET-LENS told its customers that “Bausch & Lomb has
4 implemented a Unilateral Pricing Policy (UPP) on all retailers, both online and bricks and
5 mortar. The UPP prevents anyone from selling Bausch & Lomb products below a certain
6 price.”

7 131. In mid-2014, warehouse club retailer, Costco, conducted an analysis of its
8 prices for Alcon’s DAILIES TOTAL1 contact lenses before and after Alcon implemented
9 RPM. Costco concluded that the price for a 90-lens pack had increased 10.1%, from
10 \$85.00 to \$95.00. It also examined Johnson & Johnson prices and concluded that Johnson
11 & Johnson’s RPM policy required Costco to raise its prices an average of 26%.

12 132. At a January 29, 2015 hearing before the Mississippi Senate Public Health
13 & Welfare Committee, 1-800-Contacts presented econometric evidence that the use of
14 RPM policies going forward could cost contact lens consumers as much as \$2 billion
15 annually.

16 133. On February 16, 2015, a representative for Costco testified before the
17 Washington Senate Health Care Committee that the Manufacturer Defendants’
18 implementation of RPMs has caused Costco to raise prices on affected contact lenses by
19 as much as 35%.

20 134. Defendants’ conspiracy has thus caused Plaintiffs and members of the Class
21 to pay supra-competitive prices for contact lenses and has substantially eliminated price
22 competition in the market.

23 5. The RPMs Have No Procompetitive Purpose or Justification

24 135. Federal antitrust claims arising from vertical RPM agreements are
25 examined under a rule of reason analysis. *See Leegin Creative Leather Products, Inc. v.*
26 *PSKS, Inc.*, 551 U.S. 877 (2007) (“*Leegin*”). The RPMs at issue in this action are
27 anticompetitive and unlawful under governing antitrust standards.

28 136. First, Plaintiffs do not allege merely that the Manufacturer Defendants
entered into vertical RPM policies with their retailers. Instead, Plaintiffs allege that the

1 Manufacturer Defendants, in addition to conspiring with the ECPs and ABB, also
2 conspired with each other in a horizontal, *per se* illegal agreement in restraint of trade.
3 Plaintiffs also allege that these policies were the subject of agreements among the
4 Defendant Manufacturers and Independent ECPs, effectuated through adherence to the
5 anticompetitive scheme in place of price competition for market share.

6 137. Second, to the extent Plaintiffs' claims challenging each Manufacturer
7 Defendant's RPM policy are examined separate and apart from the agreement among the
8 Manufacturer Defendants, the RPMs at issue also are unlawful under a rule of reason
9 analysis. In particular, above, all four Manufacturer Defendants—Alcon, Bausch &
10 Lomb, Cooper Vision and Johnson & Johnson—have adopted RPM policies.
11 Collectively, the Manufacturer Defendants control 97% of the domestic contact lens
12 market (by revenue). Independent ECPs also prescribe the majority of contact lenses sold
13 in the United States. Under *Leegin*, these facts alone are sufficient to justify stricter
14 scrutiny.

15 138. Another factor to be considered under *Leegin* is whether retailers played a
16 role in instigating RPM programs. *Id* at 897-98. This factor also is present here. As
17 alleged above, Independent ECPs and Defendant ABB played significant roles in
18 instigating contact lens manufacturers to adopt RPM policies. ABB worked with all four
19 Manufacturer Defendants to impose the RPM policies. As the dominant distributor in the
20 market, Defendant ABB has the power to foreclose price competition. Additionally,
21 Johnson & Johnson has stated that it developed its RPM policy after listening to ECPs'
22 "feedback" and they were "instrumental" in the creation of that policy. Cooper Vision
23 has also admitted as much. This is consistent with Independent ECPs' other conduct
24 aimed at keeping out low-cost competitors, including their campaign in the 1980s and
25 1990s to boycott mail-order contact lens suppliers, their public opposition to sales of
26 contact lenses by non-traditional retailers (such as Costco), and their resistance to giving
27 patients their prescriptions, as required by federal law.

28

1 139. Nor do the RPM agreements have any procompetitive justification. These
2 policies do not prevent free-riding—the concept that “one benefits at no cost from what
3 another has paid for”—because the ECP is compensated for his or her services (the eye
4 examination), even if the patient fills the prescription elsewhere. As discussed above,
5 moreover, concerns about harm to patients from buying contact lenses from other than
6 ECPs are pretextual and do not justify the anticompetitive conduct claimed here.
7 Furthermore, the Manufacturer Defendants’ RPM policies do not encourage ECPs to
8 focus more on patient needs instead of contact lens costs. Instead, they do just the
9 opposite; as several ECPs have said, a “savvy” ECP will always prescribe a contact lens
10 subject to a RPM agreement over another one, because the ECP will earn a greater profit.

11 **CAUSES OF ACTION**

12 **FIRST CAUSE OF ACTION**

13 **VIOLATIONS OF SHERMAN ANTITRUST ACT, 15 U.S.C. §1**

14 140. Plaintiffs incorporate by reference all the above allegations as if fully set
15 forth herein.

16 141. Beginning in June 2013 and continuing to the present, Defendants have
17 engaged in a conspiracy and agreement in unreasonable restraint of trade in violation of
18 Section 1 of the Sherman Act (15 U.S.C. §1). The Manufacturer Defendants implemented
19 RPM policies in concert with each other and with Independent ECPs, acting, in part,
20 through Defendant ABB, which is complicit in their implementation. Non-ECP vendors
21 of contact lenses are coerced into abiding by the UPPs or suffer the loss of the ability to
22 sell the products covered by them. The Manufacturer Defendants agreed, at least tacitly,
23 among themselves to start using RPM policies recognizing that the policies could be
24 enforced only if all of them implemented UPPs. The Manufacturer Defendants also
25 conspired with Defendant ABB and with Independent ECPs to implement UPPs. As
26 noted above, UPPs represented a drastic or “Fundamental Change” in how contact lenses
27 were sold in the United States.

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

8 143. As a result of Defendants' unlawful conduct, prices for contact lenses
9 subject to UPPs were raised, fixed, maintained, and stabilized in the United States.

10 144. As a result of Defendants' unlawful conduct, Plaintiffs and the other
11 members of the Class have been injured in their businesses and property in that they have
12 paid more for contact lenses than they otherwise would have paid in the absence of that
13 conduct.

14 145. With respect to their claim under the Sherman Act, Plaintiffs seek
15 injunctive relief, treble damages, and attorneys' fees and costs.

16 **SECOND CAUSE OF ACTION**

17 **VIOLATIONS OF THE CALIFORNIA CARTWRIGHT ACT**

18 146. The California Plaintiff incorporates by reference all the above allegations
19 as if fully set forth herein.

20 147. Defendants' conduct has occurred in substantial part in the State of
21 California and also violates the Cartwright Act, Cal. Bus. & Prof. Code §16720 *et seq.*,
22 which prohibits combinations of two or more persons' capital, skill, or acts to restrict
23 trade or commerce. Such schemes are viewed as *per se* violations of the Cartwright Act.
24 *See, e.g., Mailand v. Burckle*, 20 Cal. 3d 367 (1978); *Chavez v. Whirlpool Corp.*, 93 Cal.
25 App.4th 363, 359 (2001).

26 148. The California Plaintiff and the other members of the Class paid supra-
27 competitive, artificially inflated prices for contact lenses.

28

1 149. As a direct and proximate result of Defendants' unlawful conduct, the
2 California Plaintiff and the members of the Class and California Subclass have been
3 injured in their business and property in that they paid more for contact lenses than they
4 otherwise would have paid in the absence of that conduct.

5 150. The RPM policies' instituted by the Manufacturer Defendants and the
6 conduct of all Defendants in implementing them violate the Cartwright Act and should be
7 enjoined accordingly.

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

11 **THIRD CAUSE OF ACTION**

12 **VIOLATIONS OF CALIFORNIA UNFAIR COMPETITION LAW**

13 152. The California Plaintiff incorporates by reference all of the above
14 allegations as are fully set forth herein.

15 153. Defendants' conduct has occurred in substantial part in the State of
16 California. California's Unfair Competition Law ("UCL"), Cal. Bus. and Prof. Code
17 §17200 *et seq.*, prohibits acts of unfair competition, which mean and include any "unfair .
18 . . business act or practice."

19 154. Defendants' conduct constitutes "unfair" business acts and practices
20 because Defendants' practices have caused and are "likely to cause substantial injury" to
21 the California Plaintiff and California Subclass members, which injury is not "reasonably
22 avoidable" by the California Plaintiff and California Subclass members and is "not
23 outweighed" by the practices' benefits to the California Plaintiff and California Subclass
24 members.

25 155. As more fully described above, the purpose and effect of Defendants'
26 agreements to impose RPM policies on leading contact lens lines was and is to eliminate
27 the competition engendered by the FCLCA. Defendants' anticompetitive agreements
28 constitute unfair business acts or practices within the meaning of the UCL in that the

1 justification for Defendants' conduct is outweighed by the gravity of the consequences to
2 the general public.

3 156. The California Plaintiff and California Subclass members have been and
4 are unable to avoid injury, because ECPs, co-conspirators, and beneficiaries of the RPM
5 agreements are the ones who prescribe the contact lenses that the California Plaintiff and
6 California Subclass members are required to use, without substitution.

7 157. Defendants' RPM policies are contrary to public policy, immoral,
8 unethical, oppressive, unscrupulous, and/or substantially injurious to consumers.

9 158. Independently of prohibiting acts of "unfair" competition, the UCL also
10 prohibits "unlawful" business acts or practices. The conduct alleged in this Complaint not
11 only violates the Sherman Act and the antitrust laws of California and New York, but
12 also is in direct contravention of the policy and spirit of the FCLCA and the FTC's
13 Contact Lens Rule. This unlawful conduct has significantly harmed Plaintiffs and the
14 Class.

15 159. The California Plaintiff and California Subclass members have suffered
16 injury in fact and have lost money as a result of Defendants' unfair competition and
17 violations of law in that they paid more for contact lens that they would have paid in the
18 absence of the RPM agreements. They are therefore entitled to the relief available under
19 the UCL as detailed herein.

20 **FOURTH CAUSE OF ACTION**

21 **VIOLATIONS OF NEW YORK GEN. BUS. LAW §§ 340 et seq.**

22 160. The New York Plaintiff incorporates by reference all of the above
23 allegations as are fully set forth herein.

24 161. By reason of the conduct alleged herein, have entered into a contract or
25 combination in the form of trust or otherwise, or conspiracy in restraint of trade or
26 commerce in the United States contact lens market, in violation of New. York Gen. Bus.
27 Law §§ 340 et seq. As more fully described above, the purpose and effect of Defendants'
28

1 unlawful trust, conspiracy or agreements to impose RPM policies on leading contact lens
2 lines was and is to eliminate and restrain price competition in contact lens market.

3 162. Defendants' combination or conspiracy had the following effects: (a)
4 contact lens price competition was restrained, suppressed or eliminated throughout New
5 York; (b) contact lens prices were raised, fixed, maintained or stabilized at artificially
6 high levels throughout New York; (c) the New York Plaintiff and members of the New
7 York Subclass were deprived of free and open competition; and (D) The New York
8 Plaintiff and members of the New York Subclass paid more for contact lens than they
9 would have paid absent Defendants' illegal acts.

10 163. Defendants' unlawful conduct substantially affected New York's trade and
11 commerce.

12 164. As a direct and proximate Defendants' unlawful conduct, the New York
13 Plaintiff and the members of the New York Subclass have been injured in their business
14 or property and are threatened with further injury.

15 165. By reason of the foregoing, the New York Plaintiff and members of the
16 New York Subclass seek all forms of relief available under New York Gen. Bus. Law §§
17 340 *et seq.*

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiffs pray that the Court enter judgment on its behalf and on
20 behalf of the Class herein, adjudging and decreeing that:

21 A. This action may proceed as a class action, with Plaintiffs as the designated
22 Class representatives (and where appropriate, Subclass representatives) and their counsel
23 as Class and Subclass Counsel;

24 B. Defendants have engaged in a contract, combination, and conspiracy in
25 violation of Section 1 of the Sherman Act (15 U.S.C. §1), the California Cartwright Act,
26 the California UCL and New York Gen. Bus. Law §§ 340 *et seq.*, and that Plaintiffs and
27 the members of the Class (or where appropriate, Subclasses) have been injured in their
28 business and property as a result of Defendants' violations;

1 C. Plaintiffs and the members of the Class (or, where appropriate, Subclasses)
2 recover damages sustained by them, as provided by the federal antitrust laws, the
3 California Cartwright Act, and New York Gen. Bus. Law §§ 340 *et seq.*, and that a
4 judgment in favor of Plaintiffs and the Class be entered against the Defendants in an
5 amount to be trebled to the extent such trebling is permitted pursuant to such laws;

6 D. Plaintiffs and the members of the Class (or, where appropriate, Subclasses)
7 recover restitutionary relief to the extent such relief is afforded by any of the
8 aforementioned laws;

9 E. Defendants, their subsidiaries, affiliates, successors, transferees, assignees
10 and the respective officers, directors, partners, agents, and employees thereof and all
11 other persons acting or claiming to act on their behalf be permanently enjoined and
12 restrained from continuing and maintaining the combination, conspiracy, or agreement
13 alleged herein;

14 F. Plaintiffs and members of the Class (or, where appropriate, Subclasses) be
15 awarded pre-judgment and post-judgment interest, and that such interest be awarded at
16 the highest legal rate from and after the date of service of the initial Complaint in this
17 action;

18 G. Plaintiffs and members of the Class (or, where appropriate, Subclasses) recover
19 their costs of this suit, including reasonable attorneys' fees as provided by law; and

20 H. Plaintiffs and members of the Class (or, where appropriate, Subclasses)
21 receive such other or further relief as may be just and proper.

22 DATED: March 12, 2015

Respectfully submitted,

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for the proposed classes

DEMAND FOR JURY TRIAL

Plaintiffs on behalf of themselves and all others similarly situated hereby requests
a jury trial on any and all claims so triable.

DATED: March 12, 2015

Respectfully submitted,

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