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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NATIONAL ASSOCIATION OF
OPTOMETRISTS & OPTICIANS;
LENSCRAFTERS, INC; and EYE
CARE CENTERS OF AMERICA, INC.,

NO. CIV. S-02-1464 LKK/DAD

Plaintiffs,

v.

EDMUND G. BROWN, JR., in his
official capacity as Attorney
General of the State of California;
and CHARLENE ZETTEL, in her official
capacity as Director of the
Department of Consumer Affairs,

O R D E R

Defendants.

_____ /

This case concerns the constitutionality of certain
California statutes and regulations. These statutes and
regulations prohibit optical companies from offering
prescription eyewear at the same location in which eye
examinations are provided and from advertising that eyewear and
eye examinations were available in the same location.

1 Plaintiffs, an association of optometrists and opticians and two
2 out-of-state optical companies, contend that these statutes and
3 regulations violate the dormant Commerce Clause because their
4 burden on interstate commerce excessively outweighs the local
5 benefits of the law. Plaintiffs and defendants each bring cross-
6 motions for summary judgment. For the reasons described below,
7 plaintiffs' motion is denied and defendants' motion is granted.

8 **I. BACKGROUND¹**

9 In 2002, plaintiffs, the National Association of
10 Optometrists and Opticians ("NAOO") and two out-of-state optical
11 companies, LensCrafters, Inc. ("LensCrafters") and Eye Care
12 Centers of America, Inc. ("ECCA"), filed a complaint against
13 defendants, the Attorney General of California and the Director
14 of the California Department of Consumer Affairs, seeking
15 declaratory and injunctive relief. Plaintiffs challenge Sections
16 655, 2556, and 3130 of California's Business & Professions Code
17 and their companion regulations, 16 California Code of
18 Regulations, Title 16, Sections 1399.251 and 1514. These
19 provisions prohibit optical companies from offering prescription
20 eyewear at the same location in which eye examinations are
21 provided and from advertising that eyewear and eye examinations
22 are available at the same locations. Optometrists and
23 ophthalmologists who are unaffiliated with optical companies,

24
25 ¹ Several motions to seal were filed by parties concerning the
26 briefs and exhibits in these motions. The court addresses these
motions in a concurrently filed order.

1 however, may offer prescription eyewear at the same location in
2 which eye examinations are provided and may advertise these
3 services.

4 Plaintiffs allege that these statutes and regulations
5 violate the dormant Commerce Clause because local optometrists
6 and ophthalmologists may offer "one-stop shopping" of both
7 eyewear and eye examinations, which they contend is the
8 preferred or dominant business model, and out-of-state optical
9 companies are prohibited from providing the same one-stop
10 shopping. Defendants argue that these statutes and regulations
11 do not violate the dormant Commerce Clause because they promote
12 the health of Californians by protecting the optometric
13 profession from being taken over by large business interests.

14 In 2003, plaintiffs and defendants filed their first cross-
15 motions for summary judgment. On March 10, 2004, before the
16 court issued an order on these motions, the case was stayed
17 pending resolution of People v. Cole, 38 Cal. 4th 964 (2006).
18 This court then granted plaintiffs' motion for summary judgment
19 and denied defendants' motion on the ground that "the challenged
20 laws substantially effect and discriminate against interstate
21 commerce and therefore are subject to strict scrutiny under the
22 dormant Commerce Clause." Nat'l Ass'n of Optometrists &
23 Opticians v. Lockyer ("Lockyer"), 463 F. Supp. 2d 1116, 1138
24 (E.D. Cal. 2006). This court continued to hold that, "Although
25 California has legitimate interests in regulating the provision
26 of health services, defendants have failed to meet [their]

1 burden of showing that [they have] no other means to advance
2 [their] interests." Id. As such, this court concluded that the
3 laws and regulations violate the dormant Commerce Clause.

4 Defendants appealed. On May 28, 2009, the Ninth Circuit
5 reversed this court's decision and remanded the case for the
6 court to conduct the Pike v. Bruce Church, Inc., 397 U.S. 137,
7 142 (1970), balancing test. Nat'l Ass'n of Optometrists &
8 Opticians v. Brown ("Brown"), 567 F.3d 521, 528 (9th Cir. 2009).
9 The Ninth Circuit held that the challenged laws and regulations
10 are not discriminatory under the dormant Commerce Clause because
11 opticians, including optical chains like LensCrafters, are not
12 similarly situated to optometrists and ophthalmologists.

13 The Ninth Circuit first concluded that "the dormant
14 Commerce Clause is applicable to this case because the retail
15 sale of eyewear involves and affects interstate commerce such
16 that Congress could regulate in that area." Id. at 524. The
17 court continued, however, to reverse this court's ruling that
18 the laws and regulations were discriminatory. Specifically, the
19 court reversed this court's ruling (based upon the statement of
20 the chief sponsor of the challenged provisions) that the
21 regulatory scheme was intended as economic protectionism
22 favoring California business. Id. at 525. Rather, the Ninth
23 Circuit decided that, "[T]he statement is clear that the
24 sponsor's objective was to protect California's optometric
25 profession from being taken over by large business interests, as
26 had been experienced in eastern states." Id. Thus, the Ninth

1 Circuit held that the challenged provisions did not have a
2 discriminatory purpose.

3 The Circuit then looked to whether the laws and regulations
4 had a discriminatory effect on interstate commerce. This
5 question turned on the definition of similarly situated
6 entities. Plaintiffs argued, and this court held, that
7 optometrists and ophthalmologists were similarly situated to
8 opticians, including optical chains, because they “compete in
9 the same market, with the same produces, for the same
10 customers.” Lockyer, 463 F. Supp. 2d at 1129. The Ninth Circuit,
11 however, decided that optometrists and ophthalmologists are not
12 similarly situated with opticians. That court held that, “As
13 health care providers, optometrists and ophthalmologists clearly
14 have special responsibilities that opticians do not, and as
15 commercial concerns, opticians have business structures
16 available to them that optometrists and ophthalmologists do
17 not.” Brown, 567 F.3d at 527.

18 The Court of Appeals continued to apply Exxon Corp. v.
19 Governor of Maryland, 437 U.S. 117, 125-26 (1978), to conclude
20 that optometrists and ophthalmologists are not similarly
21 situated to opticians. This court previously held that Exxon “is
22 clearly distinguishable.” Lockyer, 463 F. Supp. 2d at 1127.
23 Specifically, this court reasoned,

24 Unlike Exxon, in the instant case, California has
25 enacted a statutory scheme which has the practical
26 effect of barring all out-of-state entities from
offering one-stop shopping, while reserving for the
principal in-state competitors the right to provide

1 the competitive advantage. [¶] In Exxon, the Court
2 found that interstate dealers were able to compete in
3 the same manner as in-state service station owners
4 under the Maryland law. Only gasoline refiners could
5 no longer compete in the Maryland retail market.
6 Unlike the case at bar, in Exxon, other interstate
7 firms could compete in the Maryland market. Under
8 these circumstances, the Court held, the dormant
9 Commerce Clause was not violated.

10 Id. The Court of Appeals, however, found that Exxon is
11 controlling here and, as such, optometrists and ophthalmologists
12 are not similarly situated to opticians. The court interpreted
13 Exxon to “distinguish[] between . . . entities based on their
14 business structures, holding that a state may prevent businesses
15 with certain structures or methods of operation from
16 participating in a retail market without violating the dormant
17 Commerce Clause.” Brown, 567 F.3d at 527. Accordingly, the Ninth
18 Circuit held, “Because states may legitimately distinguish
19 between business structures in a retail market, a business
20 entity’s structure is a material characteristic for determining
21 if entities are similarly situated.” Id. The court then applied
22 Exxon to “reject LensCrafters’ argument that competition in the
23 same market renders it similarly situated to optometrists and
24 ophthalmologists.” Id. As such, “opticians are not the same as
25 optometrists or ophthalmologists. . . . Because the California
26 laws make no geographical distinctions between similarly
situated entities, they are not invalidated by the dormant
Commerce Clause.” Id. at 527-28.

When discussing the government interest in the challenged
provisions, this court previously held that, “defendants

1 fail[ed] to establish that the public's health is in greater
2 danger when receiving care from an optometrist affiliated with a
3 chain as compared to receiving care from a dispensing
4 optometrist" Lockyer, 463 F. Supp. 2d at 1136-37. The Court of
5 Appeals, however, disagreed with this analysis, and stated that

6 Here through the challenged laws, California has
7 sought to protect optometrists and ophthalmologists as
8 health care professionals from being affected by
9 subtle pressures from commercial interests. The
10 pressures of co-ownership and profit sharing
11 prohibited by the statutes are more obvious, but
12 potentially even a landlord-tenant relationship could
13 undermine health care quality if the landlord required
14 a certain level of performance to maintain the lease.
15 It is true that an optometrist or ophthalmologist
16 would still be bound by professional and ethical
17 standards. However, it is the subtle pressure to
18 conform to commercial desires that the statutes seek
19 to avoid. These subtle pressures would be difficult to
20 regulate as violations of professional or ethical
21 standards. Thus, the California laws in this case are
22 health regulations designed to prevent health care
23 providers from being unduly affected by commercial
24 interests. We must give deference to the State's
25 choice to protect its citizens in this way.

17 Brown, 567 F.3d at 526.² Accordingly, the Ninth Circuit
18 disagreed with this court's analysis of the record that "there
19 is no evidence that the practices that defendants complain of
20 actually harm the public's health." Lockyer, 463 F. Supp. 2d at

22 ² The parties dispute whether this court is bound by this
23 analysis. While this discussion is dicta, dicta from a higher
24 court, especially when it concerns the case at bar, should not be
25 treated lightly, because it serves as a "prophecy of what that
26 Court might hold." See McCalla v. Royal MacCabees Life Ins. Co.,
369 F.3d 1128, 1131 (9th Cir. 2004) (internal quotes and citations
omitted) (holding that court of appeals should not generally
disregard dicta of the Supreme Court).

1 1136. Rather, the Court of Appeals adopted defendant's theory
2 that commercial optical companies subtly pressure co-locating
3 optometrists and ophthalmologist to conform their treatment of
4 patients with commercial goals. Such subtle pressures, if they
5 exist, are difficult, if not impossible to measure. Nonetheless,
6 the Circuit held that these pressures may negatively effect the
7 quality of health care provided by optometrists and
8 ophthalmologists working within such companies.

9 At the conclusion of its analysis, the Ninth Circuit noted
10 that:

11 [D]espite LensCrafters' claims that the ability to
12 offer one-stop shopping affords a sales advantage to
13 optometrists and ophthalmologists, there are other
14 sales advantages enjoyed by LensCrafters by virtue of
15 their size, such as lower cost purchasing and the
16 ability to offer a wider selection of eyewear. It is
17 important that LensCrafters is not precluded from
18 operating in California, which is the situation for
19 out-of-state entities in some dormant Commerce Clause
20 cases. LensCrafters is only deprived of one eyewear
21 sales method.

22 Id. at 528.

23 The court then remanded the case to this court to conduct
24 the Pike balancing test. Under this test, plaintiffs "bear[] the
25 burden of proof in establishing the excessive burden [on
26 interstate commerce] in relation to the local benefits" of the
27 challenged laws and regulations. Id.

28 **II. STANDARD**

29 Summary judgment is appropriate when there exists no
30 genuine issue as to any material fact. Such circumstances
31 entitle the moving party to judgment as a matter of law. Fed. R.

1 Civ. P. 56(c); see also Adickes v. S.H. Kress & Co., 398 U.S.
2 144, 157 (1970); Secor Ltd. v. Cetus Corp., 51 F.3d 848, 853
3 (9th Cir. 1995). Under summary judgment practice, the moving
4 party

5 always bears the initial responsibility of informing
6 the district court of the basis for its motion, and
7 identifying those portions of "the pleadings,
8 depositions, answers to interrogatories, and
9 admissions on file, together with the affidavits, if
any," which it believes demonstrate the absence of a
genuine issue of material fact.

9 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed.
10 R. Civ. P. 56(c)).

11 If the moving party meets its initial responsibility, the
12 burden then shifts to the opposing party to establish the
13 existence of a genuine issue of material fact. Matsushita Elec.
14 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986);
15 see also First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S.
16 253, 288-89 (1968); Secor Ltd., 51 F.3d at 853. In doing so, the
17 opposing party may not rely upon the denials of its pleadings,
18 but must tender evidence of specific facts in the form of
19 affidavits and/or other admissible materials in support of its
20 contention that the dispute exists. Fed. R. Civ. P. 56(e); see
21 also First Nat'l Bank, 391 U.S. at 289. In evaluating the
22 evidence, the court draws all reasonable inferences from the
23 facts before it in favor of the opposing party. Matsushita, 475
24 U.S. at 587-88 (citing United States v. Diebold, Inc., 369 U.S.
25 654, 655 (1962) (per curiam)); County of Tuolumme v. Sonora
26 Cnty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001). Nevertheless,

1 it is the opposing party's obligation to produce a factual
2 predicate as a basis for such inferences. See Richards v.
3 Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). The
4 opposing party "must do more than simply show that there is some
5 metaphysical doubt as to the material facts Where the
6 record taken as a whole could not lead a rational trier of fact
7 to find for the nonmoving party, there is no 'genuine issue for
8 trial.'" Matsushita, 475 U.S. at 586-87 (citations omitted).

9 **III. ANALYSIS**

10 The Ninth Circuit remanded this case to apply the Pike, 397
11 U.S. at 142, balancing test. Brown, 567 F.3d at 529. Under this
12 test, plaintiffs bear the burden of proof in establishing an
13 excessive burden to interstate commerce caused by the challenged
14 laws and regulations in relation to their putative local
15 benefits. Id. at 528. Local laws and regulations are rarely
16 struck down under the Pike test. See, e.g., W. Lynn Creamery,
17 Inc. v. Healy, 512 U.S. 186, 200 (1994) ("Nondiscriminatory
18 measures . . . are generally upheld, in spite of any adverse
19 effects on interstate commerce, in part because the existence of
20 major in-state interests adversely affected is a powerful
21 safeguard against legislative abuse.") (internal quotation
22 omitted); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529
23 (1959) ("This is one of those cases - few in number - where
24 local safety measures that are nondiscriminatory place an
25 unconstitutional burden on interstate commerce."). Under the
26 Circuit's previous analysis, plaintiffs here are unable to

1 demonstrate any burden to interstate commerce, let alone an
2 excessive one. Further, the Court of Appeals has held that the
3 challenged provisions serve local interests as " health
4 regulations [that are] designed to prevent health care providers
5 from being unduly affected by commercial interests." Brown, 567
6 F.3d at 526. As such, the laws and regulations at issue do not
7 excessively burden interstate commerce in relation to their
8 local benefits. Accordingly, plaintiffs' motion for summary
9 judgment is denied and defendants' motion for summary judgment
10 is granted.

11 Plaintiffs raise two arguments as to how the challenged
12 provisions burden interstate commerce. First, they argue that
13 they burden interstate commerce by restricting access to local
14 markets by out-of-state companies. Second, plaintiffs argue that
15 the substantial financial loss that interstate firms will incur
16 under the challenged laws and regulations is so great that it
17 constitutes a burden on interstate commerce. The court need not
18 consider the evidence supporting these theories of burden to
19 interstate commerce because both fail as a matter of law under
20 the Circuit's ruling. Below, each argument will be addressed in
21 turn.

22 **1. Restricted Access to Local Markets by Out-of-**
23 **State Companies.**

24 Plaintiffs argue that interstate commerce is burdened
25 because there is no way in which an interstate company can offer
26 one-stop shopping. According to plaintiffs, one-stop shopping is

1 the "'dominant form of retailing eyewear' by all eyewear
2 sellers, including dispensing optometrists." Pls. Mot. Summ. J.
3 9. Plaintiffs have presented some surveys that indicate that
4 about 80% of responding consumers purchased their eyeglasses at
5 the same location in which they obtained an eye exam. Id. at 9
6 n.6. Further, they state, the market share of retail chains
7 nationwide in 2001 is 40% and in California in 2003 is 26%.
8 Id. at 9. They indicate that some retail chains decline to enter
9 California at all, and the ones that have entered are "simply
10 disappearing from the market." Id. at 10.

11 Plaintiffs then, in effect, ask this court to disregard the
12 analysis and reasoning of the Ninth Circuit in reversing this
13 very case. Plaintiffs argue that this court should distinguish
14 the case at bar from Exxon Corp. v. Governor of Maryland, 437
15 U.S. 117 (1978), as it did in its prior order. However, the
16 Ninth Circuit found Exxon binding upon the case and even relied
17 upon Exxon's analysis under Pike in its order. Brown, 567 F.3d
18 at 527 ("[I]n Exxon, the Court distinguished between the
19 entities based on their business structures, holding that a
20 state may prevent businesses with certain structures or methods
21 of operation from participating in a retail market without
22 violating the dormant Commerce Clause."). Accordingly, the court
23 applies Exxon to the case at bar.

24 In Exxon, the Supreme Court considered whether a Maryland
25 statute prohibiting producers or refiners from operating retail
26 services stations within the state violated the dormant Commerce

1 Clause. 437 U.S. at 119-20. This law was passed following the
2 1973 shortage of petroleum where evidence indicated that
3 "gasoline stations operated by producers or refiners had
4 received preferential treatment during the period of short
5 supply." Id. at 121. The plaintiff refiners presented evidence
6 that "their ownership of retail service stations has produced
7 significant benefits for the consuming public." Id. at 123. They
8 did not, however, present any evidence "that the total quantity
9 of petroleum products shipped into Maryland would be affected by
10 the statute." Id. The refiners also presented evidence that "at
11 least three refiners will stop selling in Maryland" because of
12 the law. Id. at 127. After holding that the statute did not
13 discriminate against interstate commerce because it created "no
14 barriers whatsoever against interstate independent dealers" or
15 prohibit the flow of interstate goods, id. at 126, the Supreme
16 Court evaluated whether the law "impermissibly *burdens*
17 interstate commerce," id. at 127 (emphasis in original). The
18 Supreme Court held that the Commerce Clause does not protect
19 "the particular structure or methods of operation in a retail
20 market." Id. The court continued,

21 [T]he Clause protects the interstate market, not
22 particular interstate firms, from prohibitive or
23 burdensome regulations. It may be true that the
24 consuming public will be injured by the loss of high-
25 volume, low-priced stations operated by the
independent refiners, but . . . that argument relates
to the wisdom of the statute, not to its burden on
commerce.

26 Id. at 127-28. Accordingly, as the Ninth Circuit explained when

1 applying this analysis to the case at bar, “[A] state may
2 prevent businesses with certain structures or methods of
3 operation from participating in a retail market without
4 violating the dormant Commerce Clause.” Brown, 567 F.3d at 527
5 (citing Exxon, 437 U.S. at 127.).

6 As the Ninth Circuit stated, California here “merely”
7 prevents opticians to offer one-stop shopping as independent
8 optometrists and ophthalmologists may do. While the challenged
9 provisions may cause consumers to prefer independent
10 optometrists and ophthalmologists to chain optical retailers,
11 “interstate commerce is not subjected to an impermissible burden
12 simply because an otherwise valid regulation causes some
13 business to shift from one [retailer] to another.” Exxon, 437
14 U.S. at 127.

15 Given that Exxon is not distinguishable on the grounds
16 reversed by the Ninth Circuit (e.g. that it is impossible for
17 any interstate company to sell eyewear under a one-stop shopping
18 model), plaintiffs seek to distinguish Exxon on the grounds that
19 one-stop shopping is the “dominant” method of doing business,
20 not a mere preferred method of doing business. Plaintiffs,
21 however, provide no authority in support of this theory that
22 prohibiting certain business structures from access to the
23 dominant method of selling eyewear is somehow different from
24 their prohibiting them from the preferred method of selling
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1 eyewear.³ This is especially so given that the Court of Appeals
2 specifically questioned the significance of LensCrafters'
3 complaint that "one-stop shopping affords a sales advantage to
4 optometrists and ophthalmologists." Brown, 567 F.3d at 528. The
5 circuit stressed that, "It is important that LensCrafters is not
6 precluded from operating in California LensCrafters is
7 only deprived on one eyewear sales method." Id. Because
8 LensCrafters is only deprived of a method of doing business, and
9 because the Circuit has clearly held that such a deprivation
10 does not constitute a burden on interstate commerce, plaintiffs
11 have not shown that interstate commerce is burdened because
12 retail optical chains are unable to offer one-stop shopping in
13 California.

14 When a plaintiff has failed to demonstrate the presence of
15 a burden on interstate commerce, courts need not attempt to
16 balance whether a non-burden is excessively outweighed by the
17 putative local benefits of the law. See Exxon, 437 U.S. at 127-
18 29 (disposing of plaintiffs' dormant Commerce Clause claims by
19 finding that the statute at issue does not burden interstate
20 commerce).

21 Even if plaintiffs had demonstrated a burden to interstate
22 commerce, however, for a court to hold that a facially neutral
23 statute violates the Commerce Clause, "the burdens of the
24 statute must so outweigh the putative benefits as to make the

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³ Assuming there is a meaningful distinction.

1 statute unreasonable or irrational." Alaska Airlines, Inc. v.
2 City of Long Beach, 951 F.2d 977, 983 (9th Cir. 1991) (holding
3 that district court's close balancing of the burden on
4 interstate commerce with the local benefits of the challenged
5 ordinance was inappropriate). The court continued to hold that a
6 statute is unreasonable or irrational under this test "where the
7 asserted benefits of the statute are in fact illusory or relate
8 to goals that evidence an impermissible favoritism of in-state
9 industry over out-of-state industry." Id. Further, the court
10 reasoned, that a regulation that has "some legitimate
11 justification would easily pass" the Pike test as applied in
12 Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978)
13 (invalidating statute where the state was unable to offer any
14 evidence that the regulation did anything to advance its argued
15 purpose).⁴

16
17 ⁴ Plaintiff heavily relies upon Yamaha Motor Corp. v. Jim's
18 Motorcycle Inc., 401 F.3d 560 (4th Cir. 2005). Accordingly,
19 defendants spend significant pages of their briefs distinguishing
20 the case. Suffice to say, Yamaha is clearly distinguishable from
21 the case at bar due to the Ninth Circuit's opinion reversing this
22 court's prior order. Specifically, in Yamaha, the Fourth Circuit
23 concluded that a challenged law provided no local benefits, and
24 thus the difficulty imposed upon out-of-state firms to enter the
25 state market excessively outweighed its local benefits. Id. at 569-
26 74. The court reasoned that there were no local benefits because
the state had another law that served the same purpose, but did not
burden interstate commerce to nearly the same extent. Id. Because
the challenged law did not provide any benefit beyond the other
law, the challenged law served no local benefit. Id. Here, however,
the Ninth Circuit reasoned that the challenged provisions serves
a purpose of avoiding the subtle pressures upon health
professionals to conform with corporate interests to the detriment
of the health of their patients. Given this distinction, Yamaha
does not provide persuasive guidance to the case at bar.

1 In the instant case, the Ninth Circuit found that the
2 benefits of the challenged laws and regulations are not illusory
3 and do not evidence impermissible favoritism when it reasoned
4 that the provisions serve to protect consumer health by
5 preventing optical companies from exerting "subtle pressures"
6 upon optometrists and ophthalmologists. Brown, 567 F.3d at 526.
7 Given that plaintiffs have not shown any burden on interstate
8 commerce, and even if they did, that the burden must be so
9 extreme as to make the statute irrational to invalidate the laws
10 and regulation, the challenged provisions are valid under the
11 Pike test as to this theory of burden.

12 **2. Substantial Financial Loss**

13 Plaintiffs' second argument is that the substantial
14 financial loss that interstate firms will incur under the
15 challenged laws and regulations is so great that it constitutes
16 a burden on interstate commerce. In support of this argument,
17 however, plaintiffs only present evidence of the predicted loss
18 in revenue plaintiff LensCrafters will incur if it is "required
19 to forgo the sale of eyewear at the same location where eye
20 exams are provided." Pls. Mot. Summ. J. 11. The amount is
21 substantial.⁵ Whether LensCrafters' loss of profits constitutes
22 a burden on interstate commerce requires resolution of a tension
23 between Pike and Exxon. Specifically, in Pike, which was decided
24

25 ⁵ Pursuant to the tentative sealing orders in this case, the
26 court omits the specific amount of revenues LensCrafters estimates
it will lose.

1 in 1970, the Supreme Court held that interstate commerce was
2 burdened based upon an individual firm's financial loss due to
3 the regulation. 397 U.S. 137, 145 (1970). Eight years later,
4 however, the Court held in Exxon that the Commerce Clause
5 "protects the interstate market, not particular interstate
6 firms, from prohibitive or burdensome regulations." 437 U.S. 11,
7 127-28 (1978).

8 Plaintiffs refer the court to Pioneer Military Lending v.
9 Manning, 2 F.3d 280 (8th Cir. 1993), which addresses this
10 tension and upon which this court has previously relied in a
11 previous case in granting a preliminary injunction, Pioneer
12 Military Lending v. DuFauchard, No. Civ. S-06-1445 LKK/PAN, 2006
13 WL 2053486, 2006 U.S. Dist. LEXIS 53973 (E.D. Cal. July 21,
14 2006). In Manning, the Eighth Circuit held that, "Exxon neither
15 overruled Pike, nor made irrelevant the burden that a state
16 regulation places on an individual business." 2 F.3d at 283.
17 Rather, Exxon "emphasizes that the burden placed on any
18 individual firm should be regarded in the context of the overall
19 interstate market." Id. Both Manning and DuFauchard concern
20 state regulations preventing the lender plaintiff from making
21 small loans to non-resident military borrowers. In Manning, the
22 court described plaintiff as a Nebraska company who adheres to
23 Nebraska laws when loaning funds to non-resident military
24 borrowers in Missouri. Id. at 281. The court then adopted the
25 district court's finding that the volume of plaintiff's business
26 in Missouri was not large enough for it to maintain a profitable

1 service in the state if forced to comply with the Missouri's
2 regulations. Id. at 282. Essentially, compliance "would have the
3 practical effect of closing [plaintiff's] operation in
4 Missouri." Id. The Eighth Circuit then considered the preclusive
5 costs plaintiff would face to do business in Missouri "[i]n the
6 context of the overall market for military loans." Id. at 283-
7 84. Specifically, the court evaluated evidence that plaintiff,
8 while not the only company to provide loans to military
9 personnel in Missouri, "was the only company to provide loans to
10 personnel in the lowest pay grades." Id. at 284. As such, the
11 Eighth Circuit concluded, plaintiff "serviced a unique niche in
12 the market and that the imposition of Missouri's regulations
13 would force [plaintiff] to discontinue its operation, thereby
14 leaving a gap where that niche existed." Id.

15 The court then assessed the local benefits of these
16 regulations. Missouri argued that the state had "an interest (1)
17 in protecting its residents from usurious interest rates and
18 oppressive lending practices; (2) in protecting its reputation
19 as a state which provides equal protection; and (3) in
20 preventing [plaintiff] from obtaining a competitive advantage
21 over other companies making loans to military personnel." Id. at
22 284. The Eighth Circuit, however, found these interests to be
23 weak. Specifically, as to the first interest, only non-residents
24 can obtain loans from plaintiff, so the regulations do not
25 protect residents. Id. As to the second interest, the court
26 adopted the district court's factual finding that there was no

1 evidence that Missouri's reputation would be harmed by
2 plaintiff's activities. Id. As to the final interest, the court
3 concluded that "[t]he interest of Missouri in preventing this
4 non-resident loan company from obtaining a competitive advantage
5 is slight on the record presented." Id. at 285. Considering the
6 significant burden to interstate commerce and the minimal local
7 interest, the Eighth Circuit held that the regulations, as
8 applied to plaintiff, violated the dormant Commerce Clause.

9 Here, plaintiffs have presented evidence that LensCrafters
10 will lose a substantial amount of profits due to California's
11 regulations preventing it from operating one-stop shopping
12 retail stores in the state. Plaintiffs do not, however, present
13 any evidence as to how this loss of profits burdens interstate
14 commerce. California consumers are not in any way barred from
15 purchasing eyewear from LensCrafters. Further, there is no
16 evidence that California consumers, or a class of California
17 consumers, will purchase less or no eyewear because of the
18 regulations. Plaintiffs also argue that the burden on interstate
19 commerce becomes apparent when considering the impact the
20 regulations would have upon retail chains if every state were to
21 adopt them. This argument is similarly without weight because
22 plaintiffs have not shown that these regulations are a burden to
23 interstate commerce, but rather that they inhibit the business
24 model plaintiffs find to be most profitable.

25 Even if this court were to find that plaintiffs' loss of
26 profits constitutes a burden on interstate commerce, the local

1 benefits of the challenged provisions are said to be more
2 substantial than those in Manning. As discussed above, the
3 statutes and regulations at issue here are said to serve a
4 legitimate government purpose of preventing optometrists and
5 ophthalmologists from the subtle pressures exerted by optical
6 companies and, as such, they serve the goal of achieving a
7 higher level of consumer health care in California. Again, the
8 court balances a minimal, if any, burden on interstate commerce
9 against a significant local interest, and finds that the burdens
10 do not excessively outweigh the local benefit.

11 Thus, plaintiffs' motion for summary judgment is denied,
12 and defendants' motion for summary judgment is granted.

13 **IV. CONCLUSION**

14 For the foregoing reasons, plaintiffs' motion for summary
15 judgment, Dkt. No 478, is DENIED and defendants' motion for
16 summary judgment, Dkt. No. 499, is GRANTED.

17 IT IS SO ORDERED.

18 DATED: April 28, 2010.

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21 LAWRENCE K. KARLTON
22 SENIOR JUDGE
23 UNITED STATES DISTRICT COURT
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