

**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*) and plaintiffs in MDL No. 2626 separately move under Panel Rule 7.1 to vacate our order conditionally transferring the action to MDL No. 2626. Defendants and counterclaimants Allied Vision Group, Inc., and National Lens, LLC, oppose the motions to vacate.

The actions in MDL No. 2626 share 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, 1370 (J.P.M.L. 2015). The *Alcon* action is a trademark infringement action against discount retailers Allied Vision and National Lens, "gray market" purchasers that allegedly bought certain Alcon products overseas and sold them in the United States. In *Alcon*, defendants have asserted several counterclaims 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 and aimed at eliminating gray market competitors, (2) challenge Alcon's proposed exclusive-dealing arrangements and (3) connect Alcon's filing of this trademark action to its alleged prior efforts to prevent resellers from distributing Alcon products to the detriment of eye care professionals.<sup>1</sup> Three

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<sup>1</sup> More specifically, defendants' counterclaims include: Universal Pricing Policy (UPP) Counterclaims: (1) Sherman Act Section 1, Clayton Act and the Donnelly Act (*per se* UPP-related claim re: U.S. contact lens market), (2) Sherman Act Section 1, Clayton Act, Donnelly Act (rule of reason UPP-related claim re: U.S. contact lens market), (3) Sherman Act Section 1, Clayton Act, Donnelly Act (rule of reason UPP-related claim re: the market for each Alcon brand (Alcon Market)); Non-UPP Counterclaims (UPPs are not mentioned in the following claims): (4) Sherman Act Section 1, Clayton Act and the Donnelly Act (*per se* claim re: exclusive dealing agreement and deceptive changes to product packaging in the Alcon market); (5) Sherman Act Section 1, Section 3 of the Clayton Act, Donnelly Act (rule of reason exclusive dealing agreement and deceptive changes to product packaging in Alcon market); (6) Sherman Act Section 2, Monopolization of the Alcon market (exclusionary conduct aimed at limiting intrabrand competition - *i.e.*, depriving (continued...))

-2-

of these counterclaims relate to universal pricing policies (UPPs) at issue in the MDL. The factual overlap between the counterclaims and the claims in the MDL is exemplified, in particular, by the transferee judge's December 2018 decision certifying various classes of retail purchasers of contact lenses subject to UPPs.

Alcon and the MDL plaintiffs oppose transfer on the grounds that the MDL is too advanced and involves consumers, as opposed to gray market resellers like defendants. We agree the MDL is at a somewhat advanced stage, and that, until recently, the litigation principally consisted of actions brought by consumers. But, in June 2019, we transferred antitrust counterclaims relating to Alcon's UPPs asserted in a similar trademark infringement action (*Lens.com*) brought by Alcon against another gray market seller. See Transfer Order at 1-2, *In re Disposable Contact Lens Antitrust Litig.*, MDL No. 2626 (J.P.M.L. June 5, 2019) (ECF No. 256). As with *Lens.com*, we are concerned that transferring the entire *Alcon* action would add significant additional antitrust and trademark-related allegations that could slow the MDL's considerable progress. A more tailored solution – transfer of only defendants' three UPP-related counterclaims – is consistent with our previous order, *see id.*, and prevents the risk of inconsistent rulings concerning Alcon's UPPs, while not expanding the MDL's 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.

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<sup>1</sup>(...continued)

patient-consumers of fair and timely access to Alcon brand and type contact lenses sold by discount sellers, which patient-consumers would have otherwise had access to in a fair and competitive market.), (7) Sherman Act Section 2, Attempted monopolization of Alcon market, for similar exclusionary conduct, (8) Sherman Act Section 1, Clayton Act claims re: use of exclusive dealing agreements - Alcon used its dominant position in the Alcon Market to strengthen its position, harm competition, and to unreasonably deprive Counterclaimants, discount sellers, and others of access to the Alcon Market; Trademark/advertising Counterclaims: (9) declaratory judgment of non-infringement; (10) violation of 15 U.S.C. 1125 (False or Misleading Description of Fact or False or Misleading Representation of Fact) - re: allegedly misleading use of American flag as suggesting contacts were made in America and misleading use of Rx Only symbol; (11) false and deceptive trade practices under New York law; and (12) declaratory judgment of invalidity of the O2 OPTIX mark and non-infringement under the Lanham Act.

IT IS FURTHER ORDERED THAT all claims and counterclaims except for the three counterclaims (Counts I, II and III) 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



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Sarah S. Vance  
Chair

Lewis A. Kaplan  
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Karen K. Caldwell

Ellen Segal Huvelle  
Catherine D. Perry  
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**IN RE: DISPOSABLE CONTACT LENS  
ANTITRUST LITIGATION**

MDL No. 2626

**SCHEDULE A**

Eastern District of New York

ALCON VISION, LLC. v. ALLIED VISION GROUP, INC., ET AL.,  
C.A. No. 1:18-2486