

**UNITED STATES JUDICIAL PANEL  
on  
MULTIDISTRICT LITIGATION**

**IN RE: DISPOSABLE CONTACT LENS  
ANTITRUST LITIGATION**

MDL No. 2626

**TRANSFER ORDER WITH SIMULTANEOUS  
SEPARATION AND REMAND OF CERTAIN CLAIMS**

**Before the Panel:** Plaintiff in the Eastern District of New York action listed on Schedule A (*Alcon*), moves under Panel Rule 7.1 to vacate our order conditionally transferring the action to MDL No. 2626. Defendant Lens.com opposes the motion to vacate.

The actions in MDL No. 2626 involve factual questions concerning defendants' alleged anticompetitive conduct aimed at fixing, raising, maintaining and/or stabilizing the prices at which disposable contact lenses are sold in the United States. At issue in all initially centralized actions were defendants' pricing policies that allegedly prevented resale of the subject contact lenses below a minimum price. *See In re: Disposable Contact Lens Antitrust Litig.*, 109 F. Supp. 3d 1369 (J.P.M.L. 2015). The Eastern District of New York *Alcon* action is a trademark infringement action against discount retailer Lens.com, a "gray market" purchaser, which allegedly bought certain Alcon products overseas and sold them in the United States. Defendant Lens.com brought several counterclaims<sup>1</sup> that generally (1) refute Alcon's accusation of trademark infringement and suggest instead that changes Alcon made to products exclusively sold in the U.S. were pretextual changes aimed at eliminating gray market competitors, (2) challenge Alcon's proposed exclusive-dealing arrangements and its alleged attempts to tie the sale of products it exclusively sells in the U.S. to an agreement that Lens.com purchase all Alcon products at its U.S. prices, and (3) connect Alcon's filing of the trademark action against Lens.com to its alleged prior efforts to prevent resellers from distributing Alcon products to the detriment of eye care professionals. Two of Lens.com's claims

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<sup>1</sup> Lens.com's counterclaims, as amended on May 17, 2019, against Alcon and Novartis AG are as follows: *per se* and rule of reason violations of the Sherman Act, Clayton Act and Donnelly Act related to post-universal pricing policy actions, including tying arrangements, group boycott, and trademark misuse (Counts I and II), *per se* and rule of reason violations of the Sherman Act, Clayton Act and Donnelly Act related to universal pricing policies (UPPs) (Counts III and IV), monopolization and attempted monopolization under the Sherman Act, Clayton Act and Donnelly Act (Counts V and VI), unlawful use of exclusive dealing agreements under the same statutes (Count VII), false advertising and deceptive trade practices under New York law (Count VIII), false or misleading description or representation of fact under 15 U.S.C. § 1125(a) (Count IX); declaratory judgment of non-infringement of trademark (Count X); and declaratory judgment of invalidity of trademark (Count XI).

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relate to universal pricing policies (UPPs) at issue in MDL No. 2626. Underscoring the factual overlap among these counterclaims and the MDL claims, the transferee judge recently certified various classes of retail purchasers of contact lenses subject to UPPs in early December 2018.<sup>2</sup>

Alcon opposes transfer because the MDL is procedurally advanced and involves consumers, as opposed to resellers like Lens.com. We agree the MDL is at a somewhat advanced stage, with discovery completed, and seven summary judgment motions, as well as motions for spoliation sanctions pending. Additionally, Lens.com would be a unique party to the MDL, inasmuch as the parties do not point to any other actions in the MDL involving gray market resellers like Lens.com. We are concerned that transferring the entire *Alcon* action would add significant trademark-related allegations, among other issues raised by the counterclaims, that could unduly prolong the MDL proceedings. A more tailored solution – transfer of only the two UPP-related counterclaims – would prevent the risk of inconsistent rulings concerning Alcon’s UPPs, but not expand the MDL’s current scope. In these circumstances, we view this as the best solution.

IT IS THEREFORE ORDERED that the action listed on Schedule A is transferred to the Middle District of Florida and, with the consent of that court, assigned to the Honorable Harvey E. Schlesinger for inclusion in the coordinated or consolidated pretrial proceedings.

IT IS FURTHER ORDERED THAT all claims and counterclaims except for the two counterclaims (Counts III and IV) relating to Alcon’s institution of universal pricing policies are separated and simultaneously remanded, under 28 U.S.C. § 1407(a), to the Eastern District of York.

#### PANEL ON MULTIDISTRICT LITIGATION



Sarah S. Vance  
Chair

Lewis A. Kaplan  
R. David Proctor  
Karen K. Caldwell

Ellen Segal Huvelle  
Catherine D. Perry  
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<sup>2</sup> The transferee judge certified horizontal (with certain state subclasses) and vertical classes (of purchasers from three defendants) of retail purchasers – for their own use and not for resale – of disposable contact lenses during the period when a unilateral pricing policy was in effect – *i.e.*, roughly between 2013 and 2016 with respect to Alcon contact lenses.

**IN RE: DISPOSABLE CONTACT LENS  
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MDL No. 2626

**SCHEDULE A**

Eastern District of New York

ALCON VISION, LLC v. LENS.COM, INC., C.A. No. 1:18-407