

BYRNES & KELLER LLP  
LAWYERS  
38TH FLOOR  
1000 SECOND AVENUE  
SEATTLE, WASHINGTON 98104

TELEPHONE  
(206) 622-2000

FACSIMILE  
(206) 622-2522

September 25, 2009

Honorable Christine Gregoire  
Governor of the State of Washington  
Office of the Governor  
P.O. Box 40002  
Olympia, WA 98504-0002

Tina E. Kondo  
Antitrust Division Chief  
Washington State Attorney General's Office  
800 5th Avenue, Suite 2000  
Seattle, WA 98104-3188

Honorable Mike Kreidler  
Insurance Commissioner  
Office of the Insurance Commissioner  
P. O. Box 40257  
Olympia, WA 98504-0257

Stuart W. Hirschfeld  
Northwest Region  
Federal Trade Commission  
915 Second Ave., Room 2896  
Seattle, WA 98174

Re: Insurance Code and Potential Antitrust Violations in the Eye Care Industry

Dear Governor Gregoire, Ms. Kondo, and Messrs. Kreidler and Hirschfeld:

We represent Nouveau Vision, a family-owned optical lens laboratory in Redmond. Nouveau is at risk of being forced out of business because of the actions of VSP, the largest managed vision care provider in both Washington and nationwide. The impacts of VSP's actions, however, extend well beyond Nouveau Vision.

Washington consumers may soon be the latest victims of a trend of concentration and collaboration among the dominant players in the vision care industry. Because of that trend, and absent prompt action, the market for prescription lenses in Washington will shortly be dominated by a single company based in France – Essilor International. Essilor has long controlled much of the world market and is becoming the dominant player in the United States. Washington may soon be among the first states where it obtains near complete market control.

Essilor's potential domination in Washington is the direct result of actions taken by its sometimes business partner, VSP. VSP sells managed vision care plans. Just as Essilor dominates the lens market, VSP is Washington's and the nation's largest provider of managed vision care plans.

This past year, VSP and Essilor publicly unveiled aspects of what may be a deeper relationship between the two companies. Whether as a part of that relationship or otherwise, VSP recently announced a series of contract cancellations nationwide that will sharply impact the middle level of the vision care chain of distribution – laboratories that grind lenses to fit

Governor Gregoire, Ms. Kondo,  
and Messrs. Kreidler and Hirschfeld  
September 25, 2009  
Page 2

prescriptions. In particular, effective December 31, 2009, VSP is canceling the contracts of a number of independent labs, including Nouveau, to process prescriptions for VSP members.<sup>1</sup> Given VSP's market dominance, a laboratory's ability to service VSP's members is critical to staying in business.

The impact of VSP's action will also be particularly severe on Washington eye care consumers, given the already concentrated nature of the industry. With one exception, all of the other labs in Washington are all owned or contractually controlled by Essilor. VSP's cancellation of Nouveau will force VSP's subscribers to use a single manufacturer's lenses – Essilor – whether or not those lenses best suit the subscriber's eye care needs. VSP's actions will also eliminate a key source of unbiased advice for optometrists and ophthalmologists as to which manufacturer's lenses are most suitable for a given patient.

As a health care service provider, VSP is required by law to maintain an adequate network of providers to furnish vision care services to its members. WAC 284.43.200. VSP's recent actions, if allowed to stand, render its provider network inadequate. The optometrists and ophthalmologists in VSP's network will not be able to do their job properly, and their ability to provide lenses best suited for their patients will be compromised.

Beyond the insurance regulation violations, VSP's action – if done pursuant to an express or implicit agreement with Essilor – raises serious antitrust questions, including potentially a conspiracy to monopolize portions of the eye care market. Essilor already dominates the Washington market through contracts which prohibit its distributors from promoting other brands over Essilor. With VSP's latest action, Essilor will become even stronger. The result? Reduced competition, higher prices, and fewer vision care choices for Washington citizens. In this regard, the Federal Trade Commission has an active and open investigation into potential antitrust violations within the eye care industry nationally.<sup>2</sup> Unfortunately, we do not believe that investigation will be finished in time to stop the impending injury to Nouveau and Washington eye care consumers.

We believe that both the Insurance Commissioner and the Attorney General's Office should act promptly to investigate the motives behind, and impacts of, VSP's cancellation of Nouveau's contract, and the contracts of many other laboratories nationwide. To aid you in your

---

<sup>1</sup> Ex. 1.

<sup>2</sup> VSP is also no stranger to the antitrust laws, having been sued for price fixing in the mid-90s by the U.S. Department of Justice. United States v. Vision Service Plan, 94 CV02693 TPJ (DC 1994). VSP entered into a consent decree to resolve that matter. On a related note, and more recently, the IRS revoked VSP's claimed tax exempt status. The revocation was affirmed by the Ninth Circuit. Vision Service Plan, Inc. v. United States, 265 Fed. Appx. 650, 2008 WL 268075 (9th Cir. Jan. 30, 2008).

analysis, set forth below is a discussion of: (i) the optical lens chain of distribution; (ii) the key role played by independent laboratories in vision care; (iii) the Washington laboratory market; (iv) overviews of VSP and Essilor, and the relationship between the two companies; and (v) an explanation of why VSP's actions violate WAC 284-43-200.

### **I. The Optical Lens Chain of Distribution**

In simple terms, there are three levels in the optical lens distribution system. The top level consists of lens manufacturers such as Essilor. They manufacture and sell unfinished lens blanks. Blanks can be made of a variety of materials (plastic, glass, etc.) and are ground into finished lenses by the second level – laboratories. Manufacturers also sell treatments for the finished lenses such as anti-reflective (“A/R”) coatings.

Laboratories – the middle tier – receive orders (prescriptions) from the dispensing (retail) level and, using blanks obtained from manufacturers, grind the blank into a finished lens to fit that prescription. They also apply A/R coatings and other finishings, if ordered, to the finished lens. Depending on the laboratory, it may also provide a key service function – advising the dispensing optometrist or ophthalmologist about the most appropriate lens for the prescription. Briefly, one manufacturer's lenses may be more suitable for a particular prescription than another's. As detailed below, many labs, because of restrictions in their distribution agreement with a manufacturer, cannot provide advice about which manufacturer's lenses might be best for the particular prescription. Labs under contract with Essilor face particularly tight restrictions – they are contractually barred from recommending another manufacturer's lenses. By contrast, independent laboratories, beholden to any particular manufacturer, can freely advise optometrists and ophthalmologists about the best lens for the particular patient.

The third level is the retail level, occupied by dispensing optometrists, ophthalmologists, and opticians. This level either issues (optometrists and ophthalmologists) or receives the prescription (opticians), and sends the prescription to the laboratory to have the prescription filled.

The patient's source of payment frequently dictates the operation of the chain of distribution in a given instance. For example, a VSP member will typically see an optometrist within VSP's network. The resulting prescription goes to a laboratory under contract with VSP. At least in Washington, and as detailed below, that laboratory will also have ties to Essilor, almost ensuring that whatever the suitability of Essilor's lenses for the particular prescription, Essilor's lenses will be used.

## **II. The Key Role Played by Independent Laboratories in Vision Care**

Independent laboratories are laboratories not contractually bound to promote one manufacturer's lenses over another. Historically, they have played a key role in the vision care delivery system. Most importantly, independent laboratories exercise their expertise to advise optometrists and ophthalmologists about the material, manufacturer, and fabrication method best suited to the individual patient's prescription and needs. Given that differing prescriptions are best filled with lenses from different manufacturers, this is critical to getting the best care and treatment for the patient. Manufacturer-controlled laboratories, such as those under contract with Essilor, do not have this independence. Regardless of the needs of the patient, and as detailed in § V below, such labs are contractually obligated to push and promote Essilor products to the exclusion of other lens manufacturers, even if another manufacturer's lenses would be better for the patient.

Independent laboratories also provide competition in both service and quality. They typically provide faster turnaround with a lower error rate. Particularly for senior citizens and those with severe vision problems, this fast and reliable lab work is critical.

## **III. The Washington Laboratory Market**

There are seven laboratories in Washington. Only one, Nouveau, is independent. With one insignificant exception, the rest are owned or controlled by manufacturers as follows:

- Walman Optical (under contract with Essilor);
- Vision Craft (under contract with Essilor);
- Capital (very small independent insignificant player);
- Jorgenson Optical Supply Co. (owned by Essilor);
- Peninsula Optical Lab (owned by Essilor);
- Sound Optical (owned by Hoya);
- Puget Sound Optical (owned by Essilor); and
- QC Optical (under contract with Essilor).

In short, with the termination of Nouveau by VSP, there will be no independent laboratories capable of providing the lenses used to fill prescriptions for VSP subscribers. Instead, nearly all of the labs will be controlled by Essilor, requiring those labs to promote Essilor products above all others, regardless of the patient's needs.

## **IV. VSP**

VSP is a prepaid, or managed care, vision plan. On behalf of its subscribers, it pays for a set number of vision care appointments per year, and a set number of lenses per year. VSP

Governor Gregoire, Ms. Kondo,  
and Messrs. Kreidler and Hirschfeld  
September 25, 2009  
Page 5

maintains a network of providers (optometrists and ophthalmologists) for which only a co-pay is required, and which have agreed to see patients for the rate paid by VSP. For non-network providers, VSP pays a set amount and the subscriber is responsible for the difference. Typically, an employer will contract VSP coverage for its employees with the premium shared, as agreed, between the employer and the employee.

VSP also contracts with laboratories to provide finished lenses to its subscribers. Those laboratories must agree to accept payment from VSP at levels set in a schedule established by VSP.

VSP is the nation's largest managed vision care company, and a major player in the vision care market in Washington. In 2008, VSP had 551,806 subscribers in Washington.<sup>3</sup> Thus, approximately 8.5 percent of all Washington residents (insured and uninsured) belong to VSP. As a percentage of persons with some form of vision coverage, VSP's share would be far higher. For example, 20 percent of Washingtonians between the ages of 19 and 64 have no health insurance of any kind.<sup>4</sup> VSP's exact share of the managed vision care market in Washington is unknown, but considerable.

VSP is vertically integrated, and now owns and operates several laboratories around the country. Most recently in a joint venture with Essilor, it acquired a minority interest in McLeod Laboratories earlier this year.

## V. Essilor

Headquartered in France, Essilor is the world's largest manufacturer of ophthalmic lenses. It sells progressive lenses under the brand name "Varilux." Essilor also produces an anti-reflective coating branded "Crizal." Essilor is vertically integrated (owning manufacturing, laboratories and retail outlets) in most major countries worldwide, and increasingly in the United States. By the end of 2008, for example, industry press reports show that Essilor owned approximately 150 labs in the United States, with \$796.4 million in sales and filling 62,000 prescriptions per day.<sup>5</sup> (By comparison, the top 25 independently owned labs had sales of \$417 million and produced 31,935 prescriptions per day.)<sup>6</sup>

---

<sup>3</sup> Ex. 2.

<sup>4</sup> Ex. 3.

<sup>5</sup> Vision Monday, Nov. 10, 2008, Special Annual Report ([www.visionmonday.com](http://www.visionmonday.com))

<sup>6</sup> Id.

Governor Gregoire, Ms. Kondo,  
and Messrs. Kreidler and Hirschfeld  
September 25, 2009  
Page 6

These reports indicate that Essilor controls 50 percent of the United States laboratory market.<sup>7</sup> If the labs Essilor controls through its restrictive distribution contract (see below) are added to the labs it owns, the control figure will be far higher.

To process and distribute Essilor products, a laboratory must sign the Essilor distributor agreement.<sup>8</sup> That agreement is quite restrictive, and as a practical matter requires the laboratory to handle Varilux to the exclusion of other brands. The lab must promote Varilux products as “Distributor’s preferred treatment for presbyopia over all other [lens manufacturers] and refrain from representing, either directly or on behalf of other manufacturers, that [lenses] of other manufacturers are equal or superior to Varilux Products.”<sup>9</sup> In fact, it is a breach of those laboratories’ contracts with Essilor to even suggest that a different manufacturer’s lenses would be more appropriate for a particular patient:

**Any activities of Distributor to advertise, promote or sell to ECPS [the retail level] any PAL [progressive eye lens] other than Varilux Products as Distributor’s preferred treatment for presbyopia and any written, oral or implied agreement by Distributor to engage in such activities shall constitute a breach of this Agreement.**<sup>10</sup>

Similarly, with regard to “Crizal” products, the lab must “refrain from comparing Crizal Products to any other spectacle lens coating or coated spectacle lens product unless the comparison indicates that the Crizal Product is the superior product or coating.”<sup>11</sup>

## **VI. Essilor and VSP – Joining Forces**

This year has seen the public unveiling of a relationship between VSP and Essilor – the dominant insurer joining the dominant manufacturer. For example, VSP recently joined with Essilor to acquire McLeod Laboratories in New York. Essilor has the majority ownership interest, and VSP is a minority partner. Likewise, in April 2009, VSP launched a private label, Essilor-manufactured lenses, which will be exclusively available to VSP members.

---

<sup>7</sup> Id.

<sup>8</sup> Ex. 4 is a sample contract. (The party that provided the contract redacted identifying information out of concerns over reprisals by Essilor.)

<sup>9</sup> Ex. 4 at 3, ¶ III.4.

<sup>10</sup> Id. (bold print in original).

<sup>11</sup> Id. at 4, ¶ III.13.

## **VII. VSP Is Required to Maintain an Adequate Network**

VSP is a Health Carrier under WAC 284-43-130 and RCW 48.44.010(12). As such, VSP must ensure “network adequacy” under WAC 284-43-200. This requires VSP to maintain a network that:

1. is sufficient in number and type of providers and facilities;
2. assures access to covered persons without unreasonable delay;  
and
3. provides adequate choice.

VSP’s decision to cancel its contract with Washington’s last significant independent laboratory violates these requirements in key respects. First, optometrists and opticians consult with and rely upon independent laboratories for advice and recommendations about which manufacturer’s lenses are most appropriate for a particular patient’s prescription. Currently, Nouveau is the only laboratory in Washington capable of providing independent unbiased advice. The laboratories owned by Essilor, or under contract with Essilor, are required to promote Essilor’s lenses above all others.

By eliminating the only remaining independent source of input, VSP is directly impacting the ability of its optometrist network to perform its basic functions as optometrists.

Second, by eliminating Nouveau, VSP’s Network will, by default, be turned into a network of Essilor-distributing optometrists. Any lab they turn to will be Essilor controlled. Patients will be denied the opportunity, or choice, of an optometrist who can obtain independent unbiased advice from laboratories. This is not to criticize the optometrists. They have no option given the way the market functions.

## **VIII. Antitrust Analysis**

We do not have sufficient access to Essilor or VSP documents to fully understand the growing relationship between the two companies. Nor do we have access to detailed market share data. Industry press reports, however, suggest that the Herfindahl-Hirschman index for the lens manufacturing market would show a high degree of concentration. Accordingly, to the extent VSP’s cancellation of Nouveau and other labs is the function of an agreement between VSP and Essilor, this potentially gives rise to charges of attempted monopolization and/or conspiracy to monopolize. In this regard, the Federal Trade Commission is actively reviewing the vision care industry nationally. The FTC’s attorney handling the matter is Stewart Hirschfeld (206-220-4484).

Governor Gregoire, Ms. Kondo,  
and Messrs. Kreidler and Hirschfeld  
September 25, 2009  
Page 8

**IX. Conclusion**

VSP's actions raise issues falling within the purview of both the Insurance Commissioner and the Attorney General. We urge you both to take prompt action. Unless VSP reverses its action, irreparable harm will be done to Washington consumers.

Very truly yours,

BYRNES & KELLER LLP

A handwritten signature in black ink, appearing to read "PRT", written in a cursive style.

Paul R. Taylor

# **EXHIBIT 1**

July 1, 2009



Timothy J. Sutich  
NOUVEAU VISION, INC. (Lab #0549)  
8567 Willows Rd.  
Redmond, WA 98052-3486

Sent via Certified Mail

Re: Notice of Nonrenewal

Dear Mr. Sutich:

We are writing to provide you with advance notice about the cancellation of your current Laboratory & License Agreement with VSP at the end of this year. The cancellation will take effect on December 31, 2009.

The current Agreement permits either of us to cancel it on 15 days' notice, but we decided to notify you 6 months before the cancellation becomes effective to provide you additional time to prepare for this transition. If you wish to end our business relationship earlier, please let us know, and we will arrange to accommodate you. We likewise reserve the right to terminate the Agreement prior to December 31, 2009, if circumstances change.

Between August 1, 2009 and December 31, 2009, you will additionally have the opportunity to receive and process any Choice Plan orders from doctors in all states except California, Ohio, West Virginia, Pennsylvania, and Washington, DC. It is mandatory that all VSP contract labs accept VSP Choice Plan orders throughout the remainder of their Laboratory & License Agreement term.

Enclosed are two copies of the Choice Addendum and one copy of VSP Options—Payment to Laboratory (Choice Plan). Please review these documents and return both copies of the signed Addendum to us by July 24, 2009 if you would like to participate on VSP's contract lab network, processing both Signature and Choice work through the end of this year. We have enclosed a pre-addressed envelope for your convenience. Once received, we will forward a fully executed copy to you for your records. If we do not receive your signed Addendum by July 24, we will assume you do not wish to remain a VSP contract lab and your Agreement will terminate on August 1, 2009.

While we will not be extending you a contract after the cancellation of our current Agreement, we appreciate your past business and hope you would consider a contract with us in the future, should our business needs change and we have additional openings for contract labs.

If you have any questions about this notice or about the termination process, please contact Ophthalmic Services at 916.851.4900, option 3.

Sincerely,

Jeff DeRose  
Manager, Ophthalmic Services

JD/jh

Enclosures

