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June 24, 2004

Federal Trade Commission
Office of the Secretary, Room H-159 (Annex L)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580.

Re: Federal Trade Commission Study of the Strength of Competition In the Sale of Prescription Contact Lenses (Matter No. V040010)

To the Commission:

On behalf of Ocular Sciences, Inc. ("OSI"), we enclose the attached study entitled "Competition, Consumer Awareness, and Distribution in the Contact Lens Industry." This study was conducted by James Langenfeld and Robert Maness at the request of OSI, in response to the Request for Comments issued by the Commission on March 30, 2004.

Please do not hesitate to contact us if you would like additional information regarding the issues discussed in the attached study, or if we can be of assistance with additional areas of inquiry in connection with this matter.

Sincerely,

FENWICK & WEST LLP

Mark S. Ostrau

Enclosure

cc: Maureen Ohlhausen, Federal Trade Commission, Office of Policy Planning,
600 Pennsylvania Avenue, N.W., Washington, D.C. 20580

**COMPETITION, CONSUMER AWARENESS, AND DISTRIBUTION
IN THE
CONTACT LENS INDUSTRY¹**

James Langenfeld² & Robert Maness³

June 24, 2004

¹ This study is sponsored by Ocular Sciences, Inc. The opinions expressed herein are those of the authors and do not necessarily reflect those of LECG or Loyola University.

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I. Overview and General Conclusions

In the recently passed Fairness to Contact Lens Consumers Act, Congress requested that the Federal Trade Commission (“FTC”) conduct an investigation of competition in the contact lens industry. On April 16, 2004, the FTC announced that it was soliciting comments on a number of issues from interested parties and industry participants in connection with its study.⁴ We have been asked by Ocular Sciences, Inc. (“OSI”) to study a number of the areas on which the FTC solicited comments. Our study and analysis is based on information and data from various public and industry sources, and from OSI.

In brief, we have concluded as follows:

- The contact lens industry is highly competitive at the manufacturer, prescriber, and retailer levels. Among key indicators are (i) the presence of many sellers at each level, (ii) a history of substantial price decreases, and (iii) significant competition through new innovations and better products.
- Consumers have access to substantial information and many choices regarding the availability, price, and alternate sources of prescriptions and contact lenses. Moreover, each year a significant number of consumers change prescribers and/or lenses, indicating consumers are not only aware of their choices, but can and do act on these choices.
- Of the five major manufacturers, Ocular Sciences is the smallest. It differentiates itself through, among other things, a marketing and sales strategy focused on eye care professionals and the sale of private label and limited distribution products. OSI believes its strategy (i) allows OSI to differentiate itself from larger

⁴ See “Announced Actions for April 16, 2004,” <http://www.ftc.gov/opa/2004/04/fyi0425.htm>. See also, <http://www.ftc.gov/os/2004/04/040416contactlensstudyfinal.pdf>. (Hereafter “FTC Request for Comments”).

competitors and (ii) encourages increased patient interaction with a doctor, resulting in more patient satisfaction and fewer “dropouts”.⁵

- OSI products are widely available, both through online and offline sellers. There is substantial information available to consumers about OSI's marketing strategy.
- Neither data nor theory supports any concern with the incidence of private label or limited distribution contact lenses. The procompetitive benefits of such marketing strategies have been validated in many industries, and appear to be evident in the contact lens industry as well.

The rest of this study is organized as follows. Section II analyzes the competitive nature of contact lens manufacturing, prescribing, and dispensing. Section III discusses the substantial information available to contact lens consumers, and its implications for competition and consumers. Section IV describes and analyzes OSI's limited distribution strategies, how they affect competition and consumers, and their impact on the market.

II. Competition in the Manufacturing, Prescribing and Dispensing of Contact Lenses

In this section we analyze the state of competition in the contact lens industry at three levels—manufacturer, retailer, and eye care professional.

A. Competition Among Contact Lens Manufacturers

1. Market Structure

The FTC Request for Comments asks for information on the national and local shares for prescribers, sellers, and manufacturers.⁶ In this section we provide evidence on market structure in manufacturing.

The only source of data available to us with estimates of shares of all major manufacturers is proprietary data purchased by OSI from Health Products Research, Inc. (“HPR”). HPR is an independent market research company that, among other things,

⁵ “Dropouts” are people who discontinue use of contact lenses.

⁶ See FTC Request for Comments, question 4, p. 6.

provides survey-based marketing data for the vision care industry.⁷ HPR collects data from a survey of eye care professionals who keep a “diary” of patients’ prescriptions and dispensing. HPR calculates share in two ways—number of lenses dispensed and patient “visits” (dispensing occasions). HPR defines patient “visits” as “visits to a practitioner where contact lenses are dispensed; also includes refills mailed from the practitioner to the patient.”⁸ Thus, patient visits should roughly track the share of prescriptions across manufacturers. Because contact lenses vary substantially in the number of lenses purchased at a time (daily disposable vs. one month lenses, etc.), analyzing market share based on lenses sold may not be as meaningful as visits.

There are five substantial contact lens manufacturers—Vistakon (a subsidiary of Johnson & Johnson), Bausch & Lomb, CIBA Vision (a subsidiary of Novartis), OSI, and CooperVision. Table 1, based on HPR data, provides estimates of shares by patient visits. A review of the shares of these five companies shows that all five have a well-established presence in the market. Vistakon has the largest share, but is not in a “dominant” position. Of the five major competitors, OSI is the smallest. Given the other indicia of competition, discussed below, the manufacturer market shares do not suggest potential competitive concerns.

Table 1
2003 Share of Patient Visits for Soft Contact Lenses

	Total Patients	Patients New to Contacts
Bausch & Lomb	14.0%	17.0%
Ciba Vision	23.1%	19.9%
Cooper Vision	13.1%	18.0%
OSI	12.4%	13.2%
Vistakon	36.2%	30.9%

Source: “Vision Information Services-Contact Lens Report,” Fourth Quarter 2003, Provided by Health Products Research, Inc. for Ocular Sciences, Inc., Tables SC-1X, SC-6X and SC-17X.

⁷ “The **Market Survey Group**, a subsection of Market Research, specializes in the development and implementation of market tracking studies for clients whose product sales/usage is not captured by pharmacy audits. These include vision care products as well as vaccines and other products dispensed directly from a physician's office.” <http://www.hprintl.com/mr.html>, visited June 15, 2004.

⁸ See “Vision Information Services-Contact Lens Report,” Fourth Quarter 2003, Provided by Health Products Research, Inc. for Ocular Sciences, Inc. (“HPR Report”).

One limitation of the HPR data is that it does not generally include prescriptions filled through Internet/mail order vendors. Since HPR collects data from provider diaries of prescriptions dispensed, these providers may not record a prescription that a patient fills through a mail order or Internet outlet not affiliated with the retailer or chain. Since OSI does not sell to Internet-only retailers, the HPR data likely overstates the share of OSI somewhat. However, the HPR data otherwise appears reasonably indicative of market shares, based on corroborating data available to OSI through the Contact Lens Institute (“CLI”), a contact lens manufacturer trade association. CLI provides aggregate market data from which it is possible for OSI to estimate its share, but not that of other manufacturers. For 2003, the CLI data showed that OSI had an approximate 11.7% share of total soft contact lens sales (based on wholesale revenue) in the U.S.⁹

Market share at a given point in time may not reflect the dynamism of competition in a market.¹⁰ Additional information can be learned from competition for new customers and changes in shares over time. Column 2 of Table 1 provides estimates of share of patient visits for patients new to contacts. Although overall these measures of share are similar to shares based on total patients, Vistakon’s share is noticeably lower for new contact lens wearers than for total patients. This suggests that, despite Vistakon’s strong position, its competitors have been relatively successful in attracting new patients, and there is the potential for Vistakon’s share eroding.

In addition, contact lens manufacturing has exhibited substantial variability in market shares and share rankings over the past 20 years. For example, in 1987 Vistakon was a relatively small player prior to the introduction of its Acuvue disposable lens. Bausch & Lomb was the largest manufacturer in that year.¹¹ Now Vistakon is by far the largest manufacturer, and Bausch & Lomb is the third largest. Such variability in share is another indicator of competitive vigor.

⁹ Contact Lens Institute 4Q03 Summary and OSI data.

¹⁰ See FTC/DOJ *1992 Horizontal Merger Guidelines*, §1.521.

¹¹ See Christensen, “Molding the Impossible: The NYPRO/Vistakon Disposable Lens Project,” *Harvard Business School Case Study*, November 23, 1994, p. 3. Bausch & Lomb’s share was 25% in 1986.

2. *Price Competition Among Contact Lens Manufacturers*

Contact lens manufacturers compete along a number of dimensions, including price, product innovation, promotion and marketing, and distribution strategies. Manufacturers' overall competitive strategy consists of the combination of these and other elements. In this section we review evidence on price competition, and we examine some of the other dimensions of competition in the following sections.

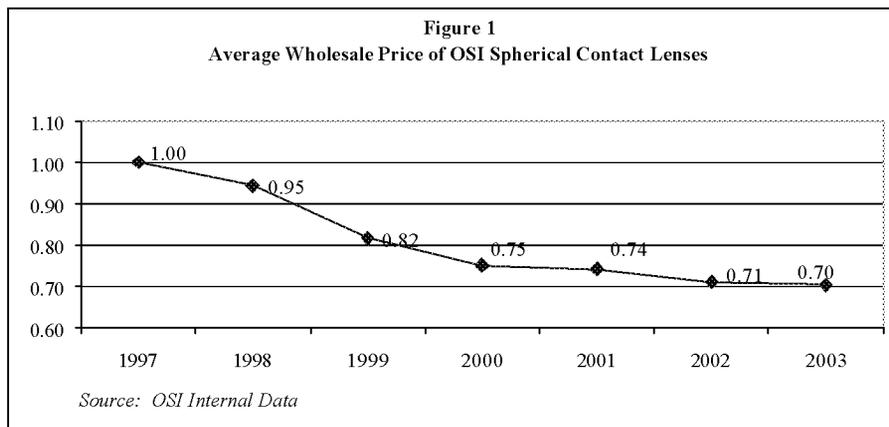
We do not have detailed information on pricing across manufacturers, or historical information on industry prices for more than a few years. However, it is well known that per lens prices have fallen dramatically over the past 20 years, and continue to fall. OSI believes a year's supply of disposable lenses (20 or so per eye) today costs about the same as an equivalent single non-disposable lens cost 15 years ago. In addition to the approximate 20-to-1 per unit cost reduction, disposable lenses do not require as much cleaning solution and other related expenses as contact lenses used in longer replacement regimens, and offer the convenience of disposability.

We have OSI data on its average wholesale revenue per lens, beginning in 1997. Even during this relatively short period of time, these data show that OSI's average price declined significantly. Figure 1 represents the fall in average estimated wholesale price of OSI's spherical soft contact lenses from 1997 to 2003, indexed to the 1997 price.¹² As the figure indicates, per lens prices have fallen by approximately 30 percent over seven years.¹³ Other data sources confirm the decline in contact lens prices.¹⁴ These price declines have taken place even though contact lenses are far more sophisticated and treat a wider variety of conditions, so the "quality adjusted" prices of contact lenses have fallen even more. These price declines are an indication of significant competition among contact lens manufacturers.

¹² OSI provided information on total revenue for spherical lenses in each year, along with total boxes of spherical lenses shipped (6 lenses per box). We excluded the number of diagnostic boxes shipped since those are generally free, and calculated a per lens price for lenses that were actually sold by OSI to its customers.

¹³ Adjusting for inflation, the reduction in real prices between 1997 and 2003 was about 39 percent.

¹⁴ See, e.g., Contact Lens Institute, *U.S. Soft Contact Lens Market Trend* (quarterly data).



Other elements of price competition between manufacturers are periodic sales and discounts, as well as the prevalence of coupons and rebates in the industry.

3. *Competition in Product and Process Innovation*

There is also substantial rivalry among manufacturers for product and process innovations. Soft contact lenses were first introduced by Bausch & Lomb in 1971.¹⁵ Since that time, there have been a number of major advances in manufacturing technology that have improved lens quality and reduced costs, and thus per lens prices, resulting in the development and introduction of disposable lenses replaceable on a biweekly, weekly, and even daily basis.¹⁶ Data from HPR indicates that new products from a variety of manufacturers are introduced most every quarter, as shown in Appendix 1. These innovations and others have enhanced competition between contact lens manufacturers and provided benefits to consumers.

Along with the growth of soft contact lenses, manufacturers have continued to offer consumers more choices of products. One of the major innovations in contact lens technology and innovation has been the increase in the amount of time a lens can be continuously worn. Initially, soft contact lenses were not suitable for extended wear and had to be removed at night. Since soft lens contacts were not very oxygen permeable,

¹⁵ See "Trends in Contact Lenses & Care," The Bausch & Lomb Annual Report to Vision Care Professionals, December 2001, p. 8.

¹⁶ See Silk, *et al.*, "Vistakon: 1 Day Acuvue Disposable Contact Lenses," Harvard Business School, Case Study No. 9-596-087, February 1, 1999. See also, Pisano, "CIBA Vision: The Daily Disposable Lens Project (A)," Harvard Business School, Case Study No. 9-696-100, January 4, 2002.

they could prevent oxygen from reaching the cornea, and serious health consequences could result from failure to remove contacts at night or while sleeping. Through innovative materials and production methods, manufacturers began to develop thinner and more oxygen permeable contact lenses. As lenses became more permeable, extended wear contacts became available allowing consumers to wear their contacts continually, including while they slept. Recently introduced “silicone hydrogel” contact lenses are even more oxygen permeable than other varieties. In 2001, two new products introduced using silicone-hydrogel material, Bausch & Lomb’s PureVision and CIBA Vision’s Night & Day, were approved by the FDA.¹⁷ These new materials allowed continuous wear for up to 30 days.¹⁸ These new materials increase comfort, allowing even more people to use extended wear contacts.

Another area of innovation has been soft contacts capable of correcting a wider variety of vision problems. For instance, until relatively recently, patients with astigmatism (deformities in the shape of the eye) who wanted contact lenses had relatively few choices. More recently, a number of manufacturers have developed and introduced “toric” soft lenses capable of correcting for astigmatism. According to Bausch & Lomb, “Introductions of new soft toric contact lenses over the past several years, notably in disposable formats, provide eye care practitioners with many more opportunities to improve vision and build value with patients with astigmatism.”¹⁹ Growth has been rapid in this area— just over 34 percent between 2002 and 2003 alone.²⁰ Bifocal contact lenses are another example of recent product innovations in soft contact lenses.

Other improvements in contact lenses include the development of ultraviolet protection to help protect the eye from UV rays, and the development of handling tints that facilitate handling without affecting eye color appearance.

¹⁷ Cole, “Continuous CL’s: The First Year and Where do We Go from Here?” *2003 U.S. Optical Industry Handbook*, Jobson Optical Research, 2003, p. 97.

¹⁸ The Bausch & Lomb products were removed from the market (at least temporarily) after Novartis prevailed in a patent suit against Bausch & Lomb. *Ibid.*

¹⁹ See “Trends in Contact Lenses and Lens Care,” The Bausch & Lomb Annual Report to Vision Care Professionals, December 2001, p. 11.

²⁰ Contact Lens Institute, *U.S. Soft Contact Lens Market Trend*, 4th Quarter 2003.

OSI has brought to market a number of design innovations. For example, OSI has made its contacts more comfortable by making the lens edge rounder, and has made lenses easier to handle through its use of a lenticulated carrier. OSI believes that both of these innovations have contributed significantly to its success. Most recently, OSI has developed a new aspheric lens (Biomedics 55 Premier) that provides better visual acuity in some patients.

Innovations are not restricted to the major U.S. manufacturers. In August 2002, the FDA approved Menicon Z, a rigid oxygen permeable contact lens made by Japanese company Menicon and distributed in the U.S. by Con-Cise Contact Lens.²¹

4. *Competition Across Distribution Channels*

Table 2
2003 Share of Patient Visits for Soft Contact Lenses
Total Patients

	M.D.'s	O.D.'s	Independent Retail Outlets	Chain Retail Outlets	Total
Bausch & Lomb	16.5%	12.4%	17.1%	14.5%	14.0%
Ciba Vision	21.5%	23.4%	24.7%	22.7%	23.1%
Cooper Vision	13.6%	13.5%	11.1%	13.3%	13.1%
OSI	11.5%	11.1%	13.5%	15.1%	12.4%
Vistakon	35.1%	38.3%	32.8%	34.2%	36.2%

Source: "Vision Information Services-Contact Lens Report," Fourth Quarter 2003, Provided by Health Products Research, Inc. for Ocular Sciences, Inc., Tables SC-2X, SC-3X, SC-4X, SC-5X and SC-1X.

The major manufacturers compete across the board in "bricks and mortar" retailers, as shown in Table 2.²² The picture does not change when we focus on new patients, as can be seen in Table 3. Even OSI, which sells private label and limited distribution lenses, does not have substantially greater penetration with the smaller retailers.

²¹ See Cole, "Continuous CL's: The First Year: Where Do We Go From Here?" *2003 Optical Industry Handbook*, Jobson Optical Research, 2003, p. 97.

²² "Independent Retail Outlets" are stores and commercial O.D. group practices not included in the top 100 optical chains as reported by *20/20 Magazine*.

Table 3
2003 Share of Patient Visits for Soft Contact Lenses
New Patients

	M.D.'s	O.D.'s	Independent Retail Outlets	Chain Retail Outlets	Total
Bausch & Lomb	17.4%	13.9%	19.3%	14.7%	15.2%
Ciba Vision	21.4%	23.1%	24.5%	22.3%	22.8%
Cooper Vision	17.5%	16.8%	14.0%	13.5%	15.6%
OSI	11.0%	10.7%	12.6%	15.0%	12.1%
Vistakon	30.7%	33.7%	28.6%	34.3%	32.9%

Source: "Vision Information Services-Contact Lens Report," Fourth Quarter 2003, Provided by Health Products Research, Inc. for Ocular Sciences, Inc., Tables SC-6X, SC-7X, SC-8X, SC-9X and SC-10X.

There are also reasons to believe that competition between contact lens manufacturers within online distribution is vigorous. All major manufacturers have their products sold online.²³ Even for OSI, virtually all of its products are available online through retailers such as Wal-Mart and other major chains.

B. Competition in the Retailing of Contact Lenses

1. Market Structure

The FTC asked for information on shares for prescribers and sellers on a national and local basis.²⁴ Competition to distribute contact lenses includes regular bricks and mortar distributors of several types—the offices of small, independent eye care professionals, chain eye care retailers, and other retailers that sell contact lenses (*e.g.*, Wal-Mart, Costco). The marketplace for retailing contact lenses is very fragmented.²⁵ With respect to “bricks and mortar” entities, there were 37,332 locations in the U.S. where soft contact lenses were dispensed in 2003. Of those, optometrists operated 18,658, M.D.’s operated 7,137, independent retailers operated 5,193, and chains operated 6,344.²⁶ Thus, almost 70 percent of the bricks and mortar outlets where contact lenses

²³ For example, Vistakon, Bausch & Lomb, CIBA Vision, and CooperVision all supply 1-800-CONTACTS. See 1-800-CONTACTS 2003 Form 10-K, pp. 5, 11, accessible at http://www.sec.gov/Archives/edgar/data/1050122/000110465904007882/a04-3568_110k.htm.

²⁴ See FTC Request for Information, question 1, p. 5.

²⁵ This point is acknowledged by the largest mail order distributor. See 1-800-CONTACTS Form 10-K, p 12.

²⁶ See Rodemich, “The State of Contact Lenses: 2003 in Review,” *Optometric Management*, April 2004, p. 30.

were sold were small businesses operated by eye care professionals.²⁷ Including independent retailers increases this figure to 83 percent of bricks and mortar dispensing outlets.

In addition, there are a large number of mail order and Internet distributors of contact lenses. These can be on-line outlets affiliated with chains, such as Wal-Mart or America’s Best Contacts & Eyeglasses, or they can be purely online or mail order retailers of contact lenses, such as 1-800-CONTACTS. In short, contact lenses are sold to consumers by a great number and variety of retailers.

Using data from a combination of sources, one can infer the relative shares of contact lens prescriptions for different distribution channels. First, HPR collects and reports share of patient visits resulting in a prescription by channel for bricks and mortar outlets. According to HPR, chains (defined as one of the top 100 chains) accounted for 21.1 percent of patient visits for contact lens dispensing in 2003, independent retail chains (stores and commercial O.D. group practices not identified as a major chain) accounted for 12.2 percent of patient visits, O.D.’s accounted for 52.6 percent, and M.D.’s 14.1 percent. (See Table 4) Thus, unlike most consumer products, larger chains accounted for a relatively small share of sales.

Table 4
Percent of Patient Visits by Channel
Soft Lenses

Channel	Share of Patient Visits*	Estimated Share of Prescriptions**
M.D.	14.1%	12.3%
O.D.	52.6%	45.8%
Independent Retail	12.2%	10.6%
Chain Retail	21.0%	18.4%
Internet/Mail Order	N/A	13.0%

Source: HPR and B&L Trends in Contact Lenses and lens care, December 2001.

* HPR measures only bricks and mortar outlets

**HPR shares adjusted to account for internet

²⁷ These figures do not include Internet or mail order outlets.

HPR data does not cover sales for mail order and Internet. Bausch & Lomb reports that Internet and mail order accounted for 7 percent of sales in 2000—up from 3 percent in 1998.²⁸ Assuming linear growth in Internet/mail order sales, these “alternative sources” would have accounted for 13 percent of sales in 2003. Using that as a base, we can estimate the shares among bricks and mortar outlets to reflect Internet/mail order sales. As can be seen, even with the growth of Internet/mail order sales, independent O.D.’s still represent the largest channel, with about 46 percent of sales.

These data indicate that contact lens retailing is a very unconcentrated industry. In any local area of any size, it is very likely that there are a number of alternative distributors of contact lenses, including eye care professionals, chain outlets, and Internet/mail order. The fragmentation of the market and the number of sellers of various kinds makes clear that contact lens retailing is a competitive market. This conclusion is reinforced by the availability of information on price through advertising and web sites.

2. *Price Competition Among Retailers*

As discussed above there is substantial competition on price, driven, in part, by mass merchandisers and online retailers who emphasize price in their marketing and sales strategies. Beyond advertising, it is straightforward to obtain price quotes from many online contact lens retailers. Many smaller retailers also advertise and promote their prices (typically in the form of in-store and/or store window signage). Many eye care professionals compete on the price of eye exams, in addition to the prices of contacts and eyeglasses. In some instances, practitioners or chains that include eye care practitioners may offer a combined price for eye exams and contact lenses, and this can be a way of offering a discounted price on the combination.²⁹

The FTC also requested information on price differences across various channels.³⁰ We have not had access to information other than the survey sponsored by the Florida Attorney General that was cited in the FTC’s recent report on the contact lens

²⁸ See “Trends in Contact Lenses & Lens Care,” Bausch & Lomb, December 2001, p. 14.

²⁹ According to a 1999 survey sponsored by the Florida Attorney General, contact lenses and the eye exam are sold as a single unit about 19 percent of the time. See Russell, “Nationwide Survey of Contact Lens Wearers: Methodology Report,” SRI Consulting, April 27, 1999, Appendix C, p. 8.

³⁰ See FTC Request for Comments, question 8, p. 7.

industry. According to this survey, average prices in 1998 for a six lens multipack were about \$19.90 for Internet and mail order, \$19.98 at mass merchandisers, and \$23.76 for lenses purchased at O.D.'s, M.D.'s and optical chains.³¹

This survey does not account for practitioners that sell contact lenses bundled with an examination, as a means of offering a discount on the bundle. Moreover, prices and rankings of prices across outlets may depend on the quantity purchased—that is, purchasing a one-year supply instead of a 1-month or 3-month supply can alter the calculus about which outlets offer the best prices. Other factors that might raise the cost of using mail order or Internet outlets can include shipping costs and the delay in receiving contacts through the mail. Given all these factors, the price of the contacts themselves may not measure the cost to consumers of one form of distribution relative to another. However, even assuming this survey is accurate, these results would not be surprising or competitively troubling. One would expect mass merchandisers and online vendors to have lower average prices, since this is true for most product categories. With regard to contact lenses, these channels generally emphasize price and, as discussed next, generally provide fewer services.

3. *Differentiation Among Retailers*

Given the great variety in distribution outlets, it is not surprising that there are a number of factors that have to be taken into account when a consumer determines which of these competitive alternatives to choose. These factors include product availability (e.g., on site rather than through mail), price, customer service, convenience, and the availability of professional services to accompany the contact lens purchase.³² Internet, mail order, and mass merchandisers compete primarily on price, and to a lesser extent on convenience. The range of services and products, and the “quality” of the smaller bricks and mortar outlets, are important non-price dimensions of bricks and mortar outlets that

³¹ See “Possible Anticompetitive Barriers to E-Commerce: Contact Lenses,” A Report of from the Staff of the Federal Trade Commission, March 2004 (“FTC Contact Lens Report”), pp. 12-13. As the FTC noted, it is unclear whether these figures include shipping costs. Survey takers were instructed to tell respondents to remove shipping costs only if the respondent asked whether it should be included. In addition, some Internet and mail order outlets ship for free.

³² See Segre, “Where’s the Best Place to Buy Contact Lenses?” Allaboutvision.com, <http://www.allaboutvision.com/buysmart/contacts.htm>.

are valued by many consumers.³³ In addition, retailers compete in dimensions such as location, the types of insurance accepted, the appearance and comfort of the establishment, flexibility in hours, etc.

The professional services component can include a number of factors. For instance, one-stop shopping is a recognized benefit of purchasing eye care products from eye care professionals.³⁴ Eye care professionals also often carry selections of eyeglasses and other items that are used by many contact lens purchasers. In contrast, online sellers generally do not carry such items, but only carry contact lenses and perhaps contact lens cleaning solutions. Moreover, many consumers value their relationship with their eye care professional, which may improve the contact lens wearing experience.

Other types of retail competitors compete by offering different bundles of service. Online retailers offer very few ancillary services or products, but offer the convenience of home delivery and easy comparison-shopping. Discount stores also offer a variety of ancillary products such as eyeglasses or contact lens solutions, a host of other products, and may offer extended hours and the ability to shop for a number of other items.

The FTC has requested information on the degree to which online sellers' prices affect offline prices, and vice versa.³⁵ Internet/mail order channels have substantially increased their market share in recent years and have made available substantial information for comparing prices. Internet and mail order retailers use promotional expenditures to encourage consumers to try new brands, and to switch eye care professionals if necessary, presumably to those that favor dispensing through their channel. As a matter of economics, this substantial segment of price-focused retailing driven by advertising and information on price has had an impact on the overall market, as discussed below in Section IV. Certainly the price retailers see the "traditional" segment as the main competition.³⁶

³³ The information below is also responsive to the FTC's request for information on differences between on-line and off-line sellers. See FTC Request for Information, question 13, p. 8.

³⁴ See FTC Eyeglass Rule, Fed. Reg., Vol. 43, No. 107, 1978, p. 23993.

³⁵ See FTC Request for Comments, question 12 a)-c), p. 8.

³⁶ See 1-800-CONTACTS Form 10-K, p. 12 ("The Company's principal competitors include ophthalmologists and optometrists in private practice.").

As in other areas of healthcare, the growth of insurance coverage of eye care has brought large and sophisticated buyers into the market. The general increase in insurance coverage has had the effect of increasing information available to consumers and using managed care tools to negotiate price discounts.

In summary, contact lens retailing is very fragmented, with a substantial and growing segment that emphasizes price. With a few clicks of a mouse, consumers can obtain a great deal of information on price, along with advertising of various kinds by some of the bricks and mortar retailers. The result is that consumers have ample opportunity and incentive to become informed about market prices, including prices across various distribution channels such as small practitioners, discount and mass merchandise chains, and the Internet. These high levels of consumer information foster price competition across these various channels.

C. Competition Among Eye Care Professionals

In addition to competition among manufacturers and among retailers (including eye care professionals), there is significant competition among eye care professionals to provide eye care services, including eye exams and contact lens fittings. OSI estimates there are approximately 35,000 active eye care professionals. Eye care professionals compete in a number of ways, including the prices of eye exams and contact lens fittings, location, convenience, operating hours, insurance accepted, etc.

In addition, some eye care professionals advertise prices of exams, contacts, and sometimes a combined price for both contacts and exams. Advertising of fees for exams, fittings, glasses and contacts provide consumers with a great deal of information in the marketplace. In addition, both local and national chains advertise the prices of services and supplies, and there is a significant degree of competition between independent eye care professionals and those that are part of chains. Chains have complex incentives to drive store traffic. Pricing for eye exams, contact lens fittings, and sales are part of a chain's overall incentive to drive store traffic, giving them an especially strong incentive to price such services competitively.

The rise of insurance also affects competition by introducing large power buyers such as Cole Managed Vision to negotiate discounts for eye care services, as well as for

glasses and contact lenses.³⁷ Large buyers can also apply standard managed care tools, such as narrow and restricted networks to encourage competition among providers to be included.

III. Consumers of Contact Lenses Have Access to a Significant Amount of Important Information on the Availability of Contact Lenses

A. Consumers Have Access to Information on Key Aspects of Contact Lenses

Information available to consumers is often a key factor affecting the performance of a market. With competition among sellers and the availability of relevant information on product characteristics, service, and prices to consumers, markets operate to the benefit of consumers.³⁸ It is also a well-established economic principle -- embraced by the FTC -- that the availability of accurate information protects not just the consumers who make use of the information, but other consumers as well. Well-informed consumers, by making informed choices, “police” vendors that do not provide a “competitive” quality and price combination.³⁹ As FTC Chairman Muris recently noted, “One of the best ways to protect consumers is to arm them with the knowledge to protect themselves.”⁴⁰ The high levels of information possessed by consumers regarding contact lenses indicate that consumers are able to make informed choices and that competition enforces discipline. This level of information is consistent with a market in which competition and informed consumers protect consumer interests.

One major source of information available to consumers is advertising and promotion by manufacturers through various vehicles, such as newspapers, magazines,

³⁷ Cole Managed Vision manages funded benefits for approximately 13 million participants, and discount benefits for more than 80 million participants. See Cole National Group Form 10-K/A, available at <http://www.sec.gov/Archives/edgar/data/909492/000095015204004390/107852ae10vkza.htm>.

³⁸ See, for example, Rubin, “The Economics of Regulating Deception,” *Cato Journal*, Vol. 10, No. 3, Winter 1991, pp. 673-674; Howard Beales, Richard Craswell, and Steven Salop, “The Efficient Regulation of Consumer Information,” *The Journal of Law & Economics*, Vol. XXIV, No. 3, December 1981, p. 502.

³⁹ See Muris, “The Federal Trade Commission and the Future of U.S. Consumer Protection Policy,” George Mason University School of Law, Law and Economics Working Paper Series, p. 2. See also, “Remarks of J. Howard Beales Before The Food and Drug Law Institute Conference on Qualified Health Claims,” Washington, DC, January 14, 2004, p. 1.

⁴⁰ See Remarks by Timothy J. Muris, Aspen Summit on Cyberspace and the American Dream, The Progress and Freedom Foundation, August 19, 2003, <http://www.ftc.gov/speeches/muris/030819aspen.htm>.

television, and the Internet. Contact lens manufacturers spent about \$66 million on advertising in 2000.⁴¹ This represents about 6 percent of 2001 sales of the top 5 manufacturers.⁴² Advertising provides a great deal of information on product features, and prices for contact lenses and examinations. These advertisements include information on both product attributes and on price and promotions such as coupons or rebates. The major manufacturers offer a number of incentives, including price inducements, coupons, and other enticements to get consumers to use their products, and actively advertise and promote their products to eye care professionals.

In addition to manufacturers, eye care professionals and retailers extensively advertise and promote contact lenses (including chains, online, mail order outlets, and some of the smaller outlets). This advertising takes place in many of the same venues used by manufacturers, including television, newspaper, magazine, direct mail and Internet advertising in addition to retailer signage. Retailers, especially chain, mail order, and Internet retailers, also post products and prices on their websites, and Internet searches quickly reveal outlets where products are available and prices. The FTC has previously recognized that many retail sources for contact lenses “advertise heavily and widely, in publications, direct mail coupon packs, on television, and on the Internet.”⁴³

In addition to advertising by manufacturers and bricks and mortar retailers, substantial amounts—\$30 million in 2000 according to Bausch & Lomb—are spent on promotion by mail order contact lens merchants.⁴⁴ 1-800-CONTACTS alone spent \$20.2 million in advertising in 2003, and has spent more than \$130 million in national advertising in the “last several years.”⁴⁵ All this advertising and promotion provides a

⁴¹ See “Trends in Contact Lenses & Lens Care,” The Bausch & Lomb Annual Report to Vision Care Professionals, December 2001, p. 17.

⁴² U.S. contact lens sales of the top 5 manufacturers were \$1.14 billion. See “Market Watch-Optical Sector Report,” OptiStock, November 2002, Table 3, available at http://www.optistock.com/mw/2002_11all.htm.

⁴³ See Comments of the Staff of the Federal Trade Commission to the Connecticut Department of Public Health, March 27, 2002, p. 5. (Included as Appendix A to FTC Contact Lens Report).

⁴⁴ See “Trends in Contact Lenses & Lens Care,” The Bausch & Lomb Annual Report to Vision Care Professionals, December 2001, p. 17.

⁴⁵ See 1-800-CONTACTS Form 10-K, p. 3.

great deal of information for consumers, which enhances the functioning of a very competitive marketplace.

Beyond advertising, it is straightforward to obtain price quotes from many online contact lens retailers. Because advertising makes consumers aware of brands and products, consumers can compare prices of their product to other products since mail order, catalogue, and Internet outlets generally carry a wide selection of products from many manufacturers.⁴⁶ The large amount of advertising creates more informed consumers, who are able to ensure a high degree of competition between manufacturers, eye care professionals, and retailers. With so much advertising by different chains, mail order, and Internet sites, consumers have the ability to compare prices across various retailers as well.

The FTC has long recognized the benefits to consumers and competition of advertising. As the FTC Staff recently observed with regard to the competitive significance of advertising, “Economic theory predicts, and a host of studies confirm, that informative advertising can stimulate firms to compete on the bases of both price and quality.”⁴⁷ The FTC’s original eyeglasses rules recognized the ability of advertising to generate informed consumers that would aid and foster competition: “The introduction of information by those who are able to do so most efficiently (i.e., sellers) tends to (1) decrease consumer search costs and (2) force sellers to become more price conscious and price competitive.”⁴⁸

Vistakon’s strategy in launching its Acuvue disposable product illustrates the importance of consumer information in fostering competition in the industry to the benefit of consumers. Acuvue was an important innovation for consumers, because these lenses permitted consumers to simply dispose of them after relatively short periods of time (a week or two when Acuvue was initially introduced), rather than having to

⁴⁶ See for instance, <http://www.1800contacts.com>, or <http://www.walmart.com/catalog/catalog.gsp?cat=116631&path=0%3A5432%3A116631>.

⁴⁷ See Comments of the Staff of the Bureau of Consumer Protection, the Bureau of Economics, and the Office of Policy Planning of the Federal Trade Commission, In the Matter of Requests for Comments on Consumer-Directed Promotion, Before the Department of Health and Human Services, Food and Drug Administration, December 1, 2003, pp. 12-13.

⁴⁸ See FTC Eyeglass Rule, Fed. Reg., Vol. 43, No. 107, 1978, p. 23994.

disinfect and extensively clean them. As Vistakon prepared to launch the product in 1987, it initiated the largest consumer advertising campaign in the history of the industry, including airing television commercials during the Olympics and the Super Bowl with messages targeted directly at consumers as opposed to eye care professionals. In addition, Vistakon offered a risk free trial period for patients to try the lenses.⁴⁹ This was a departure from existing industry marketing practices directed at practitioners through trade journals.⁵⁰

In large part as a result of the consumer awareness that Vistakon was able to generate, Acuvue became a highly successful product. Within three years of its launch, Acuvue captured 25 percent of the total U.S. contact lens market and made Vistakon the industry leader.⁵¹ Vistakon's sales grew from \$20 million in 1987 (the year Acuvue became the first FDA approved disposable extended wear contact lens) to \$290 million by 1993.⁵²

In addition to advertising product attributes and price, Internet and mail order retailers use promotional expenditures to encourage consumers to try new brands, and to switch eye care professionals to those that favor online dispensing. For instance, 1-800-CONTACTS "is attempting to transition its customers into other brands of lenses with an offer to try both a new product and a new eye care provider."⁵³ The company stated in its recent 10-K that based on test marketing, it believes that its customers are receptive to such offers. The 10-K further states that such a strategy is designed to respond to OSI's strategy of selling only through eye care professionals by encouraging OSI customers to

⁴⁹ See Silk, *et al.*, "Vistakon: 1 Day Acuvue Disposable Contact Lenses," Harvard Business School, Case Study No. 9-596-087, February 1, 1999, p. 7.

⁵⁰ See Pisano, "CIBA Vision: The Daily Disposable Lens Project (A)," Harvard Business School, Case Study No. 9-696-100, January 4, 2002, p. 5.

⁵¹ *Ibid.*, p. 6.

⁵² See Silk, *et al.*, "Vistakon: 1 Day Acuvue Disposable Contact Lenses," Harvard Business School, Case Study No. 9-596-087, February 1, 1999, p. 5.

⁵³ See Scott, "The Last Word: So Now 1-800-CONTACTS Wants to Play Doctor?" *Review of Optometry*, March 15, 2002, available at http://www.revoptom.com/index.asp?page=2_467.htm.

switch eye care professionals to those that will prescribe brands available through 1-800-CONTACTS.⁵⁴

Consumers also have the ability to gain information from a number of other sources. First, there are many third party sources of information about contact lenses and prices. These third party sources include independent outlets, such as *Consumer Reports*. For instance, *Consumer Reports* recently reported on the portability of contact lens prescriptions,⁵⁵ and has done stories in the past on variations in contact lens prices across brands and outlets.⁵⁶ Third party Internet sites such as AllAboutVision.com, can also provide a host of information about contact lenses.⁵⁷ Another source of third party information is insurance companies, or providers that specialize in vision care, such as Vision Service Plan (“VSP”). VSP, the largest provider of eye care plans, lists information on brands of contact lenses and prices (including rebates and coupon offers) on the members section of its website.⁵⁸

Word-of-mouth is also an important source of information for purchasers of contact lenses. Consumers can gather information from friends, family members, and co-workers about contact lens brands, contact lens options, pricing, and the cost, quality of service, and convenience of various retail outlets.

These sources of information also help create consumers who can make informed choices about contact lens brands and options, as well as the retail outlets available to acquire contact lenses. In addition, most contact lens users are (or will be) repeat purchasers. As repeat purchasers, they have the opportunity and incentive to learn about product attributes, distribution channels, and to comparison shop. The high levels of advertising and promotion aid this process.

⁵⁴ See 1-800-CONTACTS Form 10-K, p. 6.

⁵⁵ See *Consumer Reports*, June 2001, p. 6.

⁵⁶ See *Consumer Reports*, August 1994, p. 490.

⁵⁷ See <http://www.allaboutvision.com/contacts/>.

⁵⁸ See <https://www.vsp.com/member/htmls/contacts.jsp> showing a comparison of prices for various brands of contact lenses, and <http://www.eyefinity.com/consumer/programs/cl/offers.htm> (which is linked to VSP’s website) listing manufacturer coupons and promotions.

B. Evidence that Consumers Have Information On and Are Aware of Limitations on Contact Lens Availability and Alternative Sources of Contacts

The FTC has asked for information on whether consumers are aware that a prescriber may prescribe lenses that are only available from the prescriber, and on whether prescribers advertise their ability to prescribe custom labeled lenses.⁵⁹ Based on our research, we are not aware of any contact lenses that are unique to a particular prescriber or retailer, although some contact lenses are not available to all prescribers and retailers. We are not aware of any OSI products that are available at fewer than approximately 5,000 prescribers (and most are available at far more), although some prescribers do have private label brands of the product. In this section we provide evidence on information available to consumers regarding contact lens availability, and address the competitive significance and impact on consumers of this evidence.

There is substantial evidence that consumers are aware of the limited distribution of some contact lenses. For example, OSI's newest patient brochure, which is provided to eye care professionals for distribution to consumers, explicitly informs consumers that OSI lenses are only available from eye care professionals:

“We sell our contacts only to eye care professionals and companies affiliated with eye care professionals. We do not sell our lenses to online or mail order services that do not provide eye care, because we believe that a contact lens wearer has the best experience by purchasing their lenses from, and interacting regularly with, an eye care professional. Our contact lenses can be purchased from over 20,000 eye care professionals throughout the United States, many of whom also make our lenses available to you through the mail or online.”

OSI's patient information regarding its Hydrogenics 60 product, which is a product that is only available to independent (i.e., those not affiliated with a chain) eye care professionals with five or fewer offices, has similar statements. For example, its online information site states in boldface type that the product is “available only through authorized eye care practitioners,” and goes on to say:

⁵⁹ See FTC Request for Comments, questions 18-19, p. 9.

“Hydrogenics 60 lenses are not available through online or mail order services not affiliated with an eye care practitioner. It is Ocular Sciences’ policy to sell our products only to eye care practitioners who are trained and licensed to fit and prescribe contact lenses and monitor a patient’s wearing experience to ensure comfort and optimal corneal health.”⁶⁰

Moreover, at least one Internet seller (1-800-CONTACTS) posts extensive information on OSI’s distribution policy on its website. 1-800-CONTACTS prominently states that Hydrogenics is available only from eye care professionals as a “channel exclusive,” and suggests that the patient might want to specifically request a different brand or look for another eye care professional if the patient prefers a product with wider distribution.⁶¹ 1-800-CONTACTS provides similar information on OSI’s distribution policies for OSI’s main product brand (Biomedics) and various and private label lenses.⁶²

In addition to consumers having access to information on company distribution policies, there is evidence that indicates that consumers are broadly aware that they have options with regard to where they can buy contact lenses. A survey conducted by the Florida Attorney General’s Office in 1998 indicated that even then—well before the recent significant growth in Internet distribution—a substantial proportion of consumers were aware that contact lenses are available from outlets other than the prescribing eye care professional.⁶³ Two questions in the survey are particularly pertinent to the issue of what consumers know about their alternative sources for contacts:

“As far as you know, is it possible now in your area to get a prescription for your contact lenses from your eye doctor and use it to purchase lenses somewhere else?”

“As far as you know, is it possible now in your area to use a contact lens prescription from your eye doctor to purchase lenses from mail order companies?”

⁶⁰ See <http://www.hydrogenics60.com/prescriptions.html>.

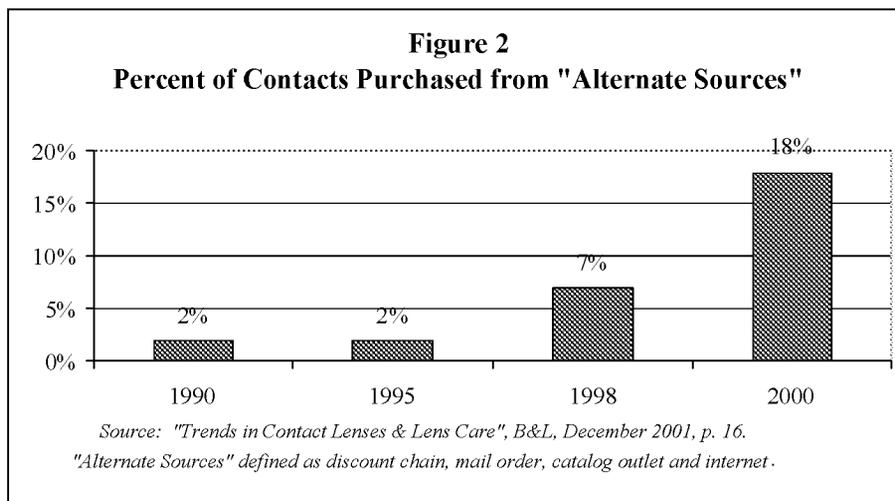
⁶¹ See <http://www.1800contacts.com/hydroinfo.aspx>.

⁶² See consumer alert button on <http://www.1800contacts.com/product.aspx?itm=001528&cv=000360>.

⁶³ This survey is now somewhat old and probably significantly underestimates the extent to which consumers are informed because of the information increasingly available online and from third party sources.

According to this 1998 survey, 76 percent of respondents said “yes” to the first question, and 68 percent said “yes” to the second.⁶⁴ Thus, a very large proportion of consumers in the survey were well informed of their options for purchasing contact lenses. The availability of additional information since that time likely would result in even higher numbers today.

The available evidence indicates that not only are consumers aware of alternative sources for contacts, they can and do switch sources. For example, there has been substantial growth in discount store distribution and on-line distribution, which emphasize price in their sales and marketing. As discussed above, estimates of consumer purchasing from “alternate sources” (discount store, catalogue, mail order, Internet) has increased from just two percent of purchasers in 1990 to 18 percent by 2000.⁶⁵ (See Figure 2). Mail order and Internet sales increased from 3 percent in 1998 to 7 percent in 2000.⁶⁶ The growth that these alternate sources have experienced also suggests consumer awareness of alternative sources for contact lens purchases.



⁶⁴ See Russell, “Nationwide Survey of Contact Lens Wearers: Methodology Report,” SRI Consulting, April 27, 1999, Appendix C, p. 10.

⁶⁵ See “Trends in Contact Lenses and Lens Care,” The Bausch & Lomb Annual Report to Vision Care Professionals, December 2001, p. 16.

⁶⁶ *Ibid.*, p. 15.

Moreover, several studies indicate that consumers switch brands regularly. According to one study, about 28 percent of soft lens wearers state that they are somewhat or very likely to switch brands within 12 months,⁶⁷ with cost and value for the money listed first as the reason these people might switch.⁶⁸ According to data presented to OSI by Health Products Research, Inc. (“HPR”), about 15 percent of the time a contact lens is dispensed, patients switched from one brand to another. The percentage of a given brand’s business that consists of switchers appears similar across brands. 12.6 percent of OSI’s patient visits are for brand switchers, 12.8 percent of Bausch & Lomb’s, 12.8 percent of Vistakon’s, and 20 percent of CIBA Vision’s.⁶⁹ Recall that well functioning markets do not require all consumers to switch. Many well-informed consumers will tend to stay with products they prefer, and only a portion of customers switching is enough to police the marketplace.

C. The Competitive Significance of Information in Healthcare Markets

The FTC has long recognized that “truthful and non-misleading advertising can help consumers manage their own health care,” and that “advertising is an important catalyst for price and quality competition.”⁷⁰ Advertising has beneficial effects because, by creating better informed consumers “it can empower consumers to manage their own health care by providing information that will help them, with the assistance of their doctors, make better informed decisions about their treatment options.”⁷¹

⁶⁷ See “Trends in Contact Lenses and Lens Care,” The Bausch & Lomb Annual Report to Vision Care Professionals, December 2001, p. 20.

⁶⁸ *Ibid.*

⁶⁹ See “Vision Information Services-Contact Lens Report,” provided for Ocular Sciences, Fourth Quarter 2003, p. 26, available from Health Products Research, Inc.

⁷⁰ See Comments of the Staff of the Bureau of Consumer Protection and the Bureau of Economics of the Federal Trade Commission, In the Matter of Direct to Consumer Promotion; Public Hearing Docket No. 95N—227, Before the Food and Drug Administration, January 11, 1996.

⁷¹ See Comments of the Staff of the Bureau of Consumer Protection, the Bureau of Economics, and the Office of Policy Planning of the Federal Trade Commission, In the Matter of Request for Comments on Consumer-Directed Promotion, Docket No. 2003N-0344, Before the Department of Health and Human Services, Food and Drug Administration, December 1, 2003, p. 3. See also a discussion of survey evidence confirming this statement on p. 6.

The theory under which practitioners would be able to steer patients to contact lenses that provide private benefits to practitioners, but no incremental benefits to patients, depends on the presence of substantial asymmetric information between providers and patients. It is well-recognized that healthcare in particular can have information asymmetries, and that these asymmetries can cause healthcare markets to perform poorly. However, the contact lens market does not exhibit such asymmetries to the degree traditionally observed in healthcare settings.

One example commonly used for the potential impact of asymmetric information is the physician-patient relationship. Physicians are extensively trained to recognize, diagnose, and treat medical conditions. This highly specialized training and knowledge means that physicians generally have superior information relative to patients. As a result of this superior information, patients are buying two services from physicians—information on their health condition and treatment of the condition.⁷² In providing information on their health condition, the physician is acting as the patient’s agent by recommending the most medically appropriate and cost-effective treatment for a given condition. However, as with any principal-agent setting, the agent’s incentives do not necessarily align with the principal’s. Given the asymmetries in information, the principal may have difficulty detecting and policing the agent’s pursuit of her self-interest at the expense of the principal’s interests.⁷³ One way that may be manifested in healthcare is in “induced demand”. Under this theory, because of their superior information, physicians can cause patients to consume more or more expensive medical care than necessary. The patient is worse off because the costs of the extra services exceed the true benefits, while the physician is better off from selling the extra.

In the case of contact lenses, such induced demand would hypothetically be prescribing and dispensing certain contact lenses to patients because those lenses create the most profits for practitioners. This outcome depends critically on the degree of asymmetric information. The more information patients have relative to practitioners, the

⁷² See Frech, *Competition and Monopoly in Medical Care*, AEI Press, Washington, DC, 1996, p. 84.

⁷³ See Black and Langenfeld, “Economic Theories of the Potential Anticompetitive Impact of Physician-owned Joint Ventures,” *Antitrust Bulletin*, Summer 1994, pp. 385-414.

less likely it is that the physician, acting as agent, will pursue goals that conflict with the patient (principal).⁷⁴

As we have discussed above, consumers have a great deal of information upon which they can make informed choices for contact lenses, examinations, *etc.* Moreover, contact lenses and examination require repeat purchases, which increases the proportion of well-informed consumers. As a result of the availability of information and repeat purchasing, at least a substantial percentage of consumers are well informed. Again, economics and FTC opinions make clear that a competitive market with a significant percentage of well-informed consumers will function in all consumers' interests. Indeed, the presumption in the prior eyeglasses rule and in the Fairness to Contact Lens Consumers Act is that consumers are capable of comparison-shopping, if permitted to do so, and are informed about their choices.⁷⁵

Another hypothetical problem in contact lenses relates to whether consumer would likely discover that a prescriber of contact lenses was taking advantage by prescribing lower net value (high priced) contact lenses. The economics literature addresses this point in general by distinguishing between products that exhibit "search" qualities, other products that exhibit "experience" qualities, and others with "credence" qualities.⁷⁶ Potential problems, if any, for consumers of contact lenses would exist only if contact lenses were credence goods, but the evidence indicates that is not the case.

For search goods, quality can be determined before purchase (for example, the style of a shirt). For such products, sellers have limited or no ability to take unfair advantage of customers. Given that consumers have access to a great deal of information

⁷⁴ See Black and Langenfeld, "Economic Theories of the Potential Anticompetitive Impact of Physician-owned Joint Ventures," *Antitrust Bulletin*, Summer 1994, p. 397, "If consumers can quickly and at low cost search for alternative providers of ancillary services, then it is unlikely that [providers] can sustain anticompetitive pricing."

⁷⁵ See FTC Contact Lens Report, p. 2, noting, "In adopting the Eyeglass Rule, the Commission found that many consumers were deterred from comparison shopping for eyeglasses *because eye care practitioners refused to release prescriptions...*" (emphasis added).

⁷⁶ See, for example, Carlton and Perloff, *Modern Industrial Organization*, Third Edition, Addison-Wesley, 2000, at Ch. 14; and Darby and Karni, "Free Competition and the Optimal Amount of Fraud," *Journal of Law and Economics*, Vol. 16, 1973, pp. 67-88.

on contact lenses and have a great deal of choice of practitioners, contact lenses have many aspects of a search good.

For experience goods, a consumer must consume the product to evaluate quality (e.g. the taste of a processed food). Under certain circumstances, sellers of experience goods may have an incentive to take unfair advantage of customers, but this potential is generally eliminated where sellers rely on repeat purchases. That is, a seller will not endanger its future sales by attempting to make a single sale that a consumer can determine was not in her interest. Since contact lens retailers rely on repeat purchases, and consumers are aware of alternatives in the competitive market for eye care professionals, there should be little or no incentive for practitioners to mislead consumers.

For credence goods, quality cannot be determined even with normal use. A product exhibiting credence qualities would be, for example, taking a certain brand of vitamin supplement, assuming it will make one healthier without being able to measure one's improved health. Since contact lens consumers often search for alternative contact lenses and directly observe and experience relevant product attributes, contact lenses do not fall in the category of "credence" good.

IV. OSI's Distribution Strategy

A. Overview

Of the five major manufacturers, OSI is the smallest. Unlike its four major competitors, OSI focuses its distribution of contact lenses on sales to eye care professionals. In particular, OSI does not sell contact lenses to retailers that do not also provide substantial eye care services. Although this is clearly a form of limited distribution, the limitation is relatively narrow. OSI sells all of its products, except for one, to approximately 17,000 different retailers representing approximately 20,000 different locations in the United States.⁷⁷ The one product that OSI does not sell as broadly is its Hydrogenics product. As discussed above, this product is only sold to independent eye care professionals with five or fewer outlets. Accordingly, this product

⁷⁷ Chains and some doctors have multiple locations.

is not sold through large chains and retailers. Even with that further limitation, OSI sells its Hydrogenics product to approximately 5,000 eye care professionals in the United States, and it is available to some 20,000 more. Hydrogenics represents less than 5 percent of OSI's sales, and an even smaller share of overall industry sales. According to HPR, Hydrogenics' share of the soft contact lens market (measured by patient visits) was just 0.5 percent in 2003.⁷⁸

OSI's flagship product is the Biomedics lens. This product is sold under the Biomedics brand name at over 11,500 locations in the United States. This product is also sold under various private label brands in another 8,300 locations in the United States. For instance, Wal-Mart and Costco sell private label versions of the Biomedics contact lens under the UltraFlex brand name, LensCrafters sells a private label version of the Biomedics contact lens under the Versaflex brand name, and Pearle Vision sells a private label version of the Biomedics contact lens under the Polysoft brand name.

B. OSI's Limited Distribution Strategy

In its Request for Comments, the FTC asked about the incidence and benefits of exclusive distribution, the role of exclusive distribution in assuring promotion and proper levels of service, and the role of exclusives in preventing seller free-riding.⁷⁹ OSI does not supply any of its products on an exclusive basis to any particular retailer, nor is it aware of any other major manufacturer that does so. However, OSI does limit its distribution to retailers that also provide substantial eye care services. OSI's agreements with its retailers prohibit these retailers from selling OSI contact lenses to anyone other than to consumers for their personal use. Such agreements do not, however, prohibit or restrict the ability of the retailers to sell contact lenses of OSI's competitors. Moreover, OSI does not prohibit its retailers from selling its products over the Internet (assuming that the retailers also provide substantial eye care services) and many OSI retailers do offer OSI products over the Internet.

⁷⁸ HPR Report, Table SC-1X.

⁷⁹ See FTC Request for Comments, question 1, p. 5 and question 5, p. 6.

Marketing, promotion, and distribution policies are part of the way firms establish their brand identities. Distribution strategies are also part of brand positioning. The branding strategies that firms choose are among the ways they compete.⁸⁰ OSI's distribution methods are a crucial aspect of its strategy to compete with its larger and better-capitalized rivals, which include firms like Johnson & Johnson (Vistakon), Novartis (CIBA Vision), and Bausch & Lomb. OSI uses its distribution strategy to help differentiate itself from these rivals, and OSI believes that its freedom to choose its distribution methods is important to its future success.

In contrast to its larger rivals, almost all of whom have greater financial resources, OSI uses very little consumer advertising and promotion. OSI primarily promotes its contacts to eye care professionals and affiliated chains, and relies on these retailers to promote its products to consumers. Even in the area of promotion to eye care professionals, OSI estimates that its sales force is half the size of those of its rivals. Consistent with economic theory, OSI's limited distribution strategy is one of the ways it can encourage independent eye care professionals and chains to promote its products. It is well accepted that when one channel (e.g. Internet outlets) can free ride off the promotional efforts of other channels, limited distribution is an important element in encouraging other channels to invest in advertising.⁸¹ Also, by focusing on a more narrow set of channels, a firm such as OSI can develop expertise in addressing the needs of those channels.⁸²

In addition, it is well known that there are differences across manufacturers such that even "lenses with the same base curve and diameter made by different manufacturers

⁸⁰ As one researcher states:

"The task of conveying [product differentiation] is not always the sole province of the manufacturer. Channel members may also be called upon to help create the perception of a differentiated product. The kinds of stores the product is sold in, the way it is displayed and sold, and the services provided can be critical in creating a differentiated product."

Rosenbloom, *Marketing Channels: A Management View*, 6th Edition, The Dryden Press, Harcourt Brace College Publishers, 1998, p. 329.

⁸¹ See Carlton and Perloff, *Modern Industrial Organization*, 3rd Edition, 2000, pp. 401-405. See also, Cady, "Reasonable Rules and Rules of Reason: Vertical Restrictions on Distributors," *Journal of Marketing*, Summer 1982, p. 31.

⁸² See Lassar and Kerr, "Strategy and Control in Supplier-Distributor Relationships: An Agency Perspective," *Strategic Management Journal*, October 1996, p. 621.

may suit a patient's eyes differently.⁸³ Thus, it can be especially important for relatively small manufacturers such as OSI to provide incentives for prescribers to learn about and carry less well-known brands, and to encourage prescribers to try new lenses for their patients. By providing smaller manufacturers increased exposure in the marketplace, these incentives to prescribers are presumably procompetitive. Eye care professionals gain more detailed information and experience prescribing and following up with patients, which can help them better tailor contact lens prescriptions to the needs of individual patients. This can increase the patient's satisfaction with the prescribed products, and thus can improve OSI's reputation for quality.

OSI has also chosen to focus its sales on eye care professionals because it believes that a patient will have a better contact lens wearing experience if he or she interacts regularly with an eye care professional, and that purchasing contact lenses from a professional increases those interactions. OSI believes that one of the most important issues facing the contact lens industry is the incidence of "dropouts"—people who discontinue use of contact lenses. According to one study, approximately 2.7 million patients become dropouts each year.⁸⁴ Another study found that in 2001, about 2.4 million patients discontinued using contact lenses out of about 28.6 million users at the start of the year.⁸⁵ Other studies show that about 3.7 percent of long-term wearers (one year or more) and 12 percent of short-term wearers dropped out in 2000.⁸⁶

The most common reason for dropouts is discomfort (including dryness).⁸⁷ Other reasons cited appear also to be correctable.⁸⁸ Closer contact with eye care practitioners therefore can be expected to prevent many of these dropouts. With closer interaction

⁸³ See FTC Contact Lens Report, p. 11.

⁸⁴ See Kirby, "What's Driving the Dropouts?" *Review of Optometry*, April 15, 2004, available at http://www.revoptom.com/index.asp?page=2_1150.htm.

⁸⁵ See Epstein and Freedman, "Strategies for Success: The Four Cs for Preventing Contact Lens Dropout," *Review of Optometry*, March 15, 2003, available at http://www.revoptom.com/index.asp?page=2_886.htm. According to the same article, there were about 3.4 million new contact lens users in 2001.

⁸⁶ See "Trends in Contact Lenses & Lens Care," The Bausch & Lomb Annual Report to Vision Care Professionals, December 2001, p. 10. Bausch & Lomb, citing HPR data, indicates that, of the 1.7 million drop outs in 2000, 1.1 million were long-term wearers (one year or more).

⁸⁷ See Kirby (49% surveyed), *supra*; Epstein and Freedman, *supra*.

⁸⁸ *Ibid.*

with eye care professionals and follow-up care, the patient could be fit with contact lenses that could reduce discomfort and improve vision. Preventing dropouts benefits patients by allowing them to continue wearing contact lenses. OSI believes that its distribution policy, by encouraging closer interaction between the eye care professional and the patient, can reduce dropouts. In addition to the benefits to patients, OSI clearly has an economic incentive to reduce the incidence of dropouts since dropouts represent lost sales opportunities.

The FTC has also discussed the potential benefits of closer and more frequent interaction between patients and eye care practitioners. For instance, the FTC Contact Lens Report states “the primary health care concern with contact lenses appears to be that contact lens wearers return to their doctors regularly for eye examinations.”⁸⁹ The FTC further states “it can be important that the patient adhere to the doctor’s recommended wearing schedule, removing and replacing lenses when recommended,” and that “contact lens wearers incur health risks if they forego regular eye exams that would allow the optometrist or ophthalmologist to spot emerging health problems in their early stages.”⁹⁰ Given these acknowledged concerns, it is not surprising that OSI adopted a distribution strategy that increases the likelihood of closer interaction between the patient and the eye care professional.

C. OSI’s Private Label Strategy

The FTC also has requested comment on the incidence of custom label (which we generally refer to here as private label) contact lens prescriptions.⁹¹ As stated above, OSI is a relatively small contact lens manufacturer with a limited advertising and marketing budget. In competing with brands such as Acuvue that are widely advertised to consumers, OSI has chosen a strategy of utilizing private label brands. In particular, OSI sells the products it markets under the Biomedics brand also under a number of private label brands. For instance, as stated above, Wal-Mart and Costco sell contact lenses identical to Biomedics contact lenses under the UltraFlex name, LensCrafters sells

⁸⁹ FTC Contact Lens Report, p. 8 (footnote omitted).

⁹⁰ *Ibid.*, p. 7 (footnote omitted).

⁹¹ See FTC Request for Comments, question 14, pp. 8-9.

contact lenses identical to Biomedics contact lenses under the brand name Versaflex, and Pearle Vision sells them under the Polysoft brand name.

OSI is the only major manufacturer that has adopted this strategy in any significant way.⁹² Accordingly, we can estimate the share of private label. Using the HPR patient visit data referenced above as a proxy for prescription shares, and OSI's internal data regarding sales of its Biomedics brand versus its sales of private label brands, we estimate that private label brands constitute less than 8 percent of total soft contact lens prescriptions.

Private label products can increase the competitiveness of OSI and benefit consumers in a number of ways. First, since retailers essentially control the private label brand name, private labels give individual retailers and retail chains incentives to expend resources on promotion of these products and make consumers aware of additional non-brand name alternatives. In this way, OSI has a low cost way to increase promotion. Encouraging retailers to expend promotion dollars essentially on behalf of OSI provides a way for OSI to partially offset the disparity in promotional expenditures between OSI and its larger rivals. Indeed, research suggests that private labels are more attractive for firms that are not the market leader in a given segment.⁹³ Second, to the extent that private label products result in expanded sales, these expanded sales better allow OSI to capture economies of scale in production, and thus enhances its competitiveness and ability to offer lower prices to consumers.⁹⁴

The FTC's recent E-commerce report on the contact lens industry states that private label products can "promote consumer health and welfare."⁹⁵ The FTC further cites a manufacturer who noted that although his company does not sell private label

⁹² The only other manufacturer that we are aware of that uses private label to any degree is CooperVision. CooperVision sells a few private label brands--2Clear sold to VisionSource (the country's largest buying group), Provision and Onevue sold to various independent study practice groups, and Sterling 55 sold to Sterling Optical. OSI estimates that these brands account for about 10 percent of CooperVision's total lens sales.

⁹³ See Dunne and Narasimhan, "The New Appeal of Private Labels," *Harvard Business Review*, May-June 1999, p. 3.

⁹⁴ *Ibid.*

⁹⁵ See FTC Contact Lens Report, p. 8.

contact lenses, private label products are procompetitive because they spur innovation among branded products.⁹⁶

Private label competition is important in many consumer products. For example, by one estimate, private label sales accounted for fully 20 percent of grocery store sales in 1999.⁹⁷ Economic theory and research indicates that the availability of private labeled products generally benefits consumers by providing an alternative to more heavily promoted national brands.⁹⁸ Private label products typically do not have the advertising and marketing costs of major brands, and provide smaller manufacturers and resellers a means of differentiating from the major brands. Survey research indicates that among the primary reasons retailers develop private labels are prices and increased consumer loyalty.⁹⁹

A vibrant private label segment of a consumer product industry is generally regarded as a benefit to competition and consumers. As with other private label products, private label contact lenses reduce the costs of advertising and marketing compared to that borne by the major brands and provide differentiation advantages to both manufacturers and retailers. The availability of private label lenses also provides leverage for retailers in dealing with manufacturers of major brands.

While we do not have comprehensive price data, anecdotal evidence suggests that OSI's private label contact lens products are sold to consumers at prices competitive with comparable contact lens products from other major manufacturers. For example, a review of online prices of leading 1-2 week disposable contact lens six-packs from various large OSI retail customers showed that the private label brands of OSI's

⁹⁶ See FTC Contact Lens Report, p. 28.

⁹⁷ See Dunne and Narasimhan, *supra*.

⁹⁸ See, for instance, Pauwels and Srinivason, "Who Benefits From Store Brand Entry?" Working Paper. See also, Berges-Sennou, Bontems, and Requillart, "Economic Impact of the Development of Private Labels," University of Toulouse Working Paper, 2003.

⁹⁹ See Berges-Sennou, Bontems, and Requillart, *supra*, p. 7 and sources cited therein.

Biomedics 55 product were generally priced below the price of Vistakon's Acuvue2 and CIBA Vision's Focus 1-2 Week contact lens products.¹⁰⁰

D. The Competitive Implications of OSI's Distribution Strategy

The FTC requested information on the competitive impact of exclusive distribution and custom labeled contact lenses.¹⁰¹ In this section we first discuss the ability of OSI's distribution policies to affect competition and consumers. We then discuss and test the evidence on whether limited distribution induces prescribers to expand sales through anticonsumer means.

1. OSI's Distribution Policies do not Limit Competition

As discussed above, OSI's overall share of the soft contact lens market was only about 12.4 percent in 2003. OSI's market share has been relatively stable over the past several years. Given this relatively small share, OSI's distribution policies cannot have any deleterious effect on competition. Instead, OSI's distribution strategy has made OSI a more effective competitor.

Moreover as stated above, OSI's distribution model is not particularly exclusive. While OSI sells only to outlets affiliated with eye care professionals, its contact lenses are widely available through all the various channels. OSI sells its main product line, Biomedics, to a number of different chain and independent eye care outlets under Biomedics and private label brand names. It is well known in the industry and among contact lens distributors that these products, although sold under a number of different brand names, are identical. It is not uncommon for distributors (including online distributors) to substitute their private label brand of the Biomedics products when presented with a Biomedics or other private label prescription. Such behavior is likely to be even more common since the passage of the Fairness to Contact Lens Consumers Act, which specifically authorized distributors to substitute among brand names for identical products produced by the same manufacturer. Thus, OSI's distribution model does not

¹⁰⁰ See <http://www.walmart.com> (OSI-\$15.96; Vistakon and CIBA Vision-\$17.96); <http://www.bestcontacts.com> (OSI-\$19.45; Vistakon and CIBA Vision-\$19.99); <http://www.docoptics.com> (all \$19.99); <http://www.foreyes.com> (OSI-\$20; Vistakon-\$22; CIBA Vision-\$25). *Sites visited June 22, 2004.*

¹⁰¹ See FTC Request for Comments, question 7, p. 7, and question 20, p. 10.

restrict the channels available to its customers; even those customers that prefer an online outlet for Biomedics or private label contacts have easy access to these products, regardless of the source of the prescription.

Even for Hydrogenics, for which access is “limited” to small independent eye care professionals, distribution cannot be characterized as limited in any meaningful sense. Indeed, as noted above, Hydrogenics lenses are carried by approximately 5,000 eye care professionals and available to some 20,000 more. Thus, Hydrogenics lenses are, in fact, widely available. The degree of information possessed by consumers, the level of competition among eye care professionals, and the wide availability of Hydrogenics lenses ensures that competitive forces provide market discipline in the practitioner’s decision to prescribe Hydrogenics and the price at which practitioners sell these lenses.

2. *Evidence Inconsistent with Prescribers Misusing Limited Distribution*

One allegation that has been made about private label or limited distribution contact lenses is that practitioners might prescribe these contact lenses to the disadvantage of their patients. Although this in theory might happen with some practitioners, consumers have access to substantial information on which to make choices. Certainly the fact that private label or limited distribution contact lenses are prescribed is not, in itself, an indication that consumers were harmed.

Any concern that private label contact lenses in particular might somehow lock-in patients with a given eye care professional has largely been eliminated by the Fairness to Contact Lens Consumers Act, which as noted above expressly authorized private label substitution without consulting the prescriber. Wal-Mart, for instance, can fill a LensCrafters Versaflex prescription with an identical Ultraflex product since both brands are produced by OSI. In practice, the Act merely formalizes the way many retailers have been behaving for some time.¹⁰² As one optometrist has noted, “private labeling doesn’t

¹⁰² See Padilla, *et al.*, “Purchasing Lenses from Online Lens Retailers,” *Contact Lens Spectrum*, March 2004, available at http://www.clspectrum.com/archive_results.asp?loc=archive\2004\march\0304038.htm. See also Lee, “Can Private-Label Save Private Practice? Or are National Brands the Best Way to Retain Your Contact Lens Patients?” *Review of Optometry*, Vol. 139, No. 5, May 15, 2002 (“[M]any of the alternate retailers offer some of the more widely used private-label lenses, or sometimes simply switch the patient to another brand of lens.”), available at http://www.revoptom.com/index.asp?page=2_522.htm.

stop patients from getting lenses elsewhere, because all the ‘elsewheres’ know that a Mediflex, Ultraflex, etc. are OSI lenses.”¹⁰³

Concerns have also been voiced that small independent eye care professionals with access to the limited distribution products, such as Hydrogenics lenses, will be able to misuse that “exclusivity” and their control over the prescription to charge an supracompetitive price for those lenses. If this occurs at all, it is unlikely that this is a significant problem for a number of theoretical and factual reasons. As discussed above in Section III.B, this hypothetical problem could only exist if consumers are either unaware of being disadvantaged at time of purchase *and later* when another decision on contact lens purchase and examination is required or, if aware, are unable or unwilling to do anything about it.

The degree to which consumers are informed, along with competition among eye care professionals and other distributors of contact lenses, provides market discipline that likely limits any such behavior.¹⁰⁴ As we discussed above, contact lens manufacturing, prescribing and distribution are all very competitive, and this gives patients ample ability for consumers to avoid being exploited by an eye care professional who might want to try to raise the price of limited distribution products.

In this highly competitive environment, there are reasons to believe that eye care professionals would not attempt to exploit their patients in this context. First, of course, the eye care professionals have ethical obligations, and we presume that most of them take those obligations seriously. However, the market provides other important constraints. A patient relationship is valuable to an optometrist or ophthalmologist. If a patient discovered that the eye care professional was exploiting the relationship, the result would likely be the loss of a patient. Satisfied patients provide a continuing source of income from regular examinations, plus the potential for other patients from family or friends of the patient. Charging an anticompetitive price for contact lenses would be economically irrational in this context. More likely, eye care professionals simply like

¹⁰³ *Ibid.*

¹⁰⁴ As Chairman Muris noted, “the [FTC] is well aware that robust competition is the best, single means to protect consumers.” See <http://www.ftc.gov/speeches/muris/030819asp.htm>

the ability to offer something different, as well as something that might aid in patient compliance and follow-up eye care, and to have the competitive margin on sales. Consumers not happy with that arrangement will presumably vote with their feet, so there is no apparent reason for intervention.

Two additional factors militate against consumer lock-in to a given brand of contact lens. First, contact lens prescriptions are generally valid for a year. Thus, consumers have to renew their prescriptions at regular intervals, which provide an opportunity to switch between brands. Second, consumers can switch between prescribers with relative ease and at low cost, either after or before their existing prescription expires. Indeed, as discussed above, 1-800-CONTACTS even has instituted a program to help consumers locate eye care professionals that will switch their prescriptions at a discounted fee to brands that 1-800-CONTACTS dispenses.¹⁰⁵

Market evidence also indicates that the availability of private label or limited distribution products does not cause eye care professionals to significantly favor these products over competitive alternatives. For example, if OSI's distribution strategy led eye care professionals to significantly alter prescribing and dispensing patterns, one would expect to see significant differences across various outlets based on the prevalence of OSI's products. Much of OSI's private label business consists of sales through chain retail outlets. However, OSI's share of patient visits is only slightly higher at chain retail outlets than its overall share (15.1% of chain retail patient visits versus 12.4% of total patient visits). (See Table 2 above.) Similarly, despite the limited distribution of Hydrogenics product to individual eye care professionals, OSI's share of patient visits to O.D.s (11.1%) is actually lower than its overall share. In addition, OSI's share of new patient visits and brand switchers is similar to its overall share, indicating that there is little steering of these patients to OSI brands that are sold exclusively through eye care professionals.¹⁰⁶

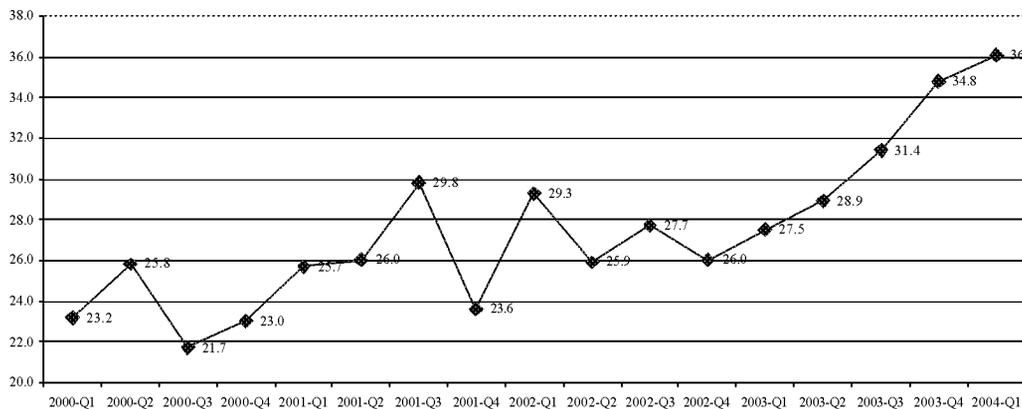
There is also a "natural experiment" with which to test the incentive and ability of eye care professionals to use limited distribution products to limit competition from other

¹⁰⁵ See 1-800-CONTACTS Form 10-K, p. 6; see also <http://www.1800contacts.com/exam.html>.

¹⁰⁶ See Table 2 above and HPR Report to Ocular Sciences, Table SC-16x.

types of contact lens. Until recently, Vistakon also had a limited distribution strategy. In fact, Vistakon only began selling directly to 1-800-CONTACTS in March 2003.¹⁰⁷ If the prescribing of limited distribution lenses could limit competition for contact lens sales from 1-800-CONTACTS and other online retailers, then one would expect to see an increase in OSI's share and a decrease in Vistakon's share after this event if (as some online sellers allege) eye care professionals had an incentive to steer patients away from the brand where they now faced more retail competition and towards brands with relatively less retail competition. If anything, the evidence indicates the opposite. In fact, for patients new to contacts (arguably the area where any alleged steering behavior would be most evident) Vistakon's share has grown steadily since it began selling directly to 1-800-CONTACTS.

Figure 3
Vistakon's Percentage Share of Soft Spherical Contact Lenses
(New to Contacts)



Source: HPR data provided by OSI

While the available data do not let us control for all the possible other explanations for the growth in Vistakon's share, there appears to be no obvious explanation, such as the introduction of new products, or changes in Vistakon's

¹⁰⁷ See 1-800-CONTACTS Form 10-K, p. 11. We understand this change in policy was part of a settlement of litigation. Thus, it seems likely that Vistakon also began selling directly to other online and mail order retailers about this same time.

promotional patterns.¹⁰⁸ Thus, this natural experiment indicates that eye care professionals do not use limited distribution as a way to forestall competition from other retail outlets.

3. *Limited Distribution has not Adversely Affected Manufacturer Entry*

The FTC has also asked whether there are instances where exclusive distribution has prevented entry by a manufacturer.¹⁰⁹ The evidence does not indicate that a limited distribution strategy has discouraged entry into manufacturing. For example, 1-800-CONTACTS has branched out into contact lens manufacturing. On February 24, 2004, 1-800-CONTACTS acquired VisionTec, “a developer and manufacturer of daily contact lenses based in the United Kingdom.”¹¹⁰ 1-800-CONTACTS renamed the business ClearLab UK, Ltd, to go along with the name of another manufacturing facility in Singapore that 1-800-CONTACTS acquired in 2002. 1-800-CONTACTS plans to use this manufacturing capability to sell its own contacts in the U.S. in direct competition with OSI and other manufacturers.¹¹¹

E. *Examples of Limited Distribution by Healthcare Providers in Other Areas of Healthcare*

The practice of healthcare professionals selling limited distribution products is not limited to contact lenses. There are other settings where healthcare professionals distribute products that are not available through other channels. One common example is dermatologists selling proprietary skin care products (so-called “cosmeceuticals”).¹¹² In some cases, dermatologists create their own skin care products that they sell to their

¹⁰⁸ Vistakon’s Acuvue Advance product was launched at the beginning of 2004. See http://www.jnj.com/news/jnj_news/20040115_112140.htm

¹⁰⁹ See FTC Request for Comments, question 3, p. 6.

¹¹⁰ See 1-800-CONTACTS Form 10-K, p. 3.

¹¹¹ *Ibid.*

¹¹² See Hayt, “Vanity Goes to the Doctor: Today’s Dermatologists are Remaking Themselves as Beauty Gurus and Even Opening Spas,” *New York Times*, November 14, 1999, http://www.thespaassociation.com/community/library/imported_content/nvt4.htm, see also, http://magazines.ivillage.com/townandcountry/print/0_628714.00.html.

patients.¹¹³ In other cases, dermatologists act as the sole channel through which manufacturers' products are distributed.¹¹⁴ These products attempt to distinguish themselves from other products through their distribution channels, and through the ingredients that are different or in higher concentration than those available at retail.

A second area is so-called "nutraceuticals," nutritional supplements sold only through healthcare providers, such as physicians and chiropractors.¹¹⁵ As with cosmeceuticals, these products use their distribution channel to distinguish themselves from nutritional supplements available at retail.

Teeth whitening systems provide a third example of a product that is often distributed exclusively through healthcare providers. In this case, there are both over-the-counter systems available from retailers and systems available only through dentists that compete with each other.

The similarities in market dynamics between the above products and contact lenses should not be affected by the presence or absence of a prescription requirement for contacts. In each case: (i) the consumer may look to the healthcare professional for advice and direction on the appropriate product; (ii) the professional has a stake in maintaining his or her reputation and a continuing relationship with the patient; (iii) consumers can readily obtain information on and access to other competing products and competing sellers; and (iv) consumers can and often do select or switch to other products or sellers. As with contact lenses, reasons to pursue such a strategy include reducing promotional costs by encouraging professionals to promote the product and developing word-of-mouth advertising, enhancing brand value, and/or enhancing the image of the seller.¹¹⁶

¹¹³ See <http://magazines.ivillage.com/townandcountry/print/0..628714.00.html>.

¹¹⁴ See "Why use medicated skincare products (cosmeceuticals)," http://english.drleeskinicare.com/content.asp?category_id=3210. See also, <http://www.advancederm.net/catalog.html>.

¹¹⁵ See http://articles.findarticles.com/p/articles/mi_m0ISW/is_2001_April/ai_72297193. See also, <http://www.hsrmagazine.com/articles/071news.html>.

¹¹⁶ The notion of using a limited distribution policy to protect the value of a high quality brand and to encourage sellers to undertake investments in learning about and promoting the products is of course common in other goods. For example, Rolex makes a point of informing consumers that it does not sell its products via the Internet. See http://www.rolex.com/home/legal_onload.html.

V. Conclusions

Manufacturing of contact lenses is competitive in a number of dimensions. The marketplace consists of five substantial competitors that compete through prices, through the introduction of new products and cost-reducing process innovations, and across various distribution channels. The products of the major manufacturers are heavily promoted to both eye care professionals and consumers, which increases consumer knowledge of prices, product characteristics, and competitive alternatives. Most contact lens patients are repeat purchasers of contact lenses, so they have strong incentives to gather information and have direct information on the performance and price of contacts. As a result of all these factors, there is substantial competition for informed consumers capable of making choices between brands -- including brands that are offered only through eye care professionals.

Any theory under which practitioners would be able to steer patients to contact lenses that provide private benefits to practitioners, but no incremental benefits to patients, depends on the presence of substantial asymmetric information between providers and patients. However, the contact lens market does not exhibit such asymmetries.

Of the five major manufacturers, OSI is the smallest. Unlike its major competitors, OSI focuses its distribution of contact lenses on sales to eye care professionals. OSI uses this distribution strategy to help distinguish itself from its larger and better-known rivals. Its agreements with its retailers do not prohibit or restrict the ability of its retailers to sell contact lenses of OSI's competitors.

OSI's limited distribution strategy is one of the ways it can encourage independent eye care professionals and chains to promote its products. It is well accepted that when one channel (say Internet outlets) can free ride off the promotional efforts of other channels, limited distribution is an important element in encouraging such other channels to invest in advertising. Even so, OSI's distribution model is not particularly exclusive. While OSI sells only to outlets affiliated with eye care professionals, there are approximately 20,000 such outlets, and its contact lenses are available through all the various channels, including both online and offline retailers.

OSI has also chosen to focus its sales on eye care professionals because it believes that a patient will have a better contact lens wearing experience if he or she interacts regularly with an eye care professional, and that purchasing contact lenses from a professional increases those interactions. With closer interaction with eye care professionals and follow-up care, the patient could be fit with contact lenses that could reduce discomfort and improve vision. Preventing dropouts benefits patients by allowing them to continue wearing contact lenses. OSI believes that its distribution policy, by encouraging closer interaction between the eye care professional and the patient, can reduce dropouts.

Given (i) the substantial evidence that the contact lens market is highly competitive, (ii) the significant amount of information available to consumers on contact lens products and distribution, and (iii) the lack of evidence of anticompetitive effects, we conclude that market forces are operating effectively in this industry. The evidence we have analyzed indicates that consumers are not disadvantaged by limited distribution strategies. Accordingly, we do not find a credible basis for increased intervention in the marketplace through additional regulation.

Appendix 1
New Product Introductions by Quarter
(As Reported by Health Products Research, Inc.)

Product Information Bulletin
Fourth Quarter - 2003
New Lens Brands

Vistakon	Acuvue Advance	Soft spherical, disposable replacement, handling tint, 6 pack
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Product Information Bulletin
Third Quarter – 2003
New Lens Brands

Manufacturer	Brand Name	Description
CIBA Vision	Fresh Look Dimensions	Soft spherical, disposable replacement, enhancing tint, 6 pack
OSI	Versaflex One Day	Soft daily disposable
Paragon Vision Sciences	Paragon HDS CRT	Rigid gas permeable, corneal refractive therapy

Product Information Bulletin
First Quarter – 2003
New Lens Brands

Manufacturer	Brand Name	Description
CIBA Vision	Fresh Look Radiance	Soft spherical, disposable replacement, shimmer tint, 6 pack
CooperVision	Expressions Accents	Soft spherical, planned lens replacement, enhancing tint, 6 pack
OSI	Cover Girl Colors*	Soft spherical, disposable replacement, opaque tint, 6 pack
Sauflon Pharmaceuticals	Sauflon 55	Soft spherical, planned lens replacement, visibility tint, 6 pack
United Contact Lens	Ultravue 2000 Toric Multifocal	Soft toric multifocal, traditional replacement

Appendix 1
New Product Introductions by Quarter
(As Reported by Health Products Research, Inc.)

Product Information Bulletin
Fourth Quarter – 2002
New Lens Brands

Manufacturer	Brand Name	Description
Acuity One	Ultravue PRP	Soft toric, planned lens replacement
Bausch & Lomb	Soflens Multifocal	Soft multifocal, planned lens replacement, visibility tint, 6 pack
CIBA Vision	Focus Dailies Toric	Soft toric, disposable replacement
Lifestyle Co.	Lifestyle Toric Bifocal	Soft toric bifocal, traditional replacement, visibility tint

Product Information Bulletin
Third Quarter – 2002
New Lens Brands

Manufacturer	Brand Name	Description
CIBA Vision	Durasoft 2 Color Blends	Soft spherical, traditional replacement, opaque tint
	Wild Eyes X-Colors	Soft spherical, traditional replacement, opaque tint
Unilens	C-View Multifocal	Soft multifocal, disposable, handling tint, 6 pack

Product Information Bulletin
Second Quarter – 2002
New Lens Brands

Manufacturer	Brand Name	Description
OSI	Biomedics Enhancing	Soft spherical, disposable, enhancing tint, 6 pack
	Biomedics Opaque	Soft spherical, disposable, opaque tint, 6 pack

Appendix 1
New Product Introductions by Quarter
(As Reported by Health Products Research, Inc.)

Product Information Bulletin
First Quarter – 2002
New Lens Brands

Manufacturer	Brand Name	Description
CooperVision	Frequency 55 Multifocal	Soft multifocal, planned lens replacement, handling tint, 6 pack
Metro Optics	Metrofocal Toric	Soft toric multifocal, traditional/reusable, handling tint
	Metro Progressive Lens	RGP multifocal, traditional/reusable

Product Information Bulletin
Fourth Quarter – 2001
New Lens Brands

Manufacturer	Brand Name	Description
Biocompatibles	Proclear Compatibles Toric	Soft toric, planned lens replacement, handling tint, 6 pack
CIBA Vision	Focus Night & Day	Soft spherical, planned lens replacement, clear lens, 6 pack
OSI	Disposable/PRP Toric "Other"*	Soft toric, disposable, handling tint, 6 pack
Vistakon	Acuvue 2 Colours Enhancing	Soft spherical, disposable, enhancing tint, 6 pack
	Acuvue 2 Colours Opaque	Soft spherical, disposable, opaque tint, 6 pack

Appendix 1
New Product Introductions by Quarter
(As Reported by Health Products Research, Inc.)

Product Information Bulletin
Third Quarter – 2001
New Lens Brands

Manufacturer	Brand Name	Description
CooperVision	ProVision Premium	Soft spherical, planned lens replacement, handling tint, 6 pack
Flexlens Products	Flexlens Spheres (PowerPak)	Soft spherical, planned lens replacement, 3 pack
Innovision	Hydro 2	RGP
OSI	Mediflex Toric	Soft toric, disposable, handling tint, 6 pack
Optech, Inc.	Polyvue Toric Multifocal	Soft multifocal toric
Specialty Ultravision	Epicon	RGP

Product Information Bulletin
Second Quarter – 2001
New Lens Brands

Manufacturer	Brand Name	Description
Blanchard Contact Lens Inc.	Essential Soft Toric Multifocal	Soft reusable, toric multifocal
CIBA Vision	Focus Dailies Progressives	Soft multifocal, 1-day disposable
CooperVision	Ascend	Soft spherical, planned lens replacement, visibility tint, 6 pack
	Clear Comfort	Soft spherical, planned lens replacement, visibility tint, 6 pack
	Cooper Expressions	Soft spherical, planned lens replacement, opaque tint, 6 pack
	Encore	Soft spherical, planned lens replacement, visibility tint, 6 pack
Vision Partners	Vision Partners	Soft spherical, disposable, visibility tint, 6 pack

Appendix 1
New Product Introductions by Quarter
(As Reported by Health Products Research, Inc.)

Product Information Bulletin
First Quarter – 2001
New Lens Brands

Manufacturer	Brand Name	Description
Benz Research & Development	Extreme H ₂ O	Soft spherical, planned lens replacement, visibility tint, 6 pack
CIBA Vision	Fresh Look ColorBlends Toric	Soft toric, disposable, flexible wear, opaque tint, 6 pack
CooperVision	CV 43	Soft spherical, reusable, visibility tint
	CV 43 FW	Soft spherical, reusable, flexible wear, visibility tint

* New brand of existing product