

United States District Court  
District of Utah

D. Mark Jones  
Clerk of Court



Louise S. York  
Chief Deputy Clerk

May 13, 2015

Counsel of Record

RE: NOTICE OF APPEAL  
Alcon Laboratories(Bausch & Lomb), Inc. V. Reyes  
Plaintiff/Appellant Defendant/appellee  
Lower Docket: 2:15-cv-00252-DB

The notice of appeal for this case has been filed.

**RETAINED** Counsel for the appellant is instructed to download the “Initial Appeal Documents and Instructions” for this appeal from [www.ca10.uscourts.gov](http://www.ca10.uscourts.gov). Please follow the instructions for Transcript Order Form and Docketing Statement (for appellant only) regarding counsel’s responsibility for compliance. For specific requirements concerning transcripts, records on appeal, briefs and appendices to briefs, please refer to the Federal Rules of Appellate Procedure and the Rules of the Tenth Circuit Court of Appeals. Rules of the Tenth Circuit are available at [www.ca10.uscourts.gov](http://www.ca10.uscourts.gov).

Counsel and the Tenth Circuit will receive the following via CM/ECF (If counsel or party are not e-filers, they will receive these documents by mail): Order/Judgment being appealed from, Notice of Appeal, Letter of Transmission of the Preliminary Record on Appeal, Docket Sheet.

Sincerely,

D. Mark Jones, Clerk

By:/s/  
Jennifer Richards  
Generalist Clerk

DMJ:jmr

cc: Clerk, U.S. Court of Appeals, Tenth Circuit  
Court Reporter: Ed Young  
Division: Central  
Jurisdiction: Federal Question

Judge Dee Benson  
District: 1088

APPEAL,CONSOLIDATED,LEAD\_CASE,OPEN\_MJ

**US District Court Electronic Case Filing System  
District of Utah (Central)  
CIVIL DOCKET FOR CASE #: 2:15-cv-00252-DB**

Alcon Laboratories, Inc. v. Reyes  
Assigned to: Judge Dee Benson  
Member cases:

2:15-cv-00257-DB

2:15-cv-00259-DB

Case in other court: Tenth, 15-04071

Tenth, 15-04072

Cause: 42:1983 Civil Rights Act

**Plaintiff**

**Alcon Laboratories, Inc.**

Date Filed: 04/13/2015

Jury Demand: None

Nature of Suit: 440 Civil Rights: Other

Jurisdiction: Federal Question

represented by **Amy F. Sorenson**

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**Plaintiff**

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V.

**Intervenor Plaintiff**

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**Intervenor Plaintiff**

**Costco Wholesale Corporation**

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V.

**Defendant**

**Sean D. Reyes**  
*in his Official Capacity as Attorney  
 General of the State of Utah*

represented by **David N. Wolf**  
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Date Filed	#	Page	Docket Text
04/13/2015	<u>1</u>		Case has been indexed and assigned to Magistrate Judge Brooke C. Wells. Plaintiff Alcon Laboratories, Inc. is directed to E-File the <u>Complaint and cover sheet</u> (found under Complaints and Other Initiating Documents) and pay the filing fee of \$ 400.00 by the end of the business day. <b>NOTE: The court will not have jurisdiction until the opening document is electronically filed and the filing fee paid in the CM/ECF system.</b>

		Civil Summons may be issued electronically. Prepare the summons using the courts <u>PDF version</u> and email it to utdecf_clerk@utd.uscourts.gov for issuance. (mms) (Entered: 04/13/2015)
04/13/2015	<u>2</u>	COMPLAINT against Sean D. Reyes (Filing fee \$ 400, receipt number 1088-2244409), filed by Alcon Laboratories, Inc.. (Attachments: # <u>1</u> Civil Cover Sheet Civil Cover Sheet) Assigned to Magistrate Judge Brooke C. Wells (Sorenson, Amy) (Entered: 04/13/2015)
04/13/2015	<u>3</u>	<b>**RESTRICTED DOCUMENT**</b> Summons Issued Electronically as to Sean D. Reyes. Instructions to Counsel: 1. Click on the document number. 2. If you are prompted for an ECF login, enter your 'Attorney' login to CM/ECF. 3. Print the issued summons for service. (mms) (Entered: 04/13/2015)
04/13/2015	<u>4</u>	NOTICE OF REQUIREMENTS for appearance phv mailed to attorney David Greenwald, for Plaintiff Alcon Laboratories, Inc. (mms) (Entered: 04/13/2015)
04/13/2015	<u>5</u>	MOTION for Preliminary Injunction and Memorandum in Support filed by Plaintiff Alcon Laboratories, Inc.. (Attachments: # <u>1</u> Appendix, # <u>2</u> Exhibit 1- Declaration of Amy F. Sorenson, # <u>3</u> Exhibit A to Dec of Amy F. Sorenson (March 10, 2015 Certified Transcript), # <u>4</u> Exhibit B to Dec of Amy F. Sorenson ( Statement of David A. Cockrell), # <u>5</u> Exhibit C to Dec of Amy F. Sorenson (March 5, 2015 Certified Transcript), # <u>6</u> Exhibit D to Dec of Amy F. Sorenson (February 17, 2015 Certified Transcript), # <u>7</u> Exhibit 2- Declaration of Richard E. Weisbarth, OD)(Sorenson, Amy) (Entered: 04/13/2015)
04/14/2015	<u>6</u>	<b>**RESTRICTED DOCUMENT**</b> SUMMONS Returned Executed by Alcon Laboratories, Inc. as to Sean D. Reyes served on 4/13/2015, answer due 5/4/2015. (Mettler, Amber) (Entered: 04/14/2015)
04/14/2015	<u>7</u>	NOTICE of Appearance by Parker Douglas on behalf of Sean D. Reyes (Douglas, Parker) (Entered: 04/14/2015)
04/15/2015	8	Plaintiff has filed a motion for Preliminary Injunction. Pursuant to court policy, the filing of a motion for Preliminary Injunction would render this case ineligible for consent to the jurisdiction of a magistrate judge. Case randomly assigned to Judge Dee Benson. Magistrate Judge Brooke C. Wells no longer assigned to the case. (las) (Entered: 04/15/2015)
04/15/2015	<u>9</u>	MOTION for Admission Pro Hac Vice of David Greenwald , Registration fee \$ 15, receipt number 1088-2246104, filed by Plaintiff Alcon Laboratories, Inc.. (Attachments: # <u>1</u> Exhibit A: Application for Pro Hac Vice, # <u>2</u> Exhibit B: Electronic Case Filing Registration Form, # <u>3</u> Text of Proposed Order)(Mettler, Amber) (Entered: 04/15/2015)
04/17/2015	<u>10</u>	MOTION to Intervene and Memorandum in Support filed by Movant 1-800 Contacts. Attorney Brent O. Hatch added to party 1-800 Contacts(pty:mov)(Hatch, Brent) (Entered: 04/17/2015)
04/17/2015	<u>11</u>	AFFIDAVIT/DECLARATION of David G Walker in Support re <u>10</u>



		MOTION to Intervene and Memorandum in Support filed by Movant 1–800 Contacts. (Hatch, Brent) (Entered: 04/17/2015)
04/17/2015	<u>12</u>	MOTION to Expedite Motion to Intervene and Memorandum in Support filed by Movant 1–800 Contacts. (Attachments: # <u>1</u> Text of Proposed Order Granting Motion)(Hatch, Brent) (Entered: 04/17/2015)
04/17/2015	<u>13</u>	NOTICE of Appearance by Phillip J. Russell on behalf of 1–800 Contacts (Russell, Phillip) (Entered: 04/17/2015)
04/20/2015	<u>14</u>	NOTICE of Appearance by David N. Wolf on behalf of Sean D. Reyes (Wolf, David) (Entered: 04/20/2015)
04/20/2015	<u>15</u>	NOTICE of Appearance by Mark M. Bettilyon on behalf of Costco Wholesale Corporation (Bettilyon, Mark) (Entered: 04/20/2015)
04/20/2015	<u>16</u>	MOTION for Admission Pro Hac Vice of Shylah R. Alfonso , Registration fee \$ 15, receipt number 1088–2249507, filed by Movant Costco Wholesale Corporation. (Attachments: # <u>1</u> Exhibit A– PHV Application, # <u>2</u> Exhibit B– ECF Registration, # <u>3</u> Text of Proposed Order Proposed Order)(Bettilyon, Mark) (Entered: 04/20/2015)
04/20/2015	<u>17</u>	MOTION for Admission Pro Hac Vice of David J. Burman , Registration fee \$ 15, receipt number 1088–2249527, filed by Movant Costco Wholesale Corporation. (Attachments: # <u>1</u> Exhibit A–Application for PHV, # <u>2</u> Exhibit B–ECF Registration, # <u>3</u> Text of Proposed Order Proposed Order)(Bettilyon, Mark) (Entered: 04/20/2015)
04/20/2015	<u>18</u>	MOTION for Admission Pro Hac Vice of David S. Steele , Registration fee \$ 15, receipt number 1088–2249530, filed by Movant Costco Wholesale Corporation. (Attachments: # <u>1</u> Exhibit A– PHV Application, # <u>2</u> Exhibit B– ECF Registration, # <u>3</u> Text of Proposed Order Proposed Order)(Bettilyon, Mark) (Entered: 04/20/2015)
04/20/2015	<u>19</u>	<b>ORDER granting <u>9</u> Motion for Admission Pro Hac Vice of David N. Greenwald for Alcon Laboratories, Inc.</b> <i>Attorneys admitted Pro Hac Vice may download a copy of the District of Utahs local rules from the courts web site at <a href="http://www.utd.uscourts.gov">http://www.utd.uscourts.gov</a> . Signed by Judge Dee Benson on 4/20/15. (jlw)</i> (Entered: 04/20/2015)
04/20/2015	<u>20</u>	NOTICE of Appearance by Brett L. Tolman on behalf of Costco Wholesale Corporation (Tolman, Brett) (Entered: 04/20/2015)
04/20/2015	<u>21</u>	MOTION to Intervene and Memorandum in Support filed by Movant Costco Wholesale Corporation. (Bettilyon, Mark) (Entered: 04/20/2015)
04/20/2015	<u>22</u>	AFFIDAVIT/DECLARATION of Shylah R. Alfonso in Support re <u>21</u> MOTION to Intervene and Memorandum in Support filed by Movant Costco Wholesale Corporation. (Attachments: # <u>1</u> Exhibit A –Costco Wholesale v. JJVC Complaint, # <u>2</u> Exhibit B –2.16.15 Ltr from R. Chavez)(Bettilyon, Mark) (Entered: 04/20/2015)
04/20/2015	<u>23</u>	AFFIDAVIT/DECLARATION of Richard Chavez in Support re <u>21</u> MOTION to Intervene and Memorandum in Support filed by Movant Costco Wholesale Corporation. (Bettilyon, Mark) (Entered: 04/20/2015)

04/21/2015	<u>24</u>	NOTICE of Appearance by Paul G. Cassell on behalf of 1-800 Contacts (Cassell, Paul) (Entered: 04/21/2015)
04/21/2015	<u>25</u>	<i>ORDER granting <u>16</u> Motion for Admission Pro Hac Vice of Shylah R. Alfonso,David S. Steele,David J. Burman for Costco Wholesale Corporation. Attorneys admitted Pro Hac Vice may download a copy of the District of Utahs local rules from the courts web site at <a href="http://www.utd.uscourts.gov">http://www.utd.uscourts.gov</a> ; granting <u>17</u> Motion for Admission Pro Hac Vice of Shylah R. Alfonso,David S. Steele,David J. Burman for Costco Wholesale Corporation. Attorneys admitted Pro Hac Vice may download a copy of the District of Utahs local rules from the courts web site at <a href="http://www.utd.uscourts.gov">http://www.utd.uscourts.gov</a> ; granting <u>18</u> Motion for Admission Pro Hac Vice of Shylah R. Alfonso,David S. Steele,David J. Burman for Costco Wholesale Corporation. Attorneys admitted Pro Hac Vice may download a copy of the District of Utahs local rules from the courts web site at <a href="http://www.utd.uscourts.gov">http://www.utd.uscourts.gov</a> . Signed by Judge Dee Benson on 4/20/15. (Attachments: # <u>1</u> Exhibit PHV, # <u>2</u> Exhibit PHV) (jlw) (Entered: 04/21/2015)</i>
04/21/2015	<u>26</u>	<i>ORDER granting <u>10</u> Motion to Intervene; granting <u>12</u> Motion to Expedite; granting <u>21</u> Motion to Intervene. The above-captioned actions are consolidated for all purposes. In accord with Local Rule DUCivR 42-1, Case No. 2:15cv257-CW, Johnson &amp;Johnson v. Reyes, and Case No. 2:15cv259-DAK, Bausch &amp;Lomb v. Reyes, shall be consolidated with the lower numbered case, Case No. 2:15cv252-DB, Alcon Laboratories, Inc. v. Reyes, to be heard by District Judge Dee Benson. All future filings shall be made under Case No.2:15cv252-DB and its corresponding caption. The Clerk of Court shall enter notice of this order on the docket of each consolidated case. Pursuant to DUCivR 7-1, the court hereby ORDERS expedited briefing on Plaintiffs Motion for Preliminary Injunction. Oppositions are due by close of business on April 28, 2015, and replies are due by close of business on May 1, 2015. The court will hear oral argument on the Motion for Preliminary Injunction on May 5,2015, at 2:00 p.m. Signed by Judge Dee Benson on 4/21/15. (jlw) (Entered: 04/21/2015)</i>
04/21/2015	<u>27</u>	MOTION for Preliminary Injunction and Memorandum in Support filed by Plaintiff Johnson &Johnson Vision Care. This document originally filed on April 14, 2015 in Case No. 2:15-cv-257 CW (jlw) Modified on 4/21/2015 by adding original filing date and case number (jlw). (Entered: 04/21/2015)
04/21/2015	<u>28</u>	MOTION for Preliminary Injunction and Memorandum in Support filed by Plaintiff Bausch &Lomb. This document originally filed on April 14, 2015 in Case No. 2:15-cv- 259 DAK (jlw) Modified on 4/21/2015 by adding original filing date and case number (jlw). (Entered: 04/21/2015)
04/21/2015	29	<b>NOTICE OF HEARING ON MOTIONS</b> re: <u>27</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>28</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>5</u> MOTION for Preliminary Injunction and Memorandum in Support : (Notice generated by Clerk) Motion Hearing set for 5/5/2015 at 02:00 PM in Rm 8.200 before Judge Dee Benson. (jlw) (Entered: 04/21/2015)
04/22/2015	<u>30</u>	MOTION for Admission Pro Hac Vice of Jerome A. Swindell , Registration fee \$ 15, receipt number 1088-2250907, filed by Plaintiff Johnson &Johnson Vision Care. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Text of

		Proposed Order)(Conde, Timothy) (Entered: 04/22/2015)
04/22/2015	<u>31</u>	MOTION for Admission Pro Hac Vice of Jonathan F. Cohn , Registration fee \$ 15, receipt number 1088-2250912, filed by Plaintiff Johnson &Johnson Vision Care. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Text of Proposed Order)(Conde, Timothy) (Entered: 04/22/2015)
04/22/2015	<u>32</u>	MOTION for Admission Pro Hac Vice of Ken Glazer , Registration fee \$ 15, receipt number 1088-2250915, filed by Plaintiff Johnson &Johnson Vision Care. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Text of Proposed Order)(Conde, Timothy) (Entered: 04/22/2015)
04/22/2015	<u>33</u>	MOTION for Admission Pro Hac Vice of Kwaku A. Akowuah , Registration fee \$ 15, receipt number 1088-2250918, filed by Plaintiff Johnson &Johnson Vision Care. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Text of Proposed Order)(Conde, Timothy) (Entered: 04/22/2015)
04/22/2015	<u>34</u>	MOTION for Admission Pro Hac Vice of Joel M. Mitnick , Registration fee \$ 15, receipt number 1088-2250920, filed by Plaintiff Johnson &Johnson Vision Care. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Text of Proposed Order)(Conde, Timothy) (Entered: 04/22/2015)
04/23/2015	<u>35</u>	MOTION for Admission Pro Hac Vice of Gregory M. Sergi , Registration fee \$ 15, receipt number 1088-2252371, filed by Intervenor Plaintiff 1-800 Contacts. (Attachments: # <u>1</u> Exhibit Signed Application, # <u>2</u> Exhibit Signed CM/ECF Form, # <u>3</u> Text of Proposed Order Granting Pro Hac Admission)(Russell, Phillip) (Entered: 04/23/2015)
04/23/2015	<u>36</u>	MOTION for Admission Pro Hac Vice of Garth T. Vincent , Registration fee \$ 15, receipt number 1088-2252395, filed by Intervenor Plaintiff 1-800 Contacts. (Attachments: # <u>1</u> Exhibit Signed Application, # <u>2</u> Exhibit Signed CM/ECF Form, # <u>3</u> Text of Proposed Order Granting Pro Hac Admission)(Russell, Phillip) (Entered: 04/23/2015)
04/23/2015	<u>37</u>	<b>ORDER granting <u>30</u> Motion for Admission Pro Hac Vice of Joel M. Mitnick,Jonathan F. Cohn,Ken Glazer,Kwaku A. Akowuah,Jerome A. Swindell for Johnson &amp;Johnson Vision Care.</b> <i>Attorneys admitted Pro Hac Vice may download a copy of the District of Utahs local rules from the courts web site at <a href="http://www.utd.uscourts.gov">http://www.utd.uscourts.gov</a> ; granting <u>31</u> Motion for Admission Pro Hac Vice of Joel M. Mitnick,Jonathan F. Cohn,Ken Glazer,Kwaku A. Akowuah,Jerome A. Swindell for Johnson &amp;Johnson Vision Care.</i> <i>Attorneys admitted Pro Hac Vice may download a copy of the District of Utahs local rules from the courts web site at <a href="http://www.utd.uscourts.gov">http://www.utd.uscourts.gov</a> ; granting <u>32</u> Motion for Admission Pro Hac Vice of Joel M. Mitnick,Jonathan F. Cohn,Ken Glazer,Kwaku A. Akowuah,Jerome A. Swindell for Johnson &amp;Johnson Vision Care.</i> <i>Attorneys admitted Pro Hac Vice may download a copy of the District of Utahs local rules from the courts web site at <a href="http://www.utd.uscourts.gov">http://www.utd.uscourts.gov</a> ; granting <u>33</u> Motion for Admission Pro Hac Vice of Joel M. Mitnick,Jonathan F. Cohn,Ken Glazer,Kwaku A. Akowuah,Jerome A. Swindell for Johnson &amp;Johnson Vision Care.</i> <i>Attorneys admitted Pro Hac Vice may download a copy of the District of Utahs local rules from the courts web site at <a href="http://www.utd.uscourts.gov">http://www.utd.uscourts.gov</a></i>

		<p>; granting <u>34</u> Motion for Admission Pro Hac Vice of Joel M. Mitnick,Jonathan F. Cohn,Ken Glazer,Kwaku A. Akowuah,Jerome A. Swindell for Johnson &amp;Johnson Vision Care.  <i>Attorneys admitted Pro Hac Vice may download a copy of the District of Utahs local rules from the courts web site at <a href="http://www.utd.uscourts.gov">http://www.utd.uscourts.gov</a></i>                  . Signed by Judge Dee Benson on 4/22/15. (Attachments: # <u>1</u> Errata PHV – Cohn, # <u>2</u> Errata PHV – Glazer, # <u>3</u> Errata PHV – Akowuah, # <u>4</u> Errata PHV – Swindell) (jlw) (Entered: 04/23/2015)</p>
04/24/2015	<u>38</u>	<p>ORDER granting <u>35</u> Motion for Admission Pro Hac Vice of Garth T. Vincent,Gregory M. Sergi for 1–800 Contacts.  <i>Attorneys admitted Pro Hac Vice may download a copy of the District of Utahs local rules from the courts web site at <a href="http://www.utd.uscourts.gov">http://www.utd.uscourts.gov</a></i>                  ; granting <u>36</u> Motion for Admission Pro Hac Vice of Garth T. Vincent,Gregory M. Sergi for 1–800 Contacts.  <i>Attorneys admitted Pro Hac Vice may download a copy of the District of Utahs local rules from the courts web site at <a href="http://www.utd.uscourts.gov">http://www.utd.uscourts.gov</a></i>                  . Signed by Judge Dee Benson on 4/24/15. (Attachments: # <u>1</u> PHV – Sergi) (jlw) (Entered: 04/24/2015)</p>
04/28/2015	<u>39</u>	<p>MEMORANDUM in Opposition re <u>5</u> MOTION for Preliminary Injunction and Memorandum in Support , <u>27</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>28</u> MOTION for Preliminary Injunction and Memorandum in Support filed by Intervenor Plaintiff Costco Wholesale Corporation. (Bettilyon, Mark) (Entered: 04/28/2015)</p>
04/28/2015	<u>40</u>	<p>AFFIDAVIT/DECLARATION of David S. Steele in Opposition re <u>5</u> MOTION for Preliminary Injunction and Memorandum in Support , <u>27</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>28</u> MOTION for Preliminary Injunction and Memorandum in Support filed by Intervenor Plaintiff Costco Wholesale Corporation. (Attachments: # <u>1</u> Exhibit A–Letter from Johnson &amp;Johnson Vision Care, # <u>2</u> Exhibit B–Acuvue Unilateral Price Policy, # <u>3</u> Exhibit C– ABB Optical Group The Profit Advisor)(Bettilyon, Mark) (Entered: 04/28/2015)</p>
04/28/2015	<u>41</u>	<p>AFFIDAVIT/DECLARATION of Richard Chavez in Opposition re <u>5</u> MOTION for Preliminary Injunction and Memorandum in Support , <u>27</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>28</u> MOTION for Preliminary Injunction and Memorandum in Support filed by Intervenor Plaintiff Costco Wholesale Corporation. (Bettilyon, Mark) (Entered: 04/28/2015)</p>
04/28/2015	<u>42</u>	<p>MEMORANDUM in Opposition re <u>5</u> MOTION for Preliminary Injunction and Memorandum in Support , <u>27</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>28</u> MOTION for Preliminary Injunction and Memorandum in Support filed by Defendant Sean D. Reyes. (Douglas, Parker) (Entered: 04/28/2015)</p>
04/28/2015	<u>43</u>	<p>MEMORANDUM in Opposition re <u>5</u> MOTION for Preliminary Injunction and Memorandum in Support , <u>27</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>28</u> MOTION for Preliminary Injunction and Memorandum in Support filed by Intervenor Plaintiff 1–800 Contacts. (Hatch, Brent) (Entered: 04/28/2015)</p>

04/28/2015	<u>44</u>	AFFIDAVIT/DECLARATION of David G. Walker in Opposition re <u>5</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>27</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>28</u> MOTION for Preliminary Injunction and Memorandum in Support filed by Intervenor Plaintiff 1-800 Contacts. (Hatch, Brent) (Entered: 04/28/2015)
04/28/2015	<u>45</u>	AFFIDAVIT/DECLARATION of Phillip J. Russell in Opposition re <u>27</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>28</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>5</u> MOTION for Preliminary Injunction and Memorandum in Support filed by Intervenor Plaintiff 1-800 Contacts. (Attachments: # <u>1</u> Exhibit A – U.S. Senate Committee on the Judiciary, Subcommittee antitrust. competition policy and consumer right, # <u>2</u> Exhibit B – Contact Lens Makers and Discounters Tussle Over Price Setting – NYTimes.com, # <u>3</u> Exhibit C – Senate Bus & Labor comm Hearing, 2_17_15, # <u>4</u> Exhibit D – House Bus & Labor Com Hearing S.B. 1679 – Contact Lens Consumer Protection Act Amendments, 3_5_15, # <u>5</u> Exhibit E – House Floor Debate – Contact Lens Consumer Protection Act Amendments, 3_10_15, # <u>6</u> Exhibit F – 2015 0216 UT Costco to Henderson re SB 169, # <u>7</u> Exhibit G – 2015 0216 Lens_com UT re SB 169, # <u>8</u> Exhibit H – VM – Johnson & Johnson Vision Care Introduces Unilateral Pricing Policy on Strategic Brand CLs, Di, # <u>9</u> Exhibit I – AAI Letter on RPM in Contact Lenses)(Russell, Phillip) (Entered: 04/28/2015)
04/30/2015	<u>46</u>	Ex Parte (Not Sealed) MOTION for Extension of Time to File Response/Reply as to <u>5</u> MOTION for Preliminary Injunction and Memorandum in Support filed by Plaintiff Alcon Laboratories, Inc.. (Attachments: # <u>1</u> Text of Proposed Order)(Sorenson, Amy) (Entered: 04/30/2015)
04/30/2015	<u>47</u>	Ex Parte (Not Sealed) MOTION for Leave to File Excess Pages <i>re Reply Memorandum in Support of Plaintiff ALCON Laboratories, Inc.'s Motion for Preliminary Injunction</i> filed by Plaintiff Alcon Laboratories, Inc.. (Attachments: # <u>1</u> Text of Proposed Order)(Sorenson, Amy) (Entered: 04/30/2015)
04/30/2015	<u>48</u>	<b>ORDER granting <u>46</u> Motion for Extension of Time to File Response/Reply re <u>5</u> MOTION for Preliminary Injunction and Memorandum in Support . Replies due by 5/4/2015. Signed by Judge Dee Benson on 4/30/15. (jlw)</b> (Entered: 04/30/2015)
04/30/2015	<u>49</u>	<b>ORDER granting <u>47</u> Motion for Leave to File Excess Pages. Signed by Judge Dee Benson on 4/30/15. (jlw)</b> (Entered: 04/30/2015)
04/30/2015	<u>50</u>	MOTION for Leave to File Overlength Reply Memorandum in Support of Motion for Preliminary Injunction filed by Plaintiff Johnson & Johnson Vision Care. (Attachments: # <u>1</u> Text of Proposed Order)(Conde, Timothy) (Entered: 04/30/2015)
04/30/2015	<u>51</u>	<b>ORDER granting <u>50</u> Motion for Leave to File. Signed by Judge Dee Benson on 4/30/15. (jlw)</b> (Entered: 04/30/2015)
05/01/2015	<u>52</u>	<b>***AMENDED***NOTICE OF HEARING ON MOTION</b> re: <u>27</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>28</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>5</u>



			MOTION for Preliminary Injunction and Memorandum in Support : (Notice generated by CHAMBERS) Motion Hearing set for 5/5/2015 at 02:00 PM in ***NEW COURTROOM***Rm 7.200 before Judge Dee Benson. (reb) (Entered: 05/01/2015)
05/01/2015	<u>53</u>		REPLY to Response to Motion re <u>28</u> MOTION for Preliminary Injunction and Memorandum in Support ( <i>Reply in Support of its Motion for Preliminary Injunction</i> ) filed by Plaintiff Bausch & Lomb. (Christiansen, Erik) (Entered: 05/01/2015)
05/01/2015	<u>54</u>		REPLY to Response to Motion re <u>27</u> MOTION for Preliminary Injunction and Memorandum in Support filed by Plaintiff Johnson & Johnson Vision Care. (Black, Kenneth) (Entered: 05/01/2015)
05/01/2015	<u>55</u>		AFFIDAVIT/DECLARATION of Laura Angelini in Support re <u>27</u> MOTION for Preliminary Injunction and Memorandum in Support ( <i>Supplemental</i> ) filed by Plaintiff Johnson & Johnson Vision Care. (Black, Kenneth) (Entered: 05/01/2015)
05/04/2015	<u>56</u>		REPLY to Response to Motion re <u>5</u> MOTION for Preliminary Injunction and Memorandum in Support filed by Plaintiff Alcon Laboratories, Inc.. (Sorenson, Amy) (Entered: 05/04/2015)
05/05/2015	57		<b>***AMENDED***NOTICE OF HEARING ON MOTION</b> re: <u>27</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>28</u> MOTION for Preliminary Injunction and Memorandum in Support, <u>5</u> MOTION for Preliminary Injunction and Memorandum in Support : (Notice generated by CHAMBERS) Motion Hearing set for 5/5/2015 at 02:00 PM in ***NEW COURTROOM Rm 8.300 (8th Floor N.W. Corner) before Judge Dee Benson. (reb) (Entered: 05/05/2015)
05/11/2015	<u>58</u>		<p><b>**RESTRICTED DOCUMENT**</b> NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Motion Hearing held on May 5, 2015 before Judge DEE BENSON. Court Reporter/Transcriber Ed Young, Telephone number 801-328-3202.</p> <p><b>NOTICE RE REDACTION OF TRANSCRIPTS: Within 7 business days of this filing, each party shall inform the Court, by filing a Notice of Intent to Redact, of the parties intent to redact <u>personal data identifiers</u> from the electronic transcript of the court proceeding. To redact additional information a Motion to Redact must be filed. The policy and forms are located on the court's website at <a href="http://www.utd.uscourts.gov">www.utd.uscourts.gov</a>. Please read this policy carefully. If no Notice of Intent to Redact is filed within the allotted time, this transcript will be made electronically available on the date set forth below.</b></p> <p>Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/1/2015. Redacted Transcript Deadline set for 6/11/2015. Release of Transcript Restriction set for 8/10/2015. (jmr) (Entered: 05/11/2015)</p>
05/11/2015	<u>60</u>	15	<b>ORDER denying <u>27</u> Motion for Preliminary Injunction; denying <u>28</u> Motion</b>

			for Preliminary Injunction; denying <u>5</u> Motion for Preliminary Injunction. Signed by Judge Dee Benson on 5/11/2015. (blh) (Entered: 05/11/2015)
05/12/2015	<u>61</u>		NOTICE OF APPEAL as to <u>60</u> Order on Motion for Preliminary Injunction,, filed by Johnson & Johnson Vision Care. Appeals to the USCA for the 10th Circuit. Filing fee \$ 505, receipt number 1088-2263879. (Black, Kenneth) (Entered: 05/12/2015)
05/12/2015	<u>62</u>		NOTICE OF INTERLOCUTORY APPEAL as to <u>60</u> Order on Motion for Preliminary Injunction,, filed by Alcon Laboratories, Inc.. Appeals to the USCA for the 10th Circuit. Filing fee \$ 505, receipt number 1088-2263900. (Sorenson, Amy) (Entered: 05/12/2015)
05/12/2015	<u>63</u>		Transmission of Preliminary Record to USCA re <u>61</u> Notice of Appeal. (Attachments: # <u>1</u> Appendix)(jmr) (Entered: 05/12/2015)
05/12/2015	<u>64</u>		Transmission of Preliminary Record to USCA re <u>62</u> Notice of Appeal – Interlocutory. (Attachments: # <u>1</u> Appendix)(jmr) (Entered: 05/12/2015)
05/12/2015	<u>65</u>		USCA Case Number Case Appealed to Tenth Case Number 15-4071 for <u>61</u> Notice of Appeal filed by Johnson & Johnson Vision Care. (jmr) (Entered: 05/12/2015)
05/12/2015	<u>66</u>		USCA Case Number Case Appealed to Tenth Case Number 15-4072 for <u>62</u> Notice of Appeal – Interlocutory filed by Alcon Laboratories, Inc.. (jmr) (Entered: 05/12/2015)
05/12/2015	<u>67</u>	34	NOTICE of Appeal by Bausch & Lomb re <u>60</u> Order on Motion for Preliminary Injunction,, <u>53</u> Reply Memorandum/Reply to Response to Motion (Christiansen, Erik) (Entered: 05/12/2015)
05/12/2015	<u>68</u>		MOTION for Extension of Time to File Answer and Memorandum in Support filed by Intervenor Plaintiffs 1-800 Contacts, Costco Wholesale Corporation, Defendant Sean D. Reyes. (Attachments: # <u>1</u> Text of Proposed Order)(Douglas, Parker) (Entered: 05/12/2015)

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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<p>ALCON LABORATORIES, INC.,  Plaintiff,  v.  SEAN D. REYES, Attorney General of Utah,  Defendant.</p>	<p><b>ORDER</b>  Case No. 2:15cv252-DB  District Judge Dee Benson</p>
<p>JOHNSON &amp; JOHNSON VISION CARE,  Plaintiff,  v.  SEAN D. REYES, Attorney General of Utah,  Defendant.</p>	<p>Case No. 2:15cv257-CW  District Judge Clark Waddoups</p>
<p>BAUSH &amp; LOMB,  Plaintiff,  v.  SEAN D. REYES, Attorney General of Utah,  Defendant.</p>	<p>Case No. 2:15cv259-DAK  District Judge Dale A. Kimball</p>

This case is before the court on Plaintiffs Alcon Laboratories, Inc.’s (“Alcon”) (Dkt. No. 5), Johnson & Johnson Vision Care, Inc.’s (“JJVC”) (Dkt. No. 27), and Bausch & Lomb, Inc.’s (“B&L”) (Dkt. No. 28) (collectively “Plaintiffs”) motions for preliminary injunction. Plaintiffs’



consolidated motions ask this court to enjoin enforcement of recently enacted Utah Code Section 58-16a-905.1 (“section 905.1” or “the statute”) pending final adjudication of its constitutionality. Plaintiffs assert that section 905.1 is an unconstitutional overreach of state legislative powers in that it impermissibly interferes with the nationwide contact lens market in violation of the Commerce Clause of the United States Constitution. Absent an injunction, section 905.1 is scheduled to take effect on May 12, 2015.

The court heard argument on the Plaintiffs’ preliminary injunction motions on May 5, 2015. At the hearing, Plaintiff Alcon was represented by David R. Marriott, Jared Jenson, Amy Sorenson and Amber Mettler. Plaintiff JJVC was represented by Jonathan F. Cohn, Kwaku Akowuah and Tim Conde. Plaintiff B&L was represented by Clifford M. Sloan and Erik Christiansen. Defendant Sean D. Reyes, in his official capacity as Attorney General of Utah (“Utah”), was represented by Parker Douglas. Intervenor 1-800 CONTACTS, Inc. (“1-800”) was represented by Paul G. Cassell, Brent Hatch, Garth Vincent and Greg Sergi. Intervenor Costco Wholesale Corporation (“Costco”) was represented by Shylah R. Alfonso and Mark Bettilyon.

At the conclusion of the hearing the court took the matter under advisement. Since then, the court has further considered the law and facts relating to the motions and the arguments presented by counsel. Now, being fully advised, the court issues the following Memorandum Decision and Order.

### **BACKGROUND**

The contact lens industry in the United States is roughly a \$4 billion dollar-per-year industry. (Alcon Mem. in Supp. at 5.) It is controlled by four primary contact lens

manufacturers – Alcon, JJVC, B&L, and CooperVision, Inc. (collectively the “Manufacturers”) – who maintain an almost 100% market share of the industry. (Costco Opp’n at viii.) None of the four manufacturers are located in Utah.

The contact lens industry has two features that make it particularly susceptible to anticompetitive conduct. First, contact lenses may be sold only pursuant to a valid prescription from an eye care professional (“ECP”), and each prescription from the ECP is brand and model specific. Except in limited circumstances, neither the consumer nor a contact lens retailer has the power to substitute an alternative or cheaper option to the prescribed brand, such as a generic equivalent. Second, “[u]nlike medical doctors who are prohibited from selling the drugs they prescribe, [ECPs] . . . are able to fill the contact lens prescriptions they write.” (1-800 Opp’n at 2-3.) In other words, an ECP is both a contact lens prescriber and a contact lens retailer. H.R. Rep. No. 108-318, at 5 (Fairness to Contact Lens Consumers Act) (Oct. 15, 2003). “In almost no other medical context does the prescriber of a medical device have the power to control both the brand the patient must use and also sell the particular medical device in the same breath.” (Costco Opp’n at ix.)

Once prescribed, however, contact lenses may be purchased from either the prescribing ECP or from eye care retailers (e.g., LensCrafters), mass merchandise retailers (e.g., Costco, Wal-Mart), internet retailers (e.g., 1-800 Contacts), pharmacies, or any other person who sells the prescribed lenses.<sup>1</sup> However, because non-ECP retailers are unable to compete with ECPs by providing a different brand of contact lens than prescribed (such as a generic equivalent), the

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<sup>1</sup> Under Federal law, the ECP is required to give the patient her prescription so the patient can purchase the contact lenses from the retailer of her choice based on price and convenience, among other factors. 15 U.S.C. § 7601(a); 16 C.F.R. § 315.3.

non-ECP retailer's only means of competing with an ECP retailer is to offer lower prices on the same brands and types of lenses.

Non-ECP retailers, such as Intervenor 1-800 and Costco, assert that because ECPs are the only contact lens retailers that are dual-positioned to both prescribe and sell contact lenses to consumers, ECPs can "leverage their control over prescriptions and brand selection to also control and monopolize contact lens sales." (Costco Opp'n at x.) The non-ECP retailers further assert that because of this control over the market, contact lens manufacturers have a strong interest in "incentivizing ECPs to prescribe their brands by assisting in various methods of shielding ECPs from retail competition by discounters." (1-800 Opp'n at 3.)

Conversely, the Manufacturers claim that they, alone, are burdened with the task of educating ECPs about innovative products and developments in the industry so that the ECPs can pass that information along to their patients. Accordingly, to foster good relationships with the ECPs, the Manufacturers have invested in programs that are extended only to ECPs and retailers associated with ECPs. These programs include but are not limited to manufacturer rebates, free trial lenses for ECPs, and launching new products exclusively with ECPs. (See Alcon Mem. in Supp. at 7.) According to the Manufacturers, these programs "improve patient access to better information and new technologies, and enhance access to better eye care." (Id.)

#### Prior Legislation and Litigation

Given the unique features of the contact lens business, the industry has a significant history of litigation and legislation. For example, in the 1990s, attorneys general from 32 states (including Utah) and a national class of consumers brought actions against the American Optometric Association and the contact lens manufacturers for conspiring with ECPs and others

to restrain competition with “alternative retailers” such as online companies, pharmacies and big box retailers. See In re Disposable Contact Lens Antitrust Litig., MDL No. 1030, 2001 WL 493244 (M.D. Fla Feb. 1, 2001). In 2001 – after nearly seven years of litigation – MDL 1030 culminated in a settlement, with the contact lens manufacturers paying a substantial cash settlement to consumers and agreeing to broad injunctive relief requiring the Manufacturers to sell contact lenses to non-ECP retailers in a “commercially reasonable” and “non-discriminatory” manner for at least five years. (See 1-800 Opp’n at 4.) After the injunctive provisions of the consent decree expired, the Utah Legislature, in 2006, essentially codified the “anti-discrimination” provisions of the MDL through the enactment of Utah Code Section 58-16a-904. See Utah Code Ann. § 58-16a-904 (providing “a manufacturer of contact lenses doing business in the state” shall certify contact lenses to be “made available in a commercially reasonable and nondiscriminatory manner”).

The business practices of the contact lens industry have also yielded federal legislation. In 2003, in response to allegations that the Manufacturers and ECPs were impeding consumers’ ability to purchase contact lenses from discounters by (1) preventing consumers from obtaining copies of their prescriptions to purchase lenses elsewhere, and (2) erecting obstacles to non-ECP retailers’ attempts to verify prescriptions, Congress enacted the Fairness to Contact Lens Consumers Act (“FCLCA”).<sup>2</sup> The FCLCA requires that a contact lens prescriber, “whether or not requested by the patient, shall provide to the patient a copy of the contact lens prescription,” and establishes a prescription verification process allowing retailers to sell lenses if the ECP does not respond to a verification request within a certain time period. 15 U.S.C. §§ 7601 & 7603.

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<sup>2</sup> See H.R. Rep. No. 108-318, at 4; Pub. L. 108-164, Fairness to Contact Lens Consumer Act (2003), codified at 15 U.S.C. § 7601 *et seq.*

Manufacturer Uniform Pricing Policies (“UPPs”)

Approximately two years ago, the Manufacturers began implementing unilateral resale pricing policies (“UPPs”).<sup>3</sup> These UPPs set a minimum retail price below which retailers may not sell certain contact lenses to consumers. If a retailer thereafter sells or prices that particular contact lens below the manufacturer’s UPP, the manufacturer punishes the retailer by terminating supply of contact lenses for one year.

The Manufacturers claim that the UPPs benefit everyone by “allow[ing] [ECPs] to refocus the critical doctor/patient conversation on eye health and product performance, rather than cost.” (Angelini Letter). According to Alcon, the Manufacturers face the challenge of “educating ECPs, who alone are authorized to write prescriptions, about the attributes of the products, and of encouraging them, in turn, to inform patients of their potential benefits.” (Alcon Mem. in Supp. at 7.) Alcon suggests that “ECPs may be reluctant to undertake these efforts if, once the patient receives a prescription, it may be filled by a low-cost contact lens reseller whose business model does not include those investments and who ‘free rides’ on the professional services the ECPs provide.” (*Id.*) Additionally, the Manufacturers claim the UPPs are beneficial because they “eliminate[] the need for discussions with eye doctors about other retailers’ prices. Consumers are assured that if their [ECP] or any other retailer is charging the minimum price, there is no need to shop around for a better bargain.” (JJVC Mem. in Supp. at 4.)

Non-ECP retailers, such as Intervenor Costco and 1-800, contend that the practical and intended effect of the UPPs is to divert sales from more efficient, lower-cost retailers. (Costco Opp’n at xiv.) They claim that by restricting retail price competition, consumers now have fewer

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<sup>3</sup>The State of Utah and the Intervenor refer to the Plaintiffs’ UPPs as minimum resale price maintenance (“RPM”) policies.

product choices and must pay higher prices, resulting in less competition and higher margins for ECPs. (Costco Opp'n at xv.) They claim that the Manufacturers' justifications for implementing the UPPs are pretextual given that the UPPs do not require or even encourage ECPs to invest in tangible or intangible services or promotional efforts that might improve patient care. (Costco Opp'n at xvi.)

Since implementation, the Manufacturers' UPPs have generated scrutiny. On July 30, 2014, the U.S. Senate Committee on the Judiciary, Subcommittee for Antitrust, Competition Policy and Consumer Rights held a hearing to examine the use of resale price maintenance programs (or UPPs) in the contact lens industry. The Committee noted their intent to revisit the issue once further evidence develops showing the impact of such policies on competition and consumer pricing. (1-800's Opp'n at 8 (providing citation to Senate's website for video recording of Senate hearing).) Additionally, in recent months roughly 40 consumer class action complaints have been filed, across the United States, against the Manufacturers, alleging violations of federal and/or state antitrust laws by engaging in an unlawful conspiracy to fix contact lens prices.<sup>4</sup>

#### Section 905.1

On March 10, 2015, the Utah Legislature amended the Contact Lens Consumer Protection Act through the addition of section 58-16a-905.1. In doing so, Utah became the first state to enact legislation attempting to restrict UPPs for contact lenses. Similar legislation has been proposed in Mississippi, Washington, Arizona, Florida, New York, Idaho, Oregon, Illinois and California. (Costco Opp'n at xviii.)

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<sup>4</sup> There are motions pending to coordinate or consolidate the actions into a multidistrict litigation forum. In re Disposable Contact Lens Antitrust Litigation, MDL No. 2626 (2015).

Section 905.1 of the Contact Lens Consumer Protection Act provides as follows:

A contact lens manufacturer or a contact lens distributor may not:

- (1) take any action, by agreement, unilaterally, or otherwise, that has the effect of fixing or otherwise controlling the price that a contact lens retailer charges or advertises for contact lenses; or
- (2) discriminate against a contact lens retailer based on whether the contact lens retailer:
  - (a) sells or advertises contact lenses for a particular price;
  - (b) operates in a particular channel of trade;
  - (c) is a person authorized by law to prescribe contact lenses; or
  - (d) is associated with a person authorized by law to prescribe contact lenses.

Utah Code Ann. Section 58-16a-905.1.

The Utah Legislature also amended section 58-16a-906, to provide that “the attorney general may bring a civil action or seek an injunction and a civil penalty” against any person “who violates section 58-16a-905.1.” *Id.* Before approving section 905.1, the Utah Legislature held hearings with views presented from the various conflicting interests, including Alcon and JJVC, various Utah retailers, the Utah Real Merchants Association, the Utah Manufacturers Association, and the Utah Optometric Association.

#### The Present Lawsuit

On April 13, 2015, Alcon initiated a declaratory judgment action seeking to have section 905.1 declared unconstitutional. Alcon accompanied the filing of its declaratory judgment action with the instant motion for preliminary injunctive relief. (Dkt. Nos. 2 & 5, respectively.) The next day, JJVC and B&L filed similar lawsuits and requests for injunctive relief. On April 21, 2015, the three separate actions were consolidated. (Dkt. No. 26.)

The State of Utah and Intervenors 1-800 and Costco assert that section 905.1 – which they perceive as simply prohibiting Plaintiffs from fixing the retail price of contact lenses in Utah – merely restores fair competition and will result in lower contact lens prices for

consumers. They claim section 905.1 is akin to countless state statutes “enacted pursuant to the traditional powers in the area of antitrust and unfair competition to regulate conduct that directly affects in-state consumers and business.” (1-800 Opp’n at 2.)

The Manufacturers assert that section 905.1 violates the Commerce Clause of the United States Constitution because it impermissibly interferes with commercial conduct outside of Utah, discriminates against interstate commerce, and imposes an excessive burden on interstate commerce. (Alcon’s Mem. in Supp. at 13-20.) They claim section 905.1 will have the effect of removing Utah-based retailers, and only Utah-based retailers, from the scope of national policies like the UPP, allowing in-state retailers to sell at lower prices than out-of-state retailers who try to serve Utah customers. (See Alcon’s Mem. in Supp. at 3.) The Manufacturers assert that section 905.1 is unconstitutional and the injuries they will suffer when section 905.1 goes into effect will be irreparable. Accordingly, the Manufacturers assert they are entitled to a preliminary injunction, to have effect only for so long as is necessary for this court to issue a final judgment.

### **DISCUSSION**

“[A] preliminary injunction is an extraordinary remedy; it is the exception rather than the rule.” General Motors Corp. v. Urban Gorilla, LLC, 500 F.3d 1222, 1226 (10<sup>th</sup> Cir. 2007) (internal quotation marks omitted). The movant must show: “(1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) [that] the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) [that] the injunction, if issued, will not adversely affect the public interest.” Id. “The party seeking the preliminary injunction must show that the . . . factors weigh heavily and



compellingly in its favor” and “[t]he right to relief in a preliminary injunction must be clear and unequivocal.” VR Acquisitions LLC v. Wasatch County, 2015 WL 417895, at \*7 (D. Utah Jan. 30, 2015) (internal quotation marks omitted). In the context of a request for a preliminary injunction against enforcement of a state law, enacted in the public interest, these already-demanding standards are applied rigorously. See Heideman v. South Salt Lake City, 348 F.3d 1182, 1189 (10<sup>th</sup> Cir. 2003).

### **1. Likelihood of Success on the Merits**

Plaintiffs have failed to convince the court that they are likely to succeed on the merits of this case. Plaintiffs argue that section 905.1 clearly violates the Commerce Clause, which grants Congress the exclusive power to regulate interstate commerce. (Alcon Reply at 6.) Specifically, Plaintiffs assert that the statute has impermissible extraterritorial effects, impermissibly discriminates against out-of-state economic interests, and imposes excessive burdens on interstate commerce. (Id.)

#### Extraterritorial Effects

The court is not persuaded that Plaintiffs are likely to succeed in demonstrating that section 905.1 has impermissible extraterritorial effects. The United States Supreme Court summarized what constitutes impermissible extraterritorial effects in Healy v. Beer Inst., 491 U.S. 324, 336 (1989): “[T]he ‘Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.’” Id. (quoting Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982)).

Any assertion that section 905.1 would impose such effects is circumvented by the Utah Supreme Court’s recent explanation that, “[u]nder a deeply rooted and longstanding canon of

construction, statutes are presumed not to have extraterritorial effect. This presumption is a gapfiller, operating under a ‘clear statement’ rule. It provides that unless a statute gives a ‘clear indication of an extraterritorial application, it has none.’” Nevares v. M.L.S., 345 P.3d 719, 727 (Utah 2015) (quoting Morrison v. Nat’l Austl. Bank Ltd., 561 U.S. 247, 262-65 (2010)) (internal citation omitted). The court sees no clear indication of an extraterritorial application in the statute at issue here and, thus, no such application can be assumed at this point in the case.

### Discrimination

Similarly, the court is not persuaded that Plaintiffs are likely to succeed in demonstrating that section 905.1 inappropriately discriminates against out-of-state economic interests. The United States Supreme Court has stated that state laws are discriminatory and “violate the Commerce Clause if they mandate ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’” Granholm v. Heald, 544 U.S. 460, 472 (2005) (quoting Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. 93, 99 (1994); see also New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273 (1988) (“This ‘negative’ aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”) However, “[n]ot every benefit or burden will suffice – only one that ‘alters the competitive balance between in-state and out-of-state firms.’” Kleinsmith v. Shurtleff, 571 F.3d 1033, 1041 (10th Cir. 2009).

Plaintiffs concede that “read literally, [section 905.1] applies to manufacturers and distributors both within and outside Utah . . . .” (Alcon Mem. in Supp. at 19.) See Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris, 729 F.3d 937, 948 (9th Cir. 2013), cert.

denied, 135 S. Ct. 398 (2014) (“A statute that ‘treats all private companies exactly the same’ does not discriminate against interstate commerce. . . . This is so even when only out-of-state businesses are burdened because there are no comparable in-state businesses.”) (citing United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342 (2007); Exxon Corp. v. Gov. of Maryland, 437 U.S. 117, 119, 125)). Plaintiffs argue instead that the statute is discriminatory because it “protects ‘a [Utah] contact lens retailer,’ but not a non-Utah contact lens retailer, from manufacturer pricing policies . . . [and] entitles ‘a [Utah] contact lens retailer,’ but not a non-Utah contact lens retailer, to manufacturer programs that are designed for some kinds of retailers and not others.” (Alcon Reply at 10.)

However, the record before the court supports Defendants’ claim that “the fact that retail sales outside of Utah could be higher because of the [UPPs] is entirely the result of Plaintiffs’ pricing policies—not any action taken by Utah.” (Costco Opp’n at 14.) Indeed, the purported burden that out-of-state retailers face as a result of the statute is simply that they may continue to be subject to UPPs and other policies implemented by contact lens manufacturers, whereas in-state retailers will not. Section 905.1 in no way requires or anticipates that out-of-state retailers will continue to be subject to UPPs. Instead, the statute merely protects Utah retailers and consumers from activity that the State of Utah believes violates principles of fair competition.

Antitrust law “is an area traditionally regulated by the States.” California v. ARC America Corp., 490 U.S. 93, 101 (1989). “Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.” Id. at 102. As such, federal antitrust law sets a floor below which states cannot go, but states are free to legislate and regulate certain transactions more aggressively. See, e.g., Exxon Corp. v. Gov. of Maryland, 437 U.S. 117, 129-

32 (1978). The statute at issue here is nothing more than a state antitrust statute, tailored to a specific industry, which the state has the power to enact. Id. at 133-34.

In Exxon, the Maryland legislature—in response to evidence that oil producers and refiners were favoring company-operated gasoline stations during the 1973 petroleum shortage—enacted a statute prohibiting petroleum producers and refiners from operating retail service stations within the State of Maryland and requiring that all temporary price reductions be extended uniformly to all service stations supplied within the state. Id. at 117. The plaintiffs in Exxon argued, similarly to Plaintiffs in the present case, that the Maryland statute discriminated against interstate commerce, unduly burdened interstate commerce, and imposed “controls on a commercial activity of such an essentially interstate character that it [was] not amenable to state regulation.” Id. at 125. The United States Supreme Court rejected all three arguments, holding that the statute did not violate the Commerce Clause. Id. at 125-29. The Court noted that the Commerce Clause does not “protec[t] the particular structure or methods of operation in a retail market” nor does it invalidate a duly enacted state statute simply because the statute “causes some business to shift from one interstate supplier to another.” Id. at 127. As in Exxon, the statute at issue here attempts to remedy a significant market issue—retail price fixing by contact lens manufacturers.

Based on the record before the court, section 905.1 appears to be no more restrictive than the statute upheld in Exxon. In Exxon, the statute required producers to provide uniform discounts to all service stations. Here, the statute merely requires that manufacturers refrain from mandating price fixing within the state of Utah and from discriminating against Utah retailers for reasons related to price fixing. This Utah statute, like the statute in Exxon, appears

to be an appropriately tailored antitrust statute within the legislative authority of the state. See ARC America Corp., 490 U.S. at 101-02; see also Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 993-94 (9th Cir. 2000) (holding that “California may apply its antitrust and unfair competition statutes consistent with the Commerce Clause” to a price fixing scheme in Wisconsin that affected prices in California).

Plaintiffs argue that the legislation at issue here is unique because “unlike traditional state antitrust, consumer protection, and public safety laws, . . . [the statute] forces out-of-state manufacturers and distributors who want to withdraw from commerce with a state resident . . . to continue engaging in interstate commerce with them.” (Alcon Reply at 7.) Plaintiffs assert that Section 2 of the statute, which prohibits “discrimination” against retailers, essentially “instructs the Attorney General to penalize a manufacturer for deciding not to ship contact lenses to Utah . . .” (Id.) At this early stage of the proceedings, a pre-enforcement request for preliminary injunction, Plaintiffs’ constitutional concerns are premature and speculative.

First, a Utah statute that has been in effect since 2006 already expressly penalizes contact lens manufacturers that fail to make contact lenses available to retailers in a nondiscriminatory and commercially reasonable manner. Utah Code Ann. § 58-16a-904. Plaintiffs have presumably complied with this statute since 2006, and nothing in the record before this court indicates that the statute has been enforced in a way that impermissibly compels or effects interstate commerce.

Second, because section 905.1 has not yet taken effect, the Utah Attorney General’s Office has not had the opportunity to offer its interpretation of the statute in connection with an actual enforcement action. At oral argument, the Attorney General’s representative expressed

some uncertainty as to how and to what extent the law will be enforced. At this early stage, the court presumes the Utah Attorney General will enforce the statute in a manner that does not violate the Commerce Clause. See, e.g., Nevares v. M.L.S., 345 P.3d 719, 727 (Utah 2015) (providing that duly enacted state statutes are presumed to be constitutional). At this stage, the court does not find that Plaintiffs have established that this statute is significantly different from other state antitrust statutes that have been upheld.

#### Burden on Interstate Commerce

The court is also unpersuaded that Plaintiffs are likely to succeed in demonstrating that the burden imposed on interstate commerce by the statute is clearly excessive in relation to the putative local benefits. Even if a state statute does not improperly discriminate or have impermissible extraterritorial effects, it will violate the Commerce Clause if it imposes a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.” Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). This inquiry requires the court to consider “(1) the nature of the putative local benefits advanced by the Ordinance; (2) the burden the Ordinance imposes on interstate commerce; (3) whether the burden is “clearly excessive in relation to” the local benefits; and (4) whether the local interests can be promoted as well with a lesser impact on interstate commerce.” Blue Circle Cement, Inc. v. Bd. of Cnty Comm’rs, 27 F.3d 1499, 1512 (10th Cir. 1994).

The putative local benefit is that section 905.1 “would return intrabrand competition to the Utah contact lens marketplace, allowing Utah contact lens retailers to provide lower prices to Utah consumers.” (Costco Opp’n at 13.) As discussed above, this is exactly the type of benefit states are permitted to advance through state antitrust laws.

The purported burden on interstate commerce is that out-of-state manufacturers would have to “participate in interstate commerce, under circumstances which they otherwise would choose not to . . .” and that retailers in Utah, but not retailers in the other 49 States, would be exempt from certain manufacturer policies. (Alcon Reply at 13-14.) This purported burden appears to be no greater than the burden imposed by any other state antitrust law. Indeed, as with apparent competitive advantages that may be gained by in-state businesses through other state antitrust laws, any competitive advantages obtained by Utah contact lens retailers through this statute will be negated if other states enact similar antitrust laws of their own. As noted above, such legislation is presently under consideration in at least 9 states. Consequently, Plaintiffs are not likely to demonstrate that the burden on interstate commerce imposed by the statute is “clearly excessive in relation to” the local benefits.

## **2. Irreparable Harm if the Injunction is Denied**

Similarly, Plaintiffs have failed to convince the court that they will suffer irreparable harm if the injunction is denied. Establishing irreparable harm is not an “easy burden to fulfill.” Greater Yellowstone Coalition v. Flowers, 321 F.3d 1250, 1258 (10<sup>th</sup> Cir. 2003). “To constitute irreparable harm, an injury must be certain, great, actual and not theoretical.” Heideman v. South Salt Lake City, 348 F.3d 1182, 1189 (10<sup>th</sup> Cir. 2003).

Plaintiffs claim they will suffer two primary forms of irreparable harm absent an injunction—constitutional injury and economic injury. (Alcon Mem. in Supp. at 22.) Plaintiffs’ claimed constitutional injury is the “[d]eprivation of the rights guaranteed under the Commerce Clause[.]” Am. Civil Liberties Union v. Johnson, 194 F.3d 1149, 1163 (10<sup>th</sup> Cir. 1999). As discussed in detail above, these constitutional injuries are speculative at this stage and, as such,

Plaintiffs have failed to establish injuries that are certain, actual and imminent, as required for a preliminary injunction. See Heideman, 348 F.3d at 1189 (“[T]he party seeking injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm.”).

Plaintiffs’ claimed economic injuries include “financial loss that cannot be recovered because of the state’s sovereign immunity from suits for damages” and the possibility that the Plaintiffs’ inability to enforce UPPs will “suppress [Plaintiffs’] incentives and ability to invest in research and development.” (Alcon Mem. in Supp. at 23.) These injuries, like Plaintiffs’ claimed constitutional injuries, rely on Plaintiffs’ speculation, both as to the monetary amounts of such injuries, and how section 905.1 will be enforced. Such hypothetical injuries are insufficient to constitute irreparable harm. See Goldammer v. Fay, 326 F.2d 268, 270 (10<sup>th</sup> Cir. 1964) (“Injunction is a drastic remedy to be exercised with caution, and should be granted only in cases where the necessity therefore is clearly established.”); Voile Mfg. Corp. v. Dandurand, 551 F. Supp. 2d 1301, 1307 (D. Utah 2008) (holding that a “probable loss in market share” was not the type of damage that amounts to irreparable harm). Accordingly, the court concludes that Plaintiffs have failed to meet their burden of establishing irreparable harm.

### **3. The Balance of Hardships & Public Interest**

Finally, the balance of hardships and public interest factors also weigh against granting a preliminary injunction in this case. Utah’s ability “to enact and enforce measures it deems to be in the public interest is [] an equity to be considered in the balance of hardships.” Heideman, 348 F.3d at 1191. Entering an injunction in this case would prevent enforcement of a law that the Utah Legislature determined was necessary to protect consumers and promote free



competition in the retail market for contact lenses. Indeed, according to Costco, the UPPs have forced Costco “to raise contact lens prices by as much as 35%, while undermining Costco Wholesale’s business model, reducing product choice, foreclosing retail competition, and damaging its goodwill.” (Costco Opp’n at 16.) In contrast, as the court has previously explained, any alleged harm to Plaintiffs is speculative.

Similarly, although Plaintiffs appeal to the public interest of upholding the Constitution as a basis for granting the preliminary injunction, as explained by the court more fully above, Plaintiffs have failed to persuade the court that they are likely to succeed on their claim that section 905.1 is, in fact, unconstitutional.

Section 905.1 was enacted by the elected representatives of the people of Utah after a determination that it was in their best interest. See Utah Gospel Mission v. Salt Lake City Corp., 316 F. Supp. 2d 1201, 1223 (D. Utah 2004), aff’d, 425 F.3d 1249 (10<sup>th</sup> Cir. 2005) (denying motion for preliminary injunction and finding public interest would be impaired because it would “undermine the public process by nullifying the decision . . . [by] elected officials. The [democratic] process . . . was extensive, time consuming, very public and often wrenching and divisive. A compromise was reached through democratic means, and it would not be in the public interest to set this process aside.”). After extensive public hearings and legislative debates, wherein Plaintiffs were provided a fair opportunity to present their positions, the people of Utah chose to enact section 905.1 to eliminate price fixing in favor of free competition.

For these reasons, Plaintiffs have failed to satisfy the court that enjoining section 905.1 would be in the best interests of the public.

**CONCLUSION**

Based on the foregoing, Plaintiffs' consolidated motions for preliminary injunction are DENIED. Plaintiffs have failed to satisfy the court that they have met the requirements for a preliminary injunction. Specifically and significantly, the court is not persuaded at this stage in the litigation that the Plaintiffs are likely to succeed on the merits.

Dated this 11th day of May, 2015.



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Dee V. Benson  
United States District Court Judge

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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION**

<p>BAUSCH &amp; LOMB INCORPORATED,  Plaintiff,  v.  SEAN D. REYES, in his Official Capacity as Attorney General of Utah,  Defendant.</p>	<p><b>BAUSCH &amp; LOMB INCORPORATED'S NOTICE OF APPEAL</b></p> <p>Case No. 2:15-cv-00252-DB</p> <p>Judge: Hon. Dee Benson</p> <p>[Consolidated with Case Nos. 2:15-cv-00257- CW and 2:15-cv-00259-DAK]</p>
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Notice is hereby given that Plaintiff Bausch & Lomb (“Plaintiff”) hereby appeals to the United States Court of Appeals for the Tenth Circuit from this Court’s order entered May 11, 2015, denying Plaintiffs’ motions for a preliminary injunction (Dkt. Nos. 28, 53 and 60).

May 12, 2015

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

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