UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

In Re: **DISPOSABLE CONTACT LENS ANTITRUST LITIGATION**	**Case No. 3:15-md-2626-J-20JRK** **Judge Harvey E. Schlesinger** **Magistrate Judge James R. Klindt**
THIS DOCUMENT RELATES TO: **All Class Actions**	

CLASS PLAINTIFFS' MOTION TO COMPEL DEFENDANT COOPERVISION TO INCLUDE ADDITIONAL CUSTODIANS AND PROVIDE A HIT LIST

Class Plaintiffs, by and through their undersigned counsel, hereby move pursuant to Federal Rule of Civil Procedure 37(a) to compel Defendant CooperVision, Inc. ("CVI") [1] to include additional custodians in its searches and to produce the search results list ("hit list")[2] in order to facilitate discovery negotiation.

[1] Additional defendants, though not part of this motion, are referenced as Alcon Laboratories, Inc. ("Alcon"); Johnson & Johnson Vision Care, Inc. ("JJVC"); Bausch & Lomb Inc. ("B&L"); and along with CVI are collectively referred to as the "Manufacturer Defendants"; and the additional wholesaler who is the largest distributor of contact lenses in the United States, Defendant ABB Concise Optical Group, LLC ("ABB"). The Manufacturer Defendants and ABB together are referred to as "Defendants".

[2] The producing party's vendor applies agreed-upon search terms to the collected data of agreed-upon custodians, and then provides a "frequency report" or "hit list" of the number or percentage of documents that hit on particular search terms so that the litigator can evaluate the efficacy of the search terms. Various iterations of this process may occur until the litigator approves the results in the hit list. The vendor then processes the filtered ESI and uploads it to a web-based review tool for review. *Sedona Conference Institute*, 2009, Solomon and Baron, "Bake Offs, Demos, and Kicking The Tires: A Practical Litigator's Brief Guide To Evaluating Early Case Assessment Software and Search and Review Tools", at p. 3. http://www.kslaw.com/library/publication/bakeoffs_solomon.pdf

INTRODUCTION

This case is about a hub-and-spoke conspiracy in which "an entity at one level of the market structure, the 'hub,' [that] coordinates an agreement among competitors at a different level, the 'spokes.' . . . . These arrangements consist of both vertical agreements between the hub and each spoke and a horizontal agreement among the spokes to adhere to the hub's terms, often because the spokes would not have gone along with the vertical agreements except on the understanding that the other spokes were agreeing to the same thing." (Order dated June 16, 2016, ECF No. 243) citing *United States v. Apple, Inc*., 791 F.3d 290, 314 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016). (internal quotations omitted). Class Plaintiffs allege the Manufacturer Defendants entered into vertical Unilateral Pricing Policy ("UPPs") agreements with retailers or their agents, and also conspired with each other in a horizontal, *per se* illegal agreement in restraint of trade that defendant ABB (acting as the agent for its independent eye care professionals ("ECP") clients) helped to orchestrate.[3]

Plaintiffs specifically allege that the UPPs[4] were the subject of agreements among the Manufacturer Defendants and independent ECPs, effectuated through ABB. The Manufacturer Defendants, working with ABB, conspired to eliminate discounting of contact lenses by ensuring that all retailers charged the same minimum price. The Manufacturer Defendants, ABB and the ECPs all share an interest in not reducing the retail price of contact lenses and limiting competition from Discount Retailers.

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[3] *See* the Corrected Consolidated Class Action Complaint [ECF No. 135] ("Complaint"), filed on November 23, 2015.

[4] "This UPP scheme was anything but 'unilateral….[B]y referring to 'UPPs' throughout this Complaint [and motion], Plaintiffs are merely using the name given by Defendants to those pricing policies and are in no way agreeing that they can fairly be characterized as "unilateral." Complaint ¶ 10.

The power to prescribe makes ECPs the gatekeepers of the disposable contact lens market. ECPs have the power and the economic incentive to prescribe lenses that provide them the largest profit margins. ECPs will refuse to prescribe a manufacturer's lenses if their profit margins are undercut by efficient retailers such as Discount Retailers. As a result, contact lens manufacturers do what they can to insulate ECPs from price competition. The economic purpose of the UPPs is to insulate ECPs from price competition from more efficient distributors, such as the Discount Retailers. Independent ECPs charge the highest average prices for contact lenses compared to any other channel of distribution.

CVI's conduct included all the elements of the UPP with respect to three contact lens product lines. As this Court has explained, "[t]he Complaint sets forth allegations of a number of communications between ECPs, ABB, and the Manufacturer Defendants, regarding the enactment, implementation and enforcement of UPPs. Complaint ¶¶ 102, 103, 106, 107, 111, 114, 115, 117-32 …. CV conducted 'focus groups' with ECPs regarding pricing policies. Id. ¶124." (ECF No. 243 at p. 46). It is in the context of these allegations that this motion is made in order to obtain documents that include the creation, implementation, communications and enforcement of the UPPs, including communications with ECPs which are central to Class Plaintiffs' case. CVI's refusals to include the additional custodians and provide a hit list are based on a generalized objection of burden and proportionality, with nothing to support these arguments. These boilerplate objections cannot stand.

The issues that Class Plaintiffs and CVI have been unable to resolve after negotiation in good faith are: (1) whether seven additional CVI upper management custodians should be included in the search and production for various categories of documents [redacted] (2) whether eleven of

CVI's regional and/or channel sales managers should also be included as custodians; and (3) whether CVI must provide to Class Plaintiffs the hit list which is in CVI's possession once it has begun running searches; and Class Plaintiffs respectfully seek the Court's intervention.

FACTUAL BACKGROUND

This multidistrict class action antitrust litigation was consolidated and transferred on June 10, 2015, before Judge Schlesinger and Magistrate Judge Klindt in the District Court for the Middle District of Florida A motion to dismiss was briefed and argued on March 30, 2016, and on June 22, 2016, Judge Schlesinger issued an Order denying all aspects of that motion except as to Class Plaintiffs' Maryland Consumer Protection Act claim ("Order") [ECF No. 243].

On March 7, 2016, Class Plaintiffs propounded their First Requests for Production of Documents ("RFPs") and First Set of Interrogatories ("Interrogatories") to CVI, which were deemed served on April 1, 2016. CVI served responses and objections on May 5, 2016.[5] Other Defendants also served responses and supplemental responses. After the service of Defendants' responses and objections, the parties began to meet and confer about the substance and scope of the Defendants' objections to particular discovery requests. To date, each Defendant has produced the documents already produced to various governmental regulators, including the Federal Trade Commission ("FTC") and various state Attorney Generals' offices. In addition, all Defendants have recently agreed to begin a rolling production of documents, though no date has been set for such production to begin.

[5] In acknowledgment of Local Rule 3.04, CVI's responses to Class Plaintiffs' RFPs are attached as Exhibit A to the accompanying Declaration of Peggy Wedgworth in Support of Class Plaintiffs' Motion to Compel Defendant Coopervision to Include Additional Custodians and Provide a Hit List ("Wedgworth Decl."). All three issues which Class Plaintiffs address in this motion are subject to all RFPs issued by Class Plaintiffs in this Case.

The Class Plaintiffs and CVI have met and conferred, and reached an impasse on three issues.[6]

1. Seven Additional Upper Management Custodians Should Be Included As Custodians

[redacted]

[6] Relevant communications between Class Plaintiffs and CVI on these issues are attached as Exhibits B through R to Wedgworth Decl.

[redacted] Class Plaintiffs require these additional seven upper management custodians so that, for example, they can obtain evidence of how the UPPs at CVI for the three disposable contact lens lines were created, adjusted, implemented and enforced. Such evidence is the typical, accepted way to prove an antitrust violation in this type of hub-and-spoke case, which is uniquely within CVI's possession. Class Plaintiffs also require these additional custodians so that they can obtain evidence concerning the consideration of the UPP that was in place with one contact lens line when CVI purchased it from Sauflon, as well as evidence concerning the ECP focus groups regarding UPPs which CVI conducted.

CVI refused to comply with Class Plaintiffs' requests, arguing that relevance and burden considerations militate in favor of an arbitrary number of the nine custodians searched at the government's request, and an additional three agreed-upon custodians. In contrast, Defendant JJVC has tentatively indicated that it would include 19 custodians in its searches. (See chart below). Other Defendants continue to negotiate on this issue.

2. Eleven Additional CVI Channel/Regional Sales Managers Should Be Included as Custodians

Class Plaintiffs also request that CVI search for documents from eleven channel/regional sales managers. Class Plaintiffs' RFPs ask for documents concerning the implementation, communications and complaints regarding the UPPs, as well as documents which reflect the communications between the Defendant manufacturers and the ECPs. (RFPs 29 and 44). Class Plaintiffs have requested this information in order to prove the implementation and enforcement as well as the anticompetitive affects of the UPPs. In addition, Class Plaintiffs seek to determine if there might be any documents that would justify Defendants' decision to implement a minimum retail price on certain products, and the timing of each decision. JJVC had previously agreed to produce documents from channel sales representatives, but now states that this position

is not concrete enough at this time. Other Defendants are still negotiating. CVI objects on the grounds that including regional/channel sales managers as custodians would be overly burdensome and not "proportional to this case." Class Plaintiffs have attempted to compromise by proposing a limited number of regional sales managers be included as custodians, but CVI refused.

3. CVI Should Produce a Hit List

Though B&L and JJVC have provided a hit list, CVI has also refused to provide a hit list which would facilitate discussions concerning all remaining discovery issues.[7] This list would facilitate discussions as to modifications to search terms, allow discussions regarding any duplication issues, and streamline discussions of burden. This hit list will be generated and in the possession of CVI once searches have begun. Without such hit list, which CVI clearly will have once they begin to run the searches, Plaintiffs are hindered by this information imbalance. It is of no additional burden or cost for CVI to produce something that is in their possession. Moreover, they will use this hit list in analyzing the effectiveness of search terms and possible alternatives and Class Plaintiffs can analyze alternatives more accurately with the information contained in the hit list.

CVI has refused to produce a hit list, stating that one is not needed nor will it facilitate negotiations.

[7] B&L and JJVC hit lists are attached as Ex.S to the Wedgworth Decl..

These issues and impasses as to other Defendants are set forth in the chart below:

Issue	ABB	Alcon	B&L	CVI	JJVC
Number of Custodians /Hit List	Negotiating custodians but refused hit list	Negotiating custodians and hit list	Negotiating custodians and produced hit list	Impasse and refused hit list	Negotiating custodians (19 previously) and produced hit list
Regional/ Channel Sales Custodians	Negotiating	Negotiating	Negotiating	Impasse	Negotiating

ARGUMENT

Federal Rule of Civil Procedure 26(b), as amended in December 2015, provides that parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Rule 26(b)(1) expressly provides that discovery "need not be admissible in evidence to be discoverable." *Id*. Therefore, the only question under the amended Rule 26 is "whether the discovery sought meets the standard set out in Rule 26(b)(1) for relevance and proportionality." *City of Jacksonville v. Shoppes of Lakeside, Inc.,* No. 3:12-CV-850-J-25 MCR, 2016 U.S. Dist. LEXIS 81846, at *4 (M.D. Fla. June 23, 2016) (internal quotations and citations omitted). In determining whether discovery is proportional, courts consider "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). "It remains true today both that claims and defenses provide discovery's outer bounds" and that "the court is inclined to err in favor of discovery rather than against it.'" *Steel Erectors, Inc. v. AIM Steel Int'l, Inc*., 312 F.R.D. 673, 676 n.4 (S.D. Ga. 2016) (internal quotations and citations omitted).

Where the discovery being contested is "readily identifiable and available" and there is no "undue expense" associated with production, proportionality will be found. *In re Blue Cross Blue Shield Antitrust Litig*., No. 2:13-CVI-20000-RDP, 2015 WL 9694792, at *3 (N.D. Ala. Dec. 9, 2015).

The recent changes to Rule 26, "although substantive and substantial, do not change the definition of relevance." *Steel Erectors, Inc.*, 312 F.R.D. 676 at n.4. It is well-settled that Rule 26 "sets a remarkably low bar" for the discovery of relevant information. *Pinilla v. Northwings Accessories Corp.*, No. 07-21564-CIV-HUCK/SIMONTON, 2007 U.S. Dist. LEXIS 70885, at *10 (S.D. Fla. Sept. 25, 2007). Courts have "long held that relevance for discovery purposes is much broader than relevance for trial purposes." *Dunkin' Donuts. Inc. v. Mary's Donuts. Inc.,* No. 01–0392-CIV-GOLD/SIMONTON, 2001 U.S. Dist. LEXIS 25204, at *7 (S.D. Fla. Nov. 1, 2001) (internal citations omitted). Ordinarily, discovery should be allowed as relevant "unless it is clear that the information sought has no possible bearing on the subject matter of the action." *Id.* (internal citations omitted). The Eleventh Circuit has stated that the Federal Rules "strongly favor full discovery whenever possible." *Farnsworth v. Procter & Gamble Co.,* 758 F.2d 1545, 1547 (11th Cir. 1985).

Motions to compel discovery under Federal Rule of Civil Procedure 37(a) are committed to the sound discretion of the district court. *Commercial Union Ins. Co. v. Westrope*, 730 F.2d 729, 731 (11th Cir. 1984). The party requesting discovery "does not have to prove a prima facie case to justify a request which appears reasonably calculated to lead to the discovery of admissible evidence." *In re Urethane Antitrust Litig.*, No. 04-MD-1616-JWL, 2010 WL 10876331, at *2 (D. Kan. Jan. 20, 2010) (internal quotations and citations omitted). An objecting party is not permitted to make "conclusory, boilerplate objections that fail to explain

the precise grounds that make the request objectionable," and "must explain its reasoning in a specific and particularized way." *Martin v. Zale Delaware, Inc. ("Martin")*, No. 8:08-CV-47-T-27EAJ, 2008 U.S. Dist. LEXIS 105215 (M.D. Fla. Dec. 15, 2008) (internal quotations and citations omitted).

The objecting party must "show specifically how, despite the broad and liberal construction afforded the federal discovery rules... each question is overly broad, burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden." *Am. Humanist Ass'n, Inc. v. City of Ocala,* No. 5:14-CVI-651-Oc-32PRL, 2016 U.S. Dist. LEXIS 63436, at *5 (M.D. Fla. May 13, 2016) (internal quotations and citations omitted). CVI has not made a showing of undue burden, and Plaintiffs' requests are reasonable and proportional to the needs of the case.

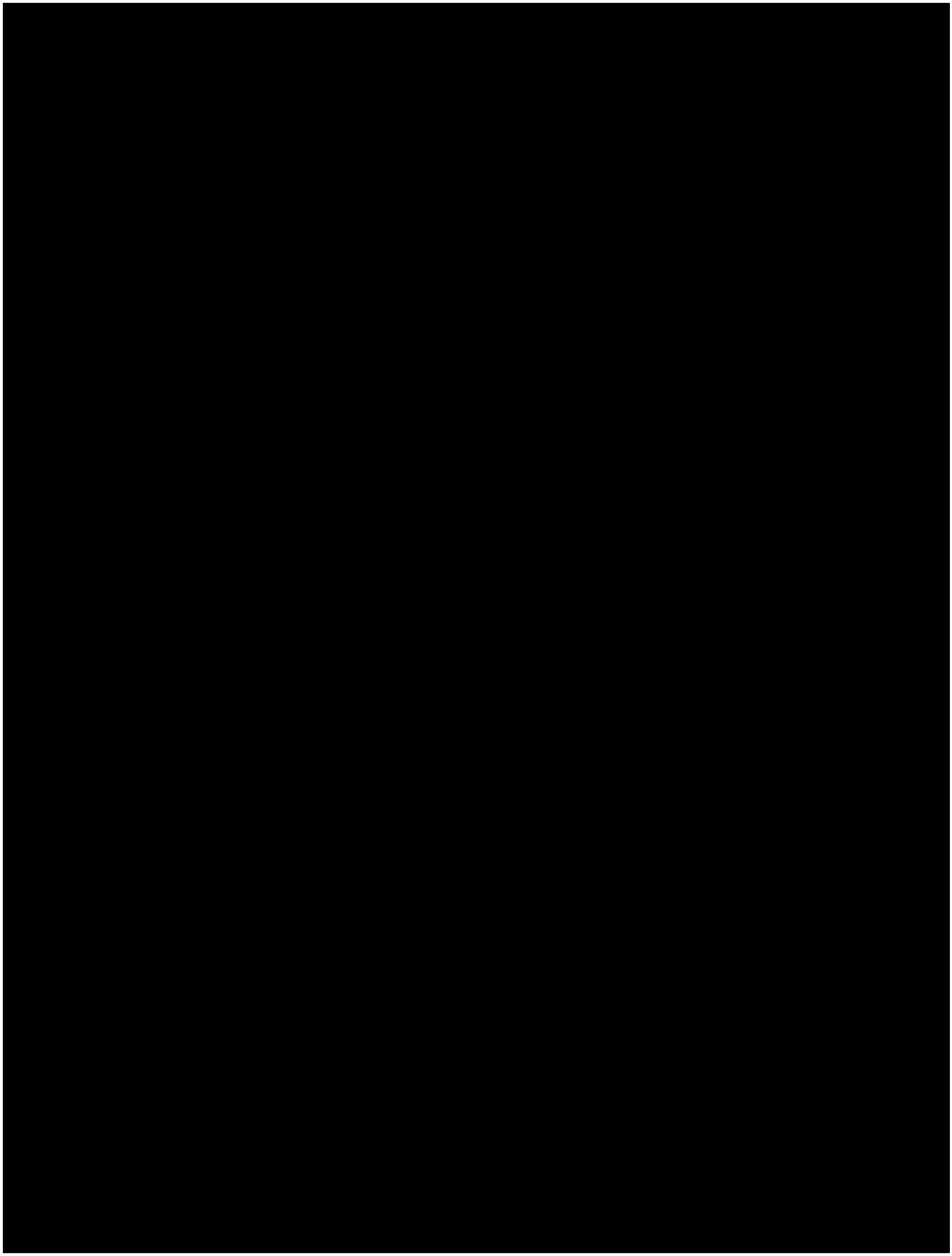
I. DEFENDANT CVI SHOULD BE REQUIRED TO INCLUDE ADDITIONAL CUSTODIANS IN THE SEARCH AND PRODUCTION OF DOCUMENTS

A. CVI Should be Required to Include Seven Additional CVI Upper Management as Custodians

Class Plaintiffs request that seven additional upper management CVI employees be included as custodians. CVI has previously agreed that twelve custodians be included [redacted] *See Family Wireless #1, LLC v. Auto. Techs., Inc.*, No. 3:15cv01310(JCH), 2016 U.S. Dist. LEXIS 65885, at *7-9 (D. Conn. May 19, 2016) (Ordering additional custodial files to be produced where proposed custodians were members of committees, involved in financial decisions regarding the subject

matter transactions of the case, or were lower level employees who may have been conduits of relevant information); *see also Fort Worth Emps. Ret. Fund v. J.P. Morgan Chase & Co.*, 297 F.R.D. 99, 105-06 (S.D.N.Y. 2013) (Inclusion in working groups at issue was sufficient to justify 18 additional proposed custodians in addition to an agreed 42).

Courts do not hesitate to approve far larger numbers of custodians to meet the needs of individual cases. *City of Sterling Heights Gen. Emps. Ret. Sys. ("Sterling Heights") v. Prudential Fin., Inc.*, Civil Action No. 12-05275 (MCA) (LDW), 2015 U.S. Dist. LEXIS 110712, at *10-11 (D.N.J. Aug. 21, 2015) (approving 76 custodians where necessary to "balance fairly plaintiffs' rights to relevant discovery against the costs and burden to defendants of providing that discovery"). Each of CVI's proposed seven upper management custodians should be included because their individual responsibilities and involvement include:



[redacted]

B. CVI Should be Required to Include Eleven Regional/Channel Sales Managers as Custodians

Plaintiffs request that an additional eleven CVI sales managers be included as custodians. CVI has refused this request. In this hub-and-spoke conspiracy, Defendants should not have the unilateral ability to select their own key document custodians, limit such custodians to a select number of high level executives, and reject Plaintiffs' reasonable requests for additional custodians that are reasonably believed likely to possess responsive documents. The Complaint adequately alleges Defendants conspired with each other ***and*** ECPs (*e.g.,* optometrists and ophthalmologists) to impose minimum resale prices on certain contact lenses lines by subjecting

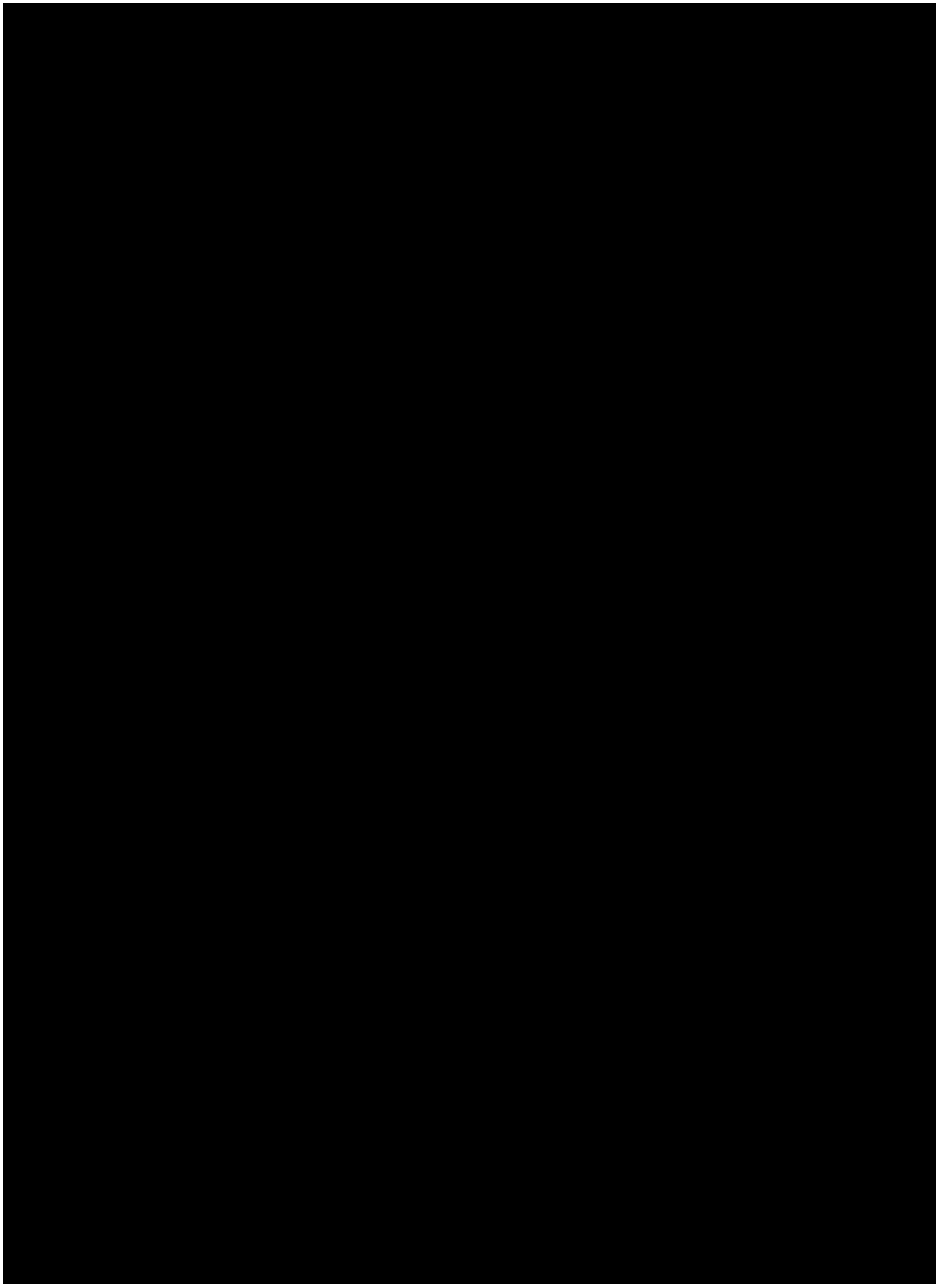
[redacted]

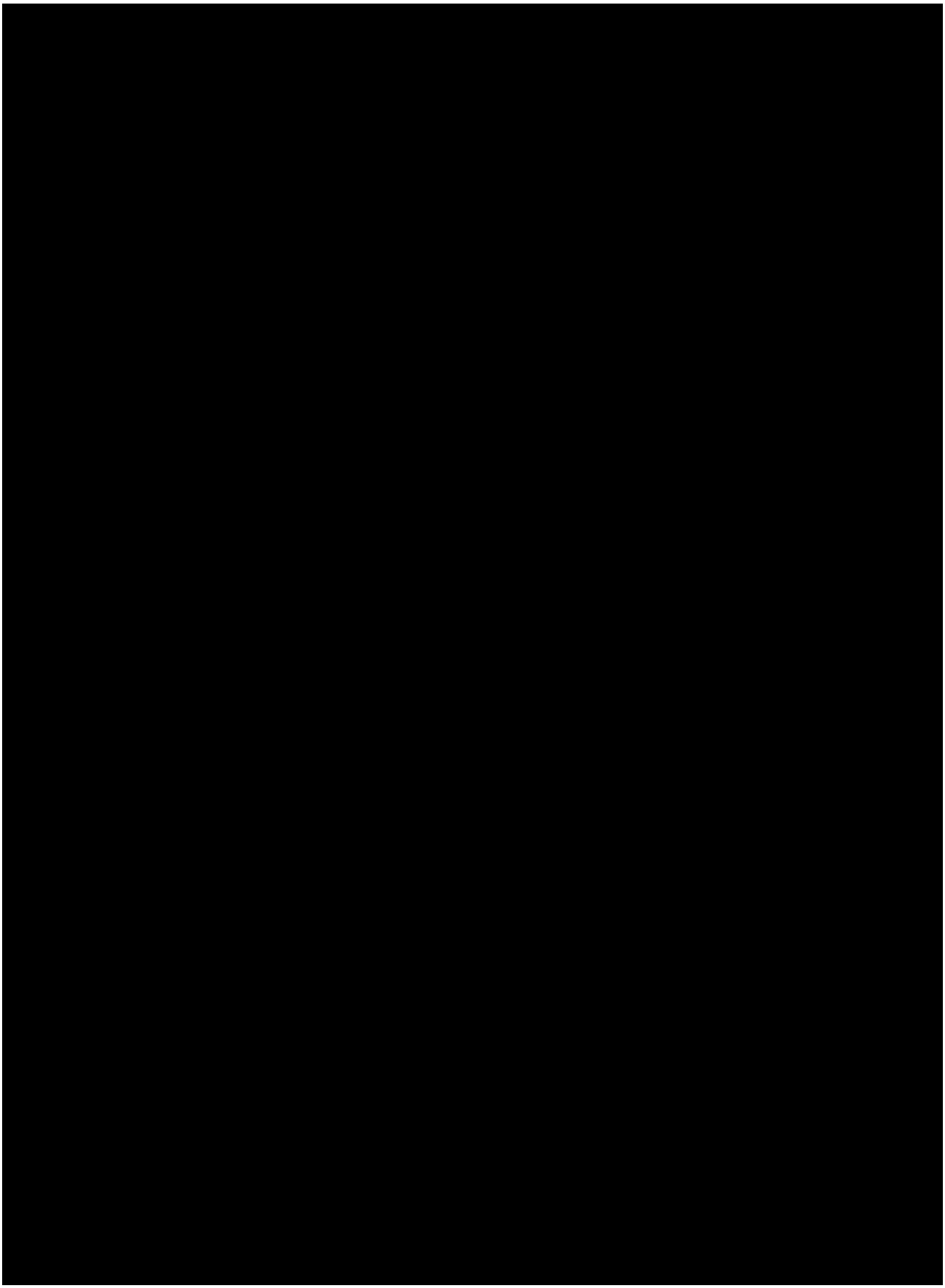
them to UPPs. Complaint ¶ 2-6. ECPs have the power to control the particular brand of contact lens consumers purchase and can refuse to prescribe a manufacturer's lenses if they are not insulated from price competition. Complaint ¶ 5-6. Class Plaintiffs are entitled to discovery regarding communications with ECPs regarding the UPPs. The custodial files of regional sales managers and channel sales managers are likely to reveal important communications between the Manufacturer Defendants and ECPs.

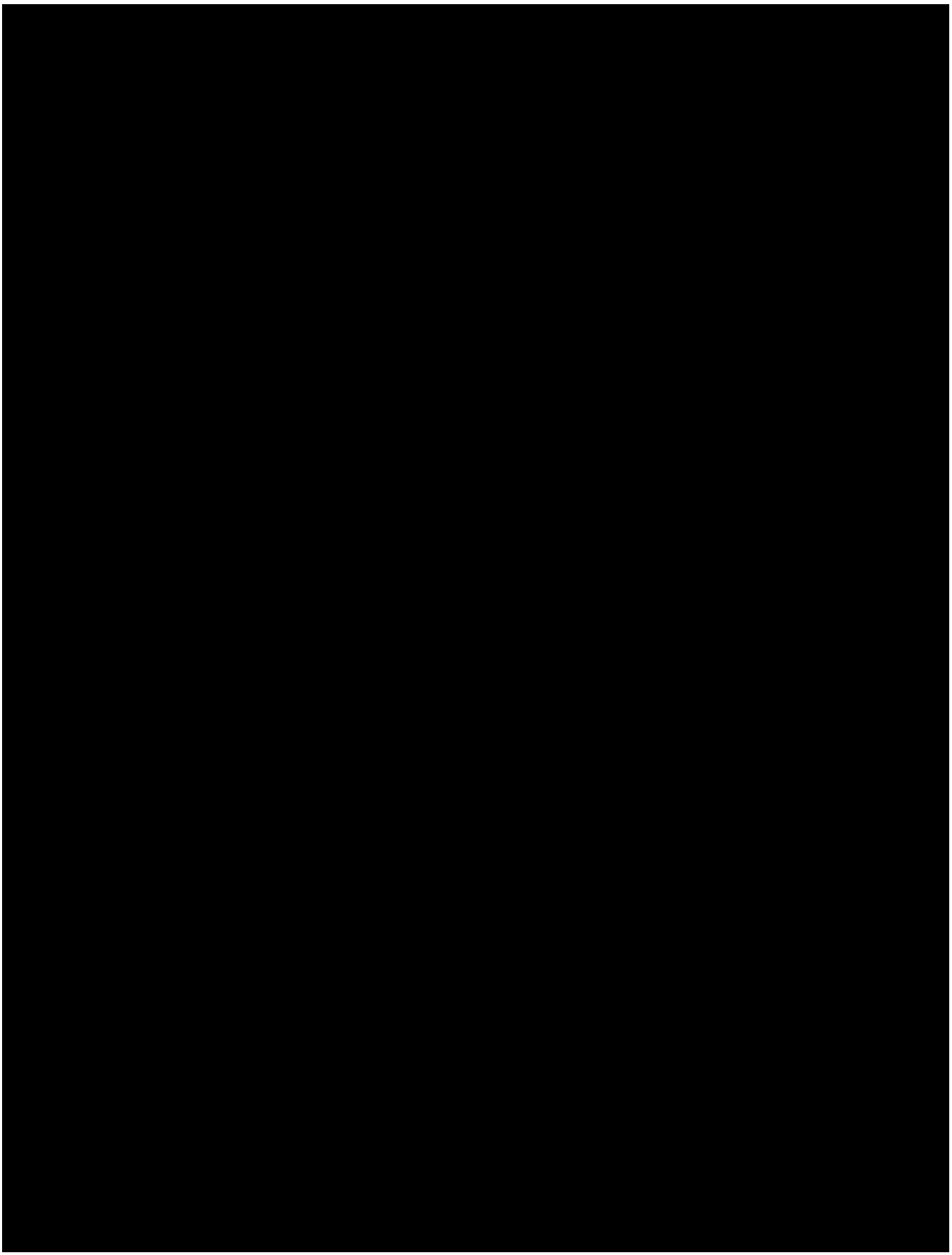
Most of the custodians CVI has agreed to produce are high-level executives.[31] However, evidence from sales personnel, including mid-level or low-level employees, is often considered by courts at various stages of antitrust cases and is used to prove antitrust violations. "[I]n an antitrust case such as this, Plaintiffs are at least entitled to a sample of lower-level . . . employees to determine if they possess significant and nonduplicative information." *Kleen Prods. LLC v. Packaging Corp. of Am.*, No. 10-5711, 2012 U.S. Dist. LEXIS 139632, at *47 (N.D. Ill. Sept. 28, 2012). The Court in *Kleen Prods.* went on to explain "while the Complaint alleges a conspiracy mostly among higher-level executives . . . , it does not exclude lower level employees. More importantly, even if the conspiracy is *among* higher-level executives, lower-level employees may *possess* important, relevant information which could reasonably lead to admissible evidence. *Id.* at *46 (citing cases). *See also Family Wireless #1, LLC,*2016 U.S. Dist. LEXIS 65885 at *10 (D. Conn. May 19, 2016) ("while not issuing directives, lower-level employees may discuss execution of policies amongst themselves and with third parties other than their superiors. These communications may be particularly revealing.")

Class Plaintiffs have now reviewed some of the documents of the initial CVI production

[redacted]







[redacted]

Gaining access to the custodial files of these eleven sales managers is critical to understanding the relationship between manufacturers and ECPs. [redacted] To understand why such a drastic change in pricing policy was ostensibly necessary, Class Plaintiffs need to understand what role ECPs had in the implementation of UPP and whether the Unilateral Pricing Policy was in fact "unilateral." [redacted] Therefore, the eleven sales managers/directors listed above should be included among the required custodians in the CVI searches. This discovery is highly relevant to Class Plaintiffs' claims and Defendants' defenses in this litigation and the discovery is proportional to the needs of this case.

C. CVI's Unsupported Objections Must Fail

CVI objects to designating additional custodians, arguing that it should not have to produce more than what it produced to the NYAG. (ECF No. 258 at 7, Defendant Coopervision, Inc.,'s Response to Class Plaintiffs' Motion to Compel Production of Documents from Defendants.) Plaintiffs are aware of no case justifying Defendant's suggestion that Plaintiffs should be limited to those documents and custodians produced in a preliminary investigation by the government. On the contrary, "the mere fact that many documents have already been produced is not sufficient to establish that there are no other relevant materials to be found." *Family Wireless #1, LLC,*2016 U.S. Dist. LEXIS 65885, at *7 (D. Conn. May 19, 2016)(Rejecting argument on motion to compel that additional custodians were unnecessary due to the large quantity of documents already produced); see also *Kleen Prods. LLC v. Packaging Corp. of Am.*, No. 10-5711, 2012 U.S. Dist. LEXIS 139632, at *49 (N.D. Ill. Sept. 28, 2012)(allowing plaintiffs to select additional custodians since plaintiffs had no input on the initial custodian determinations and the case was in the early stages of discovery). Plaintiffs previously offered to CVI documents from Defendant's own initial production to justify the need for the custodians in question and the discussion above offers precisely the kind of detail courts rely upon when granting additional custodians in complex litigation. *Id.*

CVI also protests that the additional custodians will not be "proportional." The proposed discovery is proportional to the needs of this case when analyzed by the proportionality factors laid out in Fed. R. Civ. P. 26(b).[47] The issues at stake in this action are important to all contact lens consumers throughout the United States, and the amount in controversy is high enough to support the need for additional historical discovery. This case alleges a horizontal and vertical price-fixing scheme involving parties who have been caught in such a conspiracy once before,

[47] See specific Fed. R. Civ. P. 26(b) factors, *supra* at pp. 8-9.

and where damages could be in the billion-dollar range. Moreover, CVI alone had *net sales* of over $1 billion this past year, an increase from the previous year.[48] In addition, the Clariti brand which CVI purchased in 2014 for over $1 billion came with and continues to have a UPP in place.[49] Considerations of the parties' resources also militate in favor of compelling discovery. CVI is a large multi-national corporation with virtually unlimited resources to devote toward this litigation, while Class Plaintiffs are individual consumers who were harmed by this conspiracy – no less for the second time in ten years. CVI is the only party with access to the information necessary to prove the case, and the discovery requested is of vital importance to Class Plaintiffs' case, as described above.

Production of the requested information by the additional custodians is not overly burdensome, as Defendants claim. Defendants have made no specific allegations of burden other than the conclusory assertion that producing documents by additional custodians would be burdensome. This is contrary to the the Federal Rules of Civil Procedure, which insist upon detailed and factually supported claims of burden. *Martin*, 2008 U.S. Dist. LEXIS 105215, at *1-3; *see also Wilmington Trust Co. v. AEP Generating Co.*, No. 2:13-CV-01213, 2016 U.S. Sist. LEXIS 28762, at *7 (S.D. Ohio Mar. 7, 2016) (Under the new Rule 26, "a responding party still must meet its burden of explaining how costly or time-consuming responding to a set of discovery requests will be."); *Kleen Prods. LLC v. Packaging Corp. of Am.*, No. 10-5711, 2012 U.S. Dist. LEXIS 139632, at *48 (N.D. Ill. Sept. 28, 2012)("…a party objecting to discovery must specifically demonstrate how the request is burdensome.")(citations omitted).

[48] "CooperVision fiscal 2015 net sales increased 7% from fiscal 2014 to $1.49 billion" The Cooper Companies, Inc Annual Report on Form 10-k for the Fiscal Year Ended October 31, 2015 at p. 44.

[49] "We paid approximately $1,131.1 million for Sauflon." The Cooper Companies, Inc Annual Report on Form 10-k for the Fiscal Year Ended October 31, 2014 at p. 41.

Defendants are already collecting and reviewing documents to respond to Class Plaintiffs' RFPs. Any incremental burden would be outweighed by the benefits to Class Plaintiffs described above. These are documents that are uniquely in Defendant's possession. Without production from the Defendant, Plaintiffs do not have another avenue for gaining access to these critical documents. Defendant should be compelled to include the additional proposed custodians in the searches.

D. CVI's Refusal to Provide Hit Reports Has Hindered a Good Faith Negotiation

CVI has to date refused to provide Class Plaintiffs with search term hit reports for any of its proposed search terms as they relate to the custodians in question. As both parties have previously acknowledged, E-discovery is intended to be a cooperative process. See ECF No. 225 ¶ 2, Stipulation Re: Discovery of Electronically Stored Information. Where both parties are engaging in a good faith negotiation over discovery, the creation of search term hit reports can convey to the requesting party the relative scope of its discovery requests and are used by the parties and courts to determine the number of unique documents in defendant's database for each search term or custodian. See *L-3 Commc'ns Corp. v. Sparton Corp.*, 313 F.R.D. 661, 669 (M.D. Fla. 2015) (Court referring to "hit counts Defendant [has] provided for the disputed terms" to evaluate Defendant's argument that additional searches would produce duplicative results) See also *Sterling Heights,* 2015 U.S. Dist. LEXIS 110712, at *11 (Noting that "had defendants provided hit counts suggesting…an 'egregiously large' number of 'hits'" plaintiffs could have considered narrowing their requested searches). CVI cannot hide behind a generalized "burden" and "proportional" argument without presenting quantitative, substantiated statements of such. see *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 598-99 (7th Cir. 2011) (In reversing the lower court, the Seventh Circuit stated that the producing party "could have given the district

court an estimate of the number of documents that it would be required to provide [the requesting party] in order to comply with the request, the number of hours of work by lawyers and paralegals required, and the expense. A specific showing of burden is commonly required by district judges faced with objections to the scope of discovery.")(citations omitted).

Other courts have shown a willingness to order the creation of search term hit reports by a producing party in the interest of collaboration. *Vasudevan Software, Inc., v. MicroStrategy Inc*., No. 11-cv-06637-RS-PSG, 2012 U.S. Dist. LEXIS 163654, at *14-17 (N.D. Cal. Nov. 15, 2012)(Ordering producing party to provide search term hit reports as a threshold matter to determine the reasonableness of discovery requests, stating "Before it can determine the reasonableness of VSI's request, the court — and for that matter, the parties — need more information."). It should also be noted that both JJVC and B&L produced such reports upon request and that the creation of such reports is a relatively inexpensive and speedy process. (Hit Reports attached as Exhibit S of Wedgworth Declaration) The production of these hit reports by some Defendants in this litigation has facilitated those discovery negotiations. Therefore, in order to facilitate the negotiations with CVI, Class Plaintiffs request that this Court order that CVI produce to Class Plaintiffs the hit report as soon as possible.

CONCLUSION

For the foregoing reasons, Class Plaintiffs respectfully request the Court enter an order compelling CVI (1) to include eighteen additional custodians (seven upper management custodians and eleven sales managers), and (2) to produce a hit list, as well as any other relief that the Court deems just and proper.

CERTIFICATION PURSUANT TO LOCAL RULE 3.01(G)

Class Plaintiffs' counsel hereby certifies that prior to the filing of this motion, the parties met and conferred on the substance of this motion and were unable to agree to a resolution of the motion.

Dated: August 10, 2016

s/John A. DeVault, III

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2016, I electronically filed the foregoing in redacted form with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants. An unredacted version of the foregoing was additionally served via email to Chris Yates, Counsel for Coopervision.

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